

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HP/2292

BETWEEN:

KASOTE SINGOGO

AND

ROAD DEVELOPMENT AGENCY



PLAINTIFF

DEFENDANT

Before the Hon. Justice Mr M.D. Bowa in Chambers this 5th day of June 2020.

For the Plaintiff: Mr W Mwenya Lukona Chambers

For the Defendant: Mr R Ngulube of Tembo Ngulube and Associates

JUDGMENT

Cases referred to

1. *London Ngoma and others vs. LCM Company and United Bus Company Limited (in liquidation)* 1999 ZR 75
2. *Zambia Seed Company Limited and Chartered International (PVT) Limited* S.C.Z judgment No. 20 of 1999
3. *Flame Promotion and Procurement Ltd vs. Joe earthworks and Mining Limited* 2016/HPC/016. (Unreported)
4. *National Movement against corruption vs. Sofrum Safaris & others* SCZ Appeal 16 of 2007
5. *Matthew vs. Bobbins* (1980) EG 603

Other works referred to

1. *Halsbury's Laws of England* 3rd edition at page 1672
2. *Bryan A Garner (ed) Black's Law Dictionary* Eight edition 2004 at p 542



3. Arthur I Corbin, (ed) William R Anson's principles of the law of contract 3rd ed 1919) 261-62

4. Keenan D, Smith & Keenan's English Law 13th edition Longman Imprint London 2001

4. RSC of England (White book) 1999 edition order 18 r 2(3)

The Plaintiff commenced this action on the 24th of November 2016 by writ of summons and statement of claim seeking the following remedies:

- (i) *For an order of court to set aside the consent judgment dated 25th November 2010 under complaint No. 188/2009 for having been obtained under duress, undue influence and misleading of the Plaintiff.*
- (ii) *For an order of the court ordering that the case under complaint No. 188/2009 be re-opened for trial.*
- (iii) *Any relief that the court may deem fit.*
- (iv) *Costs*

The Defendant filed a defence dated 12th June 2017 denying the claim and averred that the consent order was entered into by the parties freely and at their own volition.

At trial Mr Singogo (the Plaintiff herein) was the sole witness for his case. His evidence was that he joined the Road Development Agency (RDA) in 2006 on a 3 year fixed term contract exhibited

on pages 1-9 of the Defendant's bundle of documents. According to the Plaintiff, the contract was renewable based on performance. The court was referred to Clauses 2.2 and 2.3 as making provision for extension of the contract.

At the end of the 3 years, he received a letter from the CEO at the time Mr Erasmus Chilundika, asking whether he was interested to continue working for RDA. At page 1 of the Plaintiff's bundle of documents is his response expressing his desire to continue working. Prior to this, a thorough evaluation of his performance was made and all the performance indicators revealed that he had done extremely well.

All the senior managers had their contracts renewed. However, he received correspondence from the CEO through a senior manager advising that his contract could not be renewed because his position was very senior and could not be accommodated in the new structure. The Ministry of Works and Supply learnt about the non-renewal of the contract. The Permanent Secretary at the time Colonel Nkunika then wrote to the RDA Board disagreeing with the position it had taken over his contract. Management nonetheless went ahead to disregard the letter from

the Permanent Secretary at page 2 of the Plaintiff's bundle of documents.

Mr Singogo then decided to sue RDA in the Industrial Relations Court. Whilst the matter was in court the Board at RDA changed. The new chairperson Mr Lwambe Mwendoloka took over and was keen to ensure that outstanding legal matters were dealt with amicably. He had sight of the letter from the Permanent Secretary and called the Plaintiff to his office. He advised Mr Singogo to withdraw the matter from court and that all the issues in court could be dealt with administratively. As a consequence of this undertaking, a consent order was entered into between RDA and the Plaintiff at page 4 of the Plaintiff's bundle of documents.

After the signing of the consent order, he noticed that RDA management began to "play games" as he described it. He stated as an example, that being in senior management he was entitled to purchase the personal to holder vehicle that was assigned to him at the end of 3 years. However, it took the intervention of the then CEO Dr Mulenga for the vehicle to be offered to him a year past when he was eligible to buy it.

In addition, that the letter from the Permanent Secretary was ignored. He testified that the letter was very clear in terms of what the Board was expected to do. That the letter in part recognised the tremendous contribution that he had made to RDA and also made clear that he was supposed to be reinstated.

