

IN THE HIGH COURT FOR ZAMBIA
AT THE NDOLA DISTRICT REGISTRY
HOLDEN AT NDOLA
INDUSTRIAL/LABOUR DIVISION

IRD/ND/39/2016

BETWEEN:

MOSCANE MBULO

AND

QUATTRO COMPANY LIMITED

COMPLAINANT

RESPONDENT



Before: Hon. Judge D. Mulenga this 9th day of August, 2017.

For the Complainant : Mr. T. Chabu of Messrs Terrence Chabu & Co.

For the Respondent : Ms. K.N. Kaunda of Mmems K.N. Kaunda
Advocates.

JUDGMENT

Cases referred to:

1. **Chillingworth v Esche (1924) 1 Ch. 97**
2. **Lord Wensleydale in Ridgway v Wharton (1857) 6 H.L.C. 238, 304-7**
3. **Financing Ltd v Stimson (1962) 3 All E.R. 386**
4. **Surrey Council & Another v Bredero Homes Limited (1993) 3 ALL ER 705**
5. **Attorney General v D.G. Mpundu (1984) Z R 6**

- (iv) Compensation for loss of earnings of K8,000.00 per month, leave days housing allowance of \$215.25 and talk time allowance of K500.00 per month for the remaining contract period of 9 months
- (v) Interest and
- (vi) Costs.

The Complainant's Notice of Complaint is supported by an affidavit filed into Court on 27th April, 2016.

The Complainant's case through his depositions in the affidavit in support of complaint and oral testimony is that he was employed by the Respondent in December, 2015 but reported for work in January, 2016, as Manager Security and was stationed at Solwezi Quattro Yard.

According to the Complainant he was retained on a 12 Months' contract of employment as per exhibit *MM1*, the same is a letter of offer of employment. However, the Complainant told the Court that he was surprised when just after three months of being in employment, he received a letter from one Muyembe a Branch Manager, to the effect that his probation period of employment with the Respondent Company was unsuccessful. The letter of unsuccessful probation is dated 31st March, exhibit "*MM3*".

It is the contention of the Complainant that his employment could not be terminated for the reason of unsuccessful probation period because he was not employed on the probation period. According to Complainant, the only terms and conditions of employment that applied to him are those that are

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in the letter of offer of employment, the said letter did not state any condition as regards 'employment on probationary period'.

The Complainant told the Court that the letter of unsuccessful probationary period came to him with great shock because he had just put in measures to stop the biggest problem the Respondent Company was facing of thefts and generally that of indiscipline.

Prior to the letter of unsuccessful probationary period, the Complainant was alleged to have used abusive language to his subordinates.

The Complainant admitted, having had an argument with one of his subordinates one Kawewe who he called an idiot. The incident was followed up with a meeting attended by Kawewe, the Complainant and the Branch Manager. According to the Complainant the said meeting was reconciliatory in order to work in harmony. However, according to the Complainant after a month the Branch Manager, called him and asked him to sign what purported to be a charge sheet, which he refused to sign because according to him the said charge was being raised after it had been discussed and settled and that it was being preferred under a section that belonged to General Worker's Conditions.

In cross-examination by Learned Counsel for the Respondent, the Complainant told the Court that the effective date of his employment with the Respondent was 4th January, 2016.

The Complainant admitted that there were two disciplinary charges against him, the first one was raised on 4th February, 2016 relating to use of abusive language against the Safety Officer, one Mumba Mambwe, which charge the Complainant said he denied. The Complainant was again charged with use of abusive Language against a fellow employee one Kawewe, on 17th February, 2016, and he admitted the same.

The Complainant in cross-examination described the payment to him of gratuity by the Respondent on termination of his services, which was not provided for in his conditions of service as an act of desperation and malice upon realisation that the termination of his employment was wrongful.

In reference to the contract of employment form (exhibit *LS 1*) in the Respondent's affidavit in support of the Answer, Complainant told the Court that the said document did not affect him neither is the three months probationary clause therein.

The Complaint is opposed and to that effect the Respondent filed an Answer and an affidavit in support, on 30th May, 2016.

Clearly, the Respondent's case in its defence through the affidavit in support of the Answer and the oral testimony of one Leonard Simasiku a Human Resources Manager (RW1) is that the Complainant was offered a employment by the Respondent, effective January, 2016, on condition that he was to be issued with a twelve (12) months contract.

The Complainant signed the letter of offer of employment and was sent to take up his position as Manager - Security at Solwezi, without signing the twelve (12) months contract.

