TROPICS LIMITED v RAMASWAMY VAITHEESWARAN (1996) S.J.

SUPREME COURT
NGULUBE, C.J., CHAILA AND CHIRWA, JJ.S.
(S.C.Z. JUDGMENT NO. 3 OF 1996)

Flynote

Practice - Estoppel - When operative - Employment contract - Application by employer for exchange control clearance for increased amount of allowance not constituting an offer to employee which could found a successful estoppel.

Headnote

The respondent had been recruited by the appellant externally to work in Zambia. His terms of employment included a monthly tax free inducement allowance. A dispute arose between the respondent and the appellant as to an increase in the amount of this inducement allowance. In an action in the High Court, the Court had held that the appellant was estopped from denying the increased allowance. The Court based its judgment on the fact that the appellant's local director had made application to the Bank of Zambia for an I increase in the inducement allowance.

(1) That the person in appellant's employ responsible for authorising the terms and conditions for the respondent had not at any time aproved the increase in the allowance.

(2) That the application to the Bank of Zambia was not an offer to the employee and was not indicative or conclusive of what had been agreed as an inducement allowance.

(3) That in all the circumstances of the case the High Court should not have upheld the respondent's reliance upon an estoppel. Appeal allowed.

For Appellant: Mr. W.B. Nyirenda of Ezugha Musonda
For Respondent: M r. G. Kunda of Kunda and Company

Judgment

NGULUBE, C.J.: delivered judgment of the Court.

The respondent was recruited in India to come and work for the Appellant company in Zambia as Group Financial Controller with effect from about November, 1989. The terms of employment were those of an expatriate on a contract and it was common ground that the foreign based Director who was DW2 was in charge of fixing the terms and condition. Among the entitlements of the respondent, was a tax free inducement allowance initially at the rate of U.S. $ 355 per month. In January, 1991 that inducement allowance was increased to U.S. $ 550 per month.

Subsequently, the respondent was elevated to act as General Manager of the appellant

company in Zambia in place of a previous Group General Manager whose services were terminated.

Although various financial claims were made by the respondent in the action at the trial, it is clear that the sole issue which requires to be resolved in this appeal concerns the dispute which arose with regard to an increase in the amount of inducement allowance. There was evidence that the local Director who was DW1 had written a letter to the respondent in which it was proposed to increase the inducement allowance to $2,000 per month with effect from 1st August, 1991 subject to necessary consent being received from the Bank of Zambia. DW1 and DW2 gave evidence to the effect that this was not the inducement allowance which the appellant company had agreed to pay the expatriate employee. There was evidence including that from a witness working for the Bank of Zambia that the Bank authorised a maximum inducement allowance if $1,500 per month which the respondent promptly started to draw. The employer alleged that this amount was never agreed to and claimed that there was an overpayment resulting therefrom. The learned trial judge considered the evidence on both sides. He found that because it was the local director that had participated in increasing the entitlement of the respondent, the overseas director DW2 could only have redress as against the local director and not the employee. The learned trial judge further argued that because it was the appellant's local director who had made application to the Bank of Zambia, the employee had to receive the increased inducement allowance. The learned trial judge considered that it would be fraudulent and a false pretence if the employee were to be paid a lesser amount than that approved by the Bank of Zambia, while someone else or the company pocketed the difference between the inducement allowance paid to the employee and the amount approved by the Central Bank. It was the learned tral judge's considered view that because the bank of Zambia had not been contacted so that they are informed of any changes in the payment inducement allowance to the employee, the appellant company was, therefore, estopped from denying that the employee was entitled to inducement allowance at the rate of $1,500 per month.

Learned Counsel for the appellant, has advanced basically one ground of appeal with several arguments. He has argued that there was no estopped which ought to have been found to operate against the appellant company. He relies on the principle as expounded in paragraph 407 of the third edition of Halsbury's laws of England, where it is stated:

> "A person who knows the truth of the circumstances under which a deed has been executed, whether he has acquired that knowledge personally or through his agent, can not set up an estoppel in his own favour ."