Thirdly that in spite of the several letters that he wrote to RDA on the subject, Management insisted that he was not entitled to any compensation at all. He went as far as engaging 2 law firms to provide an interpretation of the letter from the Permanent Secretary. Both firms informed the RDA that the he ought to have been reinstated. RDA nonetheless continued to insist that it did not owe him anything.

The court was referred to a letter from the acting director at RDA Mr Balashi at page 24 of the Defendant's bundle, addressed to its lawyers Messrs' DH Kemp instructing the firm to discontinue the action before the Industrial Relations Court in furtherance of the undertaking to resolve the matter excuria. It was the Plaintiff's evidence that the matter was not dealt with administratively as per letter and to his expectation. As far as he was concerned, there was a direct correlation between the letter from the Permanent Secretary and the consent order.

The RDA continued evading the letter, at some point questioning whether it was written by Col Nkunika at all. The authenticity of the letter was confirmed by PS Sipanje, Col Nkunika's successor in his letter in response to the inquiry from RDA at page 14 of the Plaintiff's bundle of documents.

Further in response to his letters asking for compensation the director legal services by letter at pages 9-10 of the Plaintiff's bundle of documents wrote back indicating that there was no basis for his claim. This was followed by another letter from the CEO stating the same position at page 13 of the Plaintiff's bundle of documents.

It was the Plaintiff's position as stated in his pleadings that there was undue influence and duress exerted on him to sign the consent order by RDA. He contended further that from his claims initially filed in court only the issue of the motor vehicle was resolved. The reinstatement was not done.

He did not agree with RDA's averment in its defence that renewal of contracts was not solely based on performance. Performance was one of the key factors as far as he was concerned. He further

stated that he entered into the consent order voluntarily but it was the "games" that followed that he took issue with.

When cross-examined and referred to clause 2 on page 3 of his contract of employment, the Plaintiff did not agree that the decision of whether or not to renew his contract was discretionary. He maintained that the contract had to be looked at in its proper context. He did not understand the clause to be conferring discretion on RDA in this case. Questioned further, he agreed that there was no reference to performance in clause 2.2 as a condition for renewal of the contract.

When referred to the letter authored by PS Nkunika and to the last paragraph in particular, the witness agreed that the letter instructed that the matter be resubmitted to the Board for review. He further agreed that there was no specific wording directing that he should be reinstated. He agreed that in reviewing a decision, the Board could either sustain or dismiss the decision complained about. Further that in this case RDA completely refused to renew his contract.

Cross examined further the Plaintiff stated that part of his argument in advancing his case was that the consent order

should be set aside as he was misled by RDA. He acknowledged that there was no correspondence from RDA by which the institution undertook to renew his contract. He agreed that the basis of his belief that he was supposed to get a new contract was the letter from PS Nkunika. He accepted that he was represented by counsel in the negotiations that ensued before the entry of the consent order.

Cross examined further, it was the Plaintiff's evidence that he had alleged undue influence and duress in his pleadings. He contended that RDA forced him to sign by making him believe that if he discontinued the action he would be reinstated. Pressed further, he acknowledged that the word "force" may not be appropriate to describe the engagement he had with RDA. That he was "misled" would be a better description.

He testified further that he was not aware that when parties sit to explore an amicable settlement the discussions are held in the spirit of give and take. He did not agree that RDA gave in over the issue of the vehicle as it was an entitlement. He accepted that RDA had initially refused to sell the car. He further agreed that the issue of the vehicle was resolved through the negotiations that took place.

Questioned further, the Plaintiff acknowledged writing the letter to RDA at page 11 of the Defendant's bundle responding to the decision not to renew his contract. He accepted that in the letter, he did not raise any issue over the non-renewal. When referred to the consent order, he contended that he did not recall reading through it before it was signed on his behalf. He understood the content but not necessarily the consequences.

In re-examination, the Plaintiff testified that RDA was a new organisation and his group was the first breed of managers. Performance was therefore a key indicator because of the reforms in RDA. He testified further that the RDA board was appointed by the Ministry of Works and supply on behalf of GRZ as the sole shareholder of the organisation.

That was the case for the Plaintiff.

In its defence the Defendant called one witness. DW1 was Elias Mwila the Director Human Capital and Administration in RDA. His evidence was that he was employed in RDA on 26th of February 2018. His duties include overseeing appointments, confirmations, training and separation.

He testified that the Plaintiff sued the agency for compensation for alleged failure to obey instructions given by the Permanent Secretary to review its decision not to renew his contract. He gathered this information from records kept at RDA. Among the documents of relevance he found include Mr Singogo's contract of employment which was for a duration of 3 years from 1st July 2006 to 1st July 2009 by which he was employed as Manager Corporate Services.

The Plaintiff was required to apply for renewal 3 months prior to expiry of the contract. He did so and Management conveyed the decision of the Board not to renew the contract. The Director and CEO of the Agency wrote to the Plaintiff by letter dated 17th June 2009 on page 10 of the Defendant's bundle of documents conveying the decision.

He testified further that the Agency was not obliged to accept the Plaintiff's request for an extension of the contract of employment. He referred the court to clause 2.2 of the contract which states that on completion of a contract the agency may offer a further contract.

DW1 testified further that when the Plaintiff was served with the letter conveying the decision of the board, he wrote a letter thanking management for the opportunity of serving the Agency and expressing his hope that the benefits would be paid as contained in the contract. The letter was dated 18th June 2009 on page 11 of the Defendant's bundle of documents.

It was DW1's further testimony that the issues arising in the suit that the Plaintiff instituted in the Industrial Relations Court had to do with the Board's perceived failure to comply with the Permanent Secretary's directive. Further he sought to be sold the vehicle he had been using whilst he served as manager. That case was withdrawn from the courts through agreement by both parties so that the issues could be dealt with administratively. A consent order to this effect was executed under cause number comp/188/2009.

A glance at the consent order revealed nothing to suggest to DW1 that the document was obtained by undue influence. Further that it was also clear to see that both parties had legal representation. It was DW1's further evidence that the issue to do with the sale of the motor vehicle was resolved. He referred the court to a letter under the hand of the Director and CEO Dr

Mulenga dated 16th November 2011 offering the Plaintiff the motor vehicle.

It was his further evidence that RDA later received letters of demand for compensation in salaries, housing allowance and fuel premised on the non-renewal of the contract. One such letter is dated September 17th 2014 on page 7-8 of the Plaintiff's bundle of documents. In it, the Plaintiff places reliance on the letter from the Permanent Secretary Nkunika which he contended was disregarded by the Agency.

However DW1's understanding of the letter from the Permanent Secretary was that the Board chairman was being asked to resubmit the decision not to renew Mr Singogo's contract to the Board for review. The matter was resubmitted to the Board though he did not know the outcome of that review. To the best of his knowledge, Mr Singogo's contract was not renewed.

In cross examination, the witness acknowledged that GRZ has 100% shareholding in RDA. He testified further that the Government had overriding powers over the decisions of the RDA Board. When referred to the letter from Permanent Secretary Nkunika he testified that the Ministry was conveying its

disagreement with the Board's decision. He agreed that there was no document before the court to confirm that the matter was sent to the Board for review. Further that he had not seen any report sent by RDA to the Ministry as ordered in the letter from the Permanent Secretary.

He confirmed that the issue of compensation was never resolved and was thus still hanging. He agreed that the letter from the Permanent Secretary stated that the Plaintiff's performance assessment was very good. Further that the letter did state that it found the restructuring done in RDA was targeted at removing the Plaintiff. He agreed that it was thus fair that Mr Singogo be heard in court as there was no evidence that his issue was reconsidered by the Board.

When re-examined, the witness testified that RDA had taken a position over the claim for compensation. That decision was that it did not see the basis of the Plaintiff's claim and therefore was not in a position to honour his demand.

That was the case for the Defendant.

I have carefully considered the evidence before me and anxiously read the submissions filed by the parties as well. I am grateful to

counsel for their effort in this regard. The simple question for my determination as I see it is whether the consent order being the subject of this matter was obtained by undue influence and or duress to warrant it being set aside.

The Plaintiff in his submissions correctly refers me to the cases of ***London Ngoma and others vs. LCM Company and United Bus Company limited (in liquidation)***¹ as authority for the proposition that a fresh action is required to set aside a consent judgment. Other decisions in support would include the case of

Zambia Seed Company Limited and Chartered International (PVT) Limited² in which the Supreme Court held that:

“By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment.”

This position was echoed in ***Flame Promotion and Procurement Ltd vs. Joe earthworks and Mining Limited***³ and approved in the case of ***National Movement against corruption vs. Sofrum safaris & others***.⁴

The Learned Authors of **Halsbury’s Laws of England 3rd edition** at **page 1672** state the law in the following terms:

“A judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order.”

That settled, the thrust of the submissions by the Plaintiff as supported by his evidence appear to question the outcome of the excuria discussions. In essence that whereas the issue of the motor vehicle was resolved, the dispute relating to his reinstatement as supported by the position taken by the Permanent Secretary Nkunika in his letter dated 29th of June 2009 was disregarded.

This I have to say, is not what the issue before me as I understand it is about. The consent order settled was simply to discontinue the proceedings that were before the court to facilitate an excuria settlement. The details of the settlement were not subject of the consent order. The fact that what was resolved did not meet the Plaintiff's expectations cannot be the basis to set aside the consent order. The courts primary concern will be as I have stated, to assess whether the consent order was obtained by undue influence and or duress.

I was aptly referred to the definition of duress preferred by the learned authors of **Black's Law Dictionary Eight edition 2004**

at p 542 as meaning "*Broadly, a threat of harm made to compel a person to do something against his or her will or judgment*"

I was also referred to William R Anson's principles of the law of contract 261-62 in which the learned author opines that:

"Today the general rule is that any wrongful act or threat which overcomes free will of a party constitutes duress."

I would accept and adopt these definitions as my own. When asked in cross examination, the Plaintiff acknowledged that the word "force" would not be appropriate to describe what persuaded him to enter the consent order after his engagement with the Defendant. Rather that he was misled into doing so. I have no difficulty in finding that there is no evidence of any coercion whatsoever or anything disclosed to suggest he was forced to withdraw the case.

The defence argue that undue influence was exerted on the Plaintiff to sign the consent order by RDA who were the stronger party and made him believe that the matter would be resolved. Further that this was done in spite of the fact that the Agency had already taken a position one way or the other not to give into the Plaintiff's demands.

There is support for the argument that where a fiduciary relationship exists between the parties there is a presumption of undue influence in the party whom the confidence was reposed who must show that no such influence was used and the agreement reached was an act of free will. However citing the decision of the court of Appeal in the case of *Matthew vs. Bobbins*⁵ the learned authors of Smith and Keenan's English Law 13th edition at page 285 write that there is no presumption of such a relationship between an employer and employee.

I would wholesomely endorse this view and dismiss the argument that the RDA being employer was the stronger party and as such by virtue of that fact alone exerted undue influence in this case. There is quite simply no proof of such influence having been exerted in this case. It is further uncontroverted that the Plaintiff had legal representation when he was entering into negotiations for the consent order. I cannot accept any undue influence was possible in those circumstances.

I would add that a party does not go into negotiations for an excuria settlement seeking to have only his or her way. Out of court settlements are always entered in the spirit of give and take. It is clear to me that in the Plaintiff's mind, the settlement

should only have ended with him getting everything that he desired, notably the purchase of the car and a renewed contract.

The question of whether the letter from the Permanent Secretary was a directive or not, or if it was disregarded by the RDA Board is beyond the scope of the matter before me. I am as such not persuaded to be drawn into considering that line of argument as appears to be advanced by the Plaintiff. This certainly cannot be the basis for this court to set aside the consent order in issue. There being no evidence of undue influence and or duress in the matter this action inevitably fails and is dismissed with costs to the Defendant to be taxed in default of agreement.

Let me also take a moment to comment on the Defendant's submission that there was no need for the Plaintiff to have commenced an action to challenge the consent order in this case and that he could simply have instituted a fresh action for the rights he seeks. I agree. The consent order settled did not determine the parties' rights in this case but only facilitated the discontinuance of the action. Order 18 rule 2 (3) of the RSC of England 1999 edition makes provision for discontinued matters to proceed by fresh action subject to payment of costs. This is

still an option open to the Plaintiff if he is minded to pursue his claims.

Leave to appeal is granted.

Dated at Lusaka the ^{5th}.....day of ^{June}.....2020



HON. JUSTICE M.D BOWA