According to Respondent, the Complainant's offer of employment was subject to issuance of a short term contract of twelve (12) months whose terms included a probation period of three months as per Respondent's internal management policy and by law. The Respondent referred to this Court to exhibit marked "*LSI*" which is a blank contract of employment form.

According to Respondent, whereas the Complainant was charged in February, 2016, with two offences of using abusive language to two fellow employees, the reason for termination of the Complainant's employment was "unsuccessful" probation. The Respondent contends that termination of the Complainant's employment on the grounds of unsuccessful probation was its legal right and within the contractual terms and conditions of employment.

At the close of hearing of oral testimony both Learned Counsel for the Complainant and the Respondent filed written submissions and I am greatly indebted to them.

Learned Counsel for the Complainant has submitted at length in respect of wrongful and unlawful termination of Complainant's employment on the grounds of the two charges of abusive language. However, it is the position of this Court that the issue of wrongful and or unlawful termination of contract of employment as regards the two charges on the

grounds of abusive language does not arise. The issue in dispute relates as alluded to herein above to the alleged unsuccessful probation.

On the other hand Learned Counsel for the Respondent submitted that the offer letter of employment was expressed subject to the contract, therefore, the offer letter was not binding until the formal contract was drawn. According to Learned Counsel for the Respondent, the contract referred to in the letter of offer of employment was meant to include other terms of the contract of employment.

The question which this Court is called on to answer in the case in casu is whether or not the condition in the letter of offer of employment dated 18th December, 2015 (Exhibit *mm1*) stating that:

Should you agree to the conditions above you will be issued a 12 months contract.

Is an agreement subject to contract and if the answer is in the affirmative whether or not there was a binding contract.

The Learned authors **Sutton and Shannon on contracts Seven Edition at page 62** states:

*Parties when entering into a contract by offer and acceptance may intend that the agreement shall ultimately be put into the form of a written agreement and that it shall not be binding until that has been done. If this is their intention, there is no contract until the agreement has been put into writing. This is as it was described in the case of **Chillingworth v Esche**¹,*

*Or they may intend that they shall be bound as soon as they are agreed as to the terms, and that those terms are afterwards to be put into writing for the sake of preserving a memorial. In this case they are bound as soon as all the terms which are to be put into writing are agreed upon, as per Lord Wensleydale in the case of **Ridgway v Wharton**².*

Simply, therefore, the position of the rule is that where an agreement is made subject to a condition precedent, the contract does not bind the parties until the condition has been satisfied.

In the case of **Financing Ltd v Stimson**³ it was held that where a defendant agreed to purchase the Plaintiff's invention if inspected and approved by the defendant's engineer, no contract could exist until the engineer had inspected and approved the invention.

In the case in casu, the Respondent offered the Complainant employment vide a letter dated 18th December, 2015 (exhibit "mm1"). The said letter reads in part;

Re: Letter of offer of Employment

We are pleased to offer you the position of Security Manager at our Solwezi Branch effective 4th January, 2016.....

Conditions of Service

Your remuneration will be as follows:

- 1. Monthly basic pay of K8, 000.00 (Eight Thousand Kwacha only) and 30% housing allowance.*
- 2. You will be issued with a brand new working laptop for all your operations.*

3. *Company vehicle*
4. *You will also receive a brand new mobile phone.*
5. *MTN Airtime of K500.00 a month.*

Should you agree to the conditions above you will be issued a 12 months contract.

Your signature below indicates that you agree to the above conditions.

Please do not hesitate to contact me should you have any queries.

Signed

Mrs. Selena Kalero Kayi

Signed

Mr. Mscane Mbulo

A critical analysis of the evidence and authorities alluded to herein above clearly shows that the letter of offer of employment to the Complainant from the Respondent was very categorical as it relates to the conditions of employment and expressly stated that the signature of the Complainant was to indicate that he agreed to the conditions which were stipulated in the said letter. The conditions in the letter of offer did not include a probation period.

Contrary to the submissions of Learned Counsel for the Respondent, I find and hold that the condition precedent which was required to be fulfilled by the Complainant was the acceptance signified by his signature of the conditions of employment offered by the Respondent.

The Respondent did not issue a 12 months contract to the Complainant. Since the issuance of a 12 months contract to the Complainant was based on his having to accept the conditions in the letter of offer which he did, the Respondent was bound to issue the said 12 months contract of employment.

This Court has no difficulty to find that the parties herein intended that they shall be bound as soon as they agreed to the terms and conditions in the letter of offer of employment.

It is inconceivable that the Respondent wants to rely on the clause (relating to probation period) which appears in the draft contract of employment and the same was not presented to the Complainant prior and after the signing of the acceptance of the letter of offer of employment.

On the totality of the evidence before me and the authorities referred to, I find and hold that the termination of the Complainant's employment by the Respondent on the grounds of unsuccessful probation, which was not a condition of employment was done in breach of contract of employment. The Complainant has therefore, proved his case on the balance of probabilities that the Respondent breached the contract of employment when it terminated the same on the grounds of unsuccessful probation which was not a condition of employment.

Having found that the Complainant has proved his complaint for damages for breach of contract of employment, I shall now determine the damages sought.

Learned Counsel for the Complainant submitted that the Complainant is entitled to payment of salary, leave days, housing allowance and talk-time allowance for the remaining contract period, the same being nine (9) months as damages for breach of contract.

The Complainant's advocate relied on the case of **Surrey Council & Another v Bredero Homes Limited**⁴ where it was held that an award of compensation for breach of contract serves to protect three separate interests, the starting principle being that the aggrieved party ought to be compensated for loss of his positive or expectation interest.

Learned Counsel for the Complainant also referred this Court to the holding in the case of **Attorney-General v D.G. Mpundu**⁵, where an emphasis was made as regards the requirement that special damages are pleaded and proved specifically.

On the other hand Learned Counsel for the Respondent submitted and referred this Court to the case of **Kitwe City Council v William Nguni** ⁶ where the Supreme Court held that:-

It is unlawful to award a salary or pension benefit for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment.

Learned Counsel for the Respondent argues that the case of **The Attorney General v D.G. Mpundu** and **Surrey County Council and Other v Bredero Homes Limited**, cannot be relied on in the case in casu, because

they do not relate to employment, but to breach of contract on commercial contracts and special damages which are not issues in the case herein.

Learned Counsel for the Respondent further submitted that the Complainant is currently in employment and the said status goes to show mitigation of damages or loss within the meaning of Supreme Court held in the case of **Barclays Bank Zambia Limited v Mando Chola and Another** ⁷.

The above authorities notwithstanding, I find the facts in the case of **Agholor v Cheesebrough Ponds (Zambia) Limited**⁸, similar to the case herein. In that case the dictum of Cullinan, J. that:-

The Plaintiff has claimed in respect of benefits arising out of the loss of free housing and free car supplied by the defendant also the difference between his present salary and that paid by the defendant over the period of three years. The three claims total K10, 966. The claims are based on the proposition that if the employer terminates before the end of the term of service, he is liable for all benefits accruing thereafter and despite the fact that the employee ceases to render any consideration therefore, i.e. to work, None of the claims are sustainable in law. In every pure Master and servant contract there is the implied right to terminate on notice. If an employer gives due notice then the employee is required to work out the period of notice during that period.

After expiration of such period notice or after payment of salary in lieu of notice, apart from other benefits already accrued, it is no concern to the employer that the employee encounters less attractive conditions in new employment . . . to my mind the Plaintiff claims under all three heads are little short of preposterous and they are dismissed.

I am mindful of the limitation of the holding in the case of **Agholor**, in the light of Section 5 of the Employment (Amendment) Act, 2015.

There are decisions of the Labour Court in South Africa which obviously have no binding effect on this Court, but are persuasive. One of such cases is **Kwena Darius Mangope v South African Football Association** ⁹, where the Labour Court of South Africa, took the view that;

The amount of damages to be awarded to an employee as a result of an unlawful termination of a fixed term contract by the employer is the amount he or she would have received in salary but for the repudiation of the contract of the employer. In other words the damages in an unlawful termination of an employment contract is calculated on the basis of what would have been due to the employee for the unexpired period of the contract less whatever amount he or she may have received after the termination of the contract, constituting mitigation of his or her damages.

In view of the authorities cited above and considering the fact that the Complainant upon termination of his contract of employment by the Respondent, mitigated his damages by finding employment as Manager at Chowa Farms in Kitwe. Further, I take into account the gratuity paid to the Complainant which he was not entitled to following the conditions of service expressly provided vide the letter of offer of employment.

I award the Complainant four (4) months pay with all taxable allowances with interest at the Bank of Zambia ruling rate from the date of notice of complaint until date of payment.

Costs shall follow the event to be taxed in default of agreement.

Informed of Right of Appeal within thirty (30) days of the date hereof.

Dated at Ndola this **9th** day of **August, 2017.**


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Hon. Justice D. Mulenga
JUDGE