

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2019/HP/0455

BETWEEN:

ALICE CHEELO

AND

DSC HOLDINGS LIMITED



PLAINTIFF

DEFENDANT

Before: *The Hon. Mr. Justice W.G.K. Muma.*

For the Plaintiff: *Mr. M. Chakoleka and Mr. N. Chibuye from Messrs. Nchito & Nchito*

For the Respondent: *No Appearance*

JUDGMENT

Cases Referred to:

- 1. *Printing and Numerical Registering Company v. Simpson* [1875] L.R. 19 E.Q. 462;**
- 2. *Ngolima v. Zambia Consolidated Copper Mines (Appeal No. 97 of 2001);***
- 3. *Yeta v. African Banking Corporation ABC (Zambia) Limited (Appeal No. 117/2013);***
- 4. *Sililo v. Mend-a-Bath and Another (Appeal No. 168/2014);***
- 5. *Kunda v. Attorney General (1993-1994) ZR 1;***
- 6. *Mhango v. Ngulube and others (1983) Z.R. 61;***
- 7. *Raine Engineering Company vs Baker [1972] ZR 156;***

**8. MTN Zambia Limited v Olympic Milling Company Limited
(2011) ZR Vol. 1**

Legislation and materials referred to:

- 1. Order XXXV Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia;**
- 2. Treital on the Law of Contract 12th Edition, 2007 London: Sweet and Maxwell para 17-049 at page 832;**
- 3. Chesire, Fifoot and Fumston's Law of Contract, 6th Edition at page 340;**
- 4. Misrepresentation Act Chapter 69 of the Laws of Zambia**

The Plaintiff took out a Writ of Summons accompanied by a Statement of Claim seeking the following substantive reliefs:

- 1. Payment of 5% commission on monies earned from tenders;**
- 2. Damages for wrongful termination of employment;**
- 3. Damages for misrepresentation;**
- 4. Any other relief the court will deem fit;**
- 5. Interest; and**
- 6. Costs.**

The matter came for trial on January 1, 2020 where the Plaintiff and her advocates Mr. M. Chakoleka and Mr. N. Chibuye of Messrs. Nchito & Nchito were in attendance and ready to commence trial. The Defendant and their advocates from Messrs. Palan & George Advocates were not in attendance. The Plaintiff's advocates exhibited proof of Affidavit of Service

that was served on the Defendant's advocates on the November 12, 2019. The Defendant was inexcusably absent.

In accordance with Order XXXV Rule 3 of the High Court Rules, I proceeded with the Plaintiff's case. The said Order provides:

“if the Plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may upon proof of service of notice for trial, proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant”.

The Plaintiff testified that she had worked as a Senior Administrative Assistant at COMESA since September 2019. The Plaintiff explained that prior to being employed at COMESA she was employed by DCS Holdings Limited. The Plaintiff narrated that in 2017 she was employed by DCS Holdings Limited as a Personal Assistant for the Managing Director. Subsequent to working for DCS Holdings Limited, the Plaintiff worked with another company as a Tender Administrator. The Plaintiff's previous skills as Tender Administrator allowed her to negotiate and agree with DCS Holdings Limited's Managing Director on the utilization of the same skills in her role with DCS Holdings Limited. The Plaintiff's role was to solicit for tenders, respond to adverts, preparation of tender documents, submission of documents, attending to open bid meetings, responding to award letters and preparation of all necessary documents after an award. The Plaintiff referred the court to the documents that

reflected the same on page 1 and 2 of the Plaintiff's Bundle of Documents. These Documents were email correspondence between the Plaintiff and the Managing Director of DCS Holdings Limited.

After negotiations a contract was drawn between the Plaintiff and the Defendant. The contract was before the court on page 3 of the Plaintiff's Bundle of Documents. Item 6 of the contract specifically expressed commission that could be acquired by the Plaintiff for every new business brought to the company through the tender process. The Plaintiff would receive 5% commission which was reduced into writing.

The Plaintiff successfully performed the same with most of the clients being obtained through newspaper advertisements or company websites. The Plaintiff mentioned a few of these clients that she successfully attained tenders for namely; Zambia Revenue Authority, Zambezi River Authority, Examination Council of Zambia and National Water Supply Company. These tenders were reflected on Pages 7 of the Plaintiff's Bundles of Documents.

The Plaintiff stated that DCS Holdings Limited went into a joint venture with MS Fire Services where MS fire Services agreed to provide built CCTV access control and fire suppression. The same was addressed to the Plaintiff. Page 10 of the Plaintiff's Bundle of Document is an email sent by the Plaintiff. Page 12 of the Plaintiff's Bundle of Document is a Notice of Tender Award in the amount of K3 239, 005.84 million and page 13 was a proposal for Examination Council of Zambia in the amount of K1, 369, 907.80. Pages 16, 17 and 18 of the Plaintiff's Bundle of Documents was email correspondence between the Plaintiff and Mr. Rex Cole an employee of DCS Holdings Limited with regards to the Examination Council of Zambia Tender. Page 18 of the Plaintiff's Bundle of Documents represented Notification of Contract from Zambia Revenue Authority. Pages 20-25 of the Plaintiff's Bundle of Documents were

quotations availed to a NWASCO employee by the Plaintiff. Pages 20-26 of the Plaintiff's Bundles of Documents represented proposal for tender prepared by the Plaintiff.

The Plaintiff confirmed that all the clients that she dealt with were new clients with no prior standing business relationship with DCS holding. The Plaintiff explained that when an award was given and payment made, there was no discussion with her Managing Director over the commission that was due to her. A year had elapsed with no meeting nor any satisfactory answer given to the Plaintiff in regards to her commission. After a year of persistence on the part of the Plaintiff, the Plaintiff was given a letter informing her that her probation was unsatisfactory and the company was letting her go. This letter was before the court on page 5 of the Plaintiff's Bundle of Documents.

The Plaintiff verified that she joined DCS Holdings Limited in July 2017. According to page 3 of the contract it stated that probation was for the duration of three months. The Plaintiff claimed that there was no communication between her and DCS Holdings Limited in regards to the extension of her probation having worked for over a year. The Plaintiff further claimed that when her contract was terminated she was not paid anything to date. The plaintiff furthermore claimed that she was enticed to leave her previous employment with Handyman's Paradise on the premise that she would be paid 5% commission from any new business brought in. The Plaintiff averred that had she stayed at Handyman's Paradise she could have risen through the ranks with better working conditions. The Plaintiff prayed that the court grant her claims.

The Plaintiff filed submissions on February 5, 2020. The Plaintiff highlighted the issues to be determined:

- 1. Whether or not the Defendant breached the terms of the contract by not paying the plaintiff 5% commission on each of the awarded tenders.**
- 2. Whether the Defendant wrongfully terminated the Plaintiff's employment by extending her probation after the expiration of the agreed period.**
- 3. Whether the Plaintiff is entitled to damages as a result of the Defendant's misrepresentation.**

The Plaintiff argued these issues individually.

- 1. Whether or not the Defendant breached the terms of the contract by not paying the plaintiff 5% commission on each of the awarded tenders.**

The Plaintiff submitted that the case of **Printing and Numerical Registering Company v. Simpson [1875] L.R. 19 E.Q. 462** stated as follows:

If there is one thing more that another which public policy requires is that men of full age and competent to understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by the courts of justice.

The Plaintiff averred that the employment contract was governed by the same principle. The Supreme Court in the case of **Ngolima v. Zambia Consolidated Copper Mines (Appeal No. 97 of 2001)** it was held that:

It is trite law that in an employer/employee relationship, parties are bound by whatever terms and conditions they set out for themselves.

The Plaintiff contended that she entered into a contract of employment with the Defendant Company where it was agreed that she would be entitled to 5% commission on any new clients brought in by her. The Plaintiff provided email correspondence between herself and Mr. Cocker the Managing director which clearly proposed that the Plaintiff would bring in new sales. Page 2 of the Plaintiff's Bundle of Documents was an email dated July 11, 2017 under Sale/Marketing the second bullet point state:

- ***Increase bulk sale through tenders and direct enquires.***

On the same page the Plaintiff indicated her expectation for remuneration that included:

Commission for every new business that I bring to the company (we could discuss).

Mr. Cocker in his response on July 18, 2017 on page one of the Plaintiff's Bundle of Document stated:

Hi Alice,

Have been very busy with some assignments here and heading back and would like to talk to you once I come back by the weekend. I would like to offer you a package of 8k plus 5% sales now depending on what scope of work we agree on. So pls wait I come and we conclude.

The Plaintiff submitted that the above and paragraph 6 clearly reveals that the parties agreed to 5% commission. Paragraph 6 is described as follows:

6. You will receive 5% commission on any closed referrals brought in by you.

The Plaintiff argued that the Plaintiff identified and responded to tenders that were eventually awarded and carried out by the Plaintiff. According to the Plaintiff she carried out her part of her contract while the Defendant breached the contract. The Plaintiff made reference to **Treital on the Law of Contract 12th Edition, 2007 London: Sweet and Maxwell para 17-049 at page 832** that states:

A breach of contract is committed when a party without lawful excuse fails or neglects to perform what is due from him under the contract...the breach may entitle the injured party to claim damages, the agreed sum, specific performance or an injunction.

The Plaintiff contended that failure of the Defendant to pay the Plaintiff her commissions was a breach of the agreed terms of the contract. The Plaintiff argued that the Defendant could not argue with the terms of the contract as they were clear, unambiguous, and voluntarily entered into by both the parties. The Plaintiff further argued that no evidence was entered by the Defendant to disapprove the Plaintiff's position. The Defence similarly did not disapprove the Plaintiff's claim for commission. The Plaintiff submitted that she be entitled to payment of 5% commission on all the tenders that she won on behalf of the Defendant. These tenders were Zambia Revenue Authority, Examinations Council of Zambia, Ministry of Finance, Zambezi River Authority, ZICTA and National Water Supply and Sanitation Council. The Plaintiff prayed that this claim be upheld and granted.

2. Whether the Defendant wrongfully terminated the Plaintiff's employment by extending her probation after the expiration of the agreed period.

The Plaintiff submitted the Plaintiff testified that she was employed on July 28, 2017 by the Defendant. The Plaintiffs offer of employment clearly stated that:

This offer is for three (3) months probationary period which may be renewed into a regular contract following successful individual work assessment and by mutual agreement between you and management.

The Plaintiff referred to the case of **Yeta v. African Banking Corporation ABC (Zambia) Limited (Appeal No. 117/2013)** where the Supreme Court held that:

Probation period is work test period for the benefit of both parties; the employer to assess whether the employee is fit for the job and the employee to decide whether to take the job permanently.

The Plaintiff argued that the offer letter pegged probation at 3 months which ended in October, 2017. The Plaintiff however worked for 1 year and 3 months before being served with a letter informing her that her probation was unsuccessful. Prior to November 1, 2018 the Plaintiff had never been communicated to of her unsatisfactory work. The Plaintiff contended that the letter was an afterthought to enable the Defendant to terminate the Plaintiff's contract in avoidance of paying the Plaintiff her commission. The Plaintiff relied on the case of **Sililo v. Mend-a-Bath and Another (Appeal No. 168/2014)** the Supreme Court held that:

Contractual obligations cannot be overlooked merely because it is convenient for one party to do so. We have in a number of cases held that an employer is not at liberty to alter an employee's terms and conditions of employment to the employee's detriment without the agreement or concurrence

of the employee. Such unilateral alteration of the conditions of service, which negatively impacts on the employee, amounts to a wrongful termination of the contract of employment which, in appropriate circumstances, may result in liability by the employer to pay damages to the employee.

The Plaintiff submitted that the Defendant wrongfully terminated the Plaintiff's employment and in contradiction to the terms of employment. The Plaintiff prayed that the Plaintiff be awarded damages for wrongful termination.

3. Whether the Plaintiff is entitled to damages as a result of the Defendants misrepresentation.

The authors of ***Cheshire, Fifoot and Fumston's Law of Contract, 6th Edition at page 340*** described misrepresentation as:

Representation of a statement of fact made by one party to the (the representor) to the other (representee) which, while not forming a term to a contract is yet one of the reasons that induces the representee to enter into a contract. Misrepresentation is simply a representation that is not untrue.

The Plaintiff contends that she was persuaded to join the Defendant Company due to the potential of making 5% commission and therefore relinquished all her prospects in advancing her career.

Trietel on the Law of Contract at paragraph 20-002 and 20-003 on page 992 provides that:

The action for damages is always available, as of right, when a contract has been broken...As a general rule damages are

based on loss to the claimant and not on gain to the defendant.

The Plaintiff averred that the failure of the Defendant to pay the Plaintiff her commission has resulted in the Plaintiff has caused the Plaintiff loss.

I have carefully considered the evidence adduced and the submissions made thereof. The facts not in dispute are that the Plaintiff was an employee of the Defendant Company. The disputes between the parties are whether the Plaintiff was entitled to 5% commission on money earned from tenders, damages for wrongful termination of employment and damages for misrepresentation. I shall proceed to address each of these claims separately.

1. Payment of 5% Commission on monies earned from tenders

The Plaintiff in her submission provided the court with a valid contract of employment between herself and the Defendant. Under clause 6 of the Employment contract it provides that:

6. You will receive 5% commission on any closed referrals brought in by you.

The contract of employment explicitly states that the Plaintiff was entitled to 5% commission on any closed referrals that she brought in. This employment contract was entered into by the Plaintiff and the Defendant Company freely. **Printing and Numerical Registering Company** (*Supra*) quoted above stated that that contracts entered freely and voluntarily shall be enforceable by the courts. The Plaintiff in her Bundle of Documents was able show proof of having successfully closed Ministry of Finance on page 12 of the Plaintiff's Bundle of Documents was the contract award of K3, 329, 005.84. The Plaintiff additionally successfully closed Examination Council of Zambia with the contract

award of K1, 369, 807.81 exhibited on page 14 of the Plaintiff's Bundle of Documents. The contract award from Zambia Revenue Authority of K3, 609, 108.00 was exhibited on page 18 of the Plaintiff's Bundle of Documents. The Defendant Company was therefore in breach of contract entered into with the Plaintiff for not honouring the 5% commission owed to the Plaintiff.

The Plaintiff however did not provide any evidence to show that she had successfully closed bids with NWASCO and NAPSA as all that she provided was email correspondence between herself and a representative of those companies. It is prudent to show, through documentary evidence proof of loss on a claim. In **Kunda v. Attorney General (1993-1994) ZR 1** the court dealt with a claim for loss of profit and frowned upon the Plaintiff for failing to adduce evidence that quantified the net loss. The court advised as follows:

We also discouraged the practice of expecting the court to make inspired guesses...the respondent admitted to not keeping accounts. The respondent did not adduce evidence to quantify the net loss. We also said this failure must react against her.

This point was emphasized in the case of **Mhango v. Ngulube and others (1983) Z.R. 61** where the court stated:

"...it is of course for any party claiming special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. As a general rule therefore, any short comings in proof of a special loss should react against the claimant".

In view of the above, the instances where the Plaintiff was able to show proof of having successfully closed an award bid she is entitled to 5% commission of the closed amount. In the **Ngolima case** quoted above, it

specially states that parties are bound by the terms and conditions that they set for themselves. The Defendant is therefore bound by the 5% commission that they undertook to give the Plaintiff on the successful closure of bids. However where the Plaintiff did not show proof of successfully closing a bid her claim must fail.

2. Damages for wrongful termination of employment.

The Plaintiff's Contract of Employment was terminated by the Defendant on November 1, 2018 due to *Non Successful Probation Period*. The Plaintiff commenced work on August 8, 2017 with the Contract of Employment stipulating a probationary period of three months from the date of commencement of employment which could be renewed into a regular contract. This was subject to successful individual work assessment and mutual agreement between the employee and management.

The Plaintiff's employment was terminated well after the three months probation period. As a matter of fact it was terminated a year after the lapse of the period. According to the Contract of Employment it states that after three months the contract could be renewed into a regular contract after assessment and mutual agreement. However this assessment was not performed after the three month probation period and the Plaintiff continued to work on. The Defendant could not thereafter claim that he extended the probation period when the Contract of Employment did not allow for it.

The Plaintiff in their Submission correctly quoted the ***Sililo case*** (*Supra*) where the Supreme Court emphasised that an employer was not at liberty to change an employee's terms and conditions in a contract without agreeing with the employee. The employer could not further change terms and conditions of the contract because it was convenient for him

to do so. These amounted to wrongful termination to which the employee could realise damages. In the case of **Raine Engineering Company vs Baker [1972] ZR 156** Doyle, CJ, observed that

In an ordinary case of master and servant, where the conditions of dismissal are not ruled by any statutory provisions as to the manner of dismissal, wrongful dismissal terminates employment but gives rise to damages

In light of the above it is apparent that the Plaintiff is entitled to damages for wrongful dismissal.

On the facts before me and on the totality of the evidence, I am satisfied that the plaintiff has established on the balance of probabilities that her dismissal from employment was wrongful and that she is entitled to damages for wrongful dismissal.

3. Damages for Misrepresentation

The Plaintiff testified that as a result of the Defendant's misrepresentation that she would receive 5% commission on all closed referral relinquished her prospect of a career advancement where she left employment at Handyman's Paradise. The **Misrepresentation Act Chapter 69 of the Laws of Zambia** is authoritative on the law of misrepresentation. It states that:

3. (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto, and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made

fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts as represented were true. Damages for misrepresentation

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled by reason of the misrepresentation to rescind the contract, then, if it is claimed in any proceedings arising out of the contract that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2), whether or not he is liable for damages under subsection (1), but where he is so liable, any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1).

In as much as a party may be due to damages on a contract that was misrepresented, there must be proof of damage. In the case of **MTN Zambia Limited v Olympic Milling Company Limited (2011) ZR Vol. 1** it was held that:


The representee should also show that it sustained the damage and it was caused by the representee's belief in the truth of the misrepresentation and whether the proved damage was the natural and direct consequence of the misrepresentation.

The Plaintiff neglected to show a correlation between the alleged misrepresentation and the loss of career advancement. The Plaintiff has henceforth not shown any proof of loss as a result of the misrepresentation by the defendant. The Plaintiff's claim for damages in this regard must consequently fail.

In light of the foregoing I find that the Plaintiff is entitled to receive 5% commission for the tenders that she successfully closed for Ministry of Finance contract award of K3, 329, 005.84, Examination Council of Zambia contract award of K1, 369, 807.81 and contract award from Zambia Revenue Authority of K3, 609, 108.00. In regards to the Plaintiff's claim for wrongful termination, I am satisfied on a balance of probabilities that the plaintiff has proved this wrongful termination. The Plaintiff is henceforth entitled to recover damages. The same to be assessed by the Deputy Registrar. Lastly the Plaintiff's claim for misrepresentation fails as the Plaintiff neglected to prove the loss that she may have suffered as a result of the misrepresentation.

The costs of the proceedings are for the plaintiff, to be taxed in default of agreement.

DATED THIS 13th DAY OF MARCH, 2020.



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HON. JUSTICE W.G.K. MUMA