It was also argued that the employee in this case had fully acquiesced in the matter of the inducement allowance payable being less than $1,500. The decision of this court, in Burton Construction Limited v Zaminco Limited (1983) Z.R. 20 was relied upon, on the circumstances that needed to be present to establish acquiescence. Learned Counsel drew attention to the evidence both oral and written which was before the learned trial court. Mr. Kunda on behalf of the respondent, argued generally in support of the learned trial judge and suggested that there was sufficient evidence that an increased inducement allowance should be paid to the respondent. He argued that if not on the basis of the letters on record, then at least on the basis of quantum meruit, the respondent ought to be found to have been properly entitled to inducement allowance of $1,500 per month.

We have considered the arguments and the evidence. In particular, we see from the correspondence that DW2 the person responsible for authorising the terms and conditions for the respondent did not at any time approve of the increase of $1,500 let alone $2,000 applied for from the bank of zambia. The evidence show that, upon becoming aware of what had transpired, DW2 raised objections and indeed alleged an over-payment leading to the

circumstances which gave rise to this litigation. With regard to the letter relied upon by the learned trial judge and the employee in which the local director DW1 gave evidence in the court below of how such letter came to be written. At pages 129 to 130 of the record of appeal, DW1 explained how the document was written by the employee but signed by DW1. He gave evidence that he was under the impression that it was required by the Bank of Zambia as a formality for the purpose of getting approval to allow the increase to be effected. It was the evidence of DW1 that he had approached the plaintiff and offered him the position of Acting General Manager on a temporary basis. The plaintiff employee had requested for a better remuneration package. There was evidence that DW1 and the respondent had discussed the possibility of getting the inducement allowance approval increased and that figures between 1,00 and 1,200 and had been indicated by employee as being suitable for people holding senior positions such as General Manager.

It was in evidence from DW1 that he had not even been briefed that the Bank of Zambia had approved the sum of $1,500 and indicated that what was approved by the appellant was a sum of $750 per month. It seems to us when considering the evidence which was before the learned trial judge that proper advantage was not taken by the court below of its having heard and seen the witnesses and reviewed the documents before the court.

The application to the Bank of Zambia, in our opinion, was not an offer to the employee and was not indicative or conclusive of what had been agreed as inducement allowance. It seems to us that if the evidence of DW1 was taken in its proper perspective, especially the explanation on the question of inducement allowance the effect would be that the plaintiff proposed the higher allowance; got DW1 to sign a letter prepared by the plaintiff; and in effect awarded himself the higher allowance once it was approved by the Bank of Zambia. Certainly the person responsible for fixing the terms of the employee, DW2, played no hand in the increase of the inducement allowance. The correspondence on record shows that by a letter of 16 Janaury, 1992 the Local Director was only able to confirm that the approved allowance was $750 per month. By letter dated 13th January 1992 from the respondent to the overseas director DW2, the respondent advised the Director that because the Bank of Zambia had approved the sum of $1,500, that is what the respondent would get. Again by a letter of 18th January, 1992, from the respondent himself to the overseas director, the respondent said, concerning the inducement allowance, that it was agreed that he would be given $1,000 per month effective August, 1991. It was in that same communication when the respondent noted that the foreign director was opposed to any arrangement of sharing the foreign exchange. Again by a document dated 17th November, 1992 from the foreign based Director, to the respondent, and in which the overpayment was alleged, the foreign based Director, confirmed that what had been agreed was the sum of $750 per month and nothing more.

In the face of all this evidence, it is surprising that the learned trial judge found that the appellant company was estopped from denying that the respondent had ever been awarded an inducement allowance of $1,500 per month. Quite clearly, no such estoppel arose. In any event, when the judge held that the appellant company would have obtained the excess amount of the inducement allowance approved by the Bank of Zambia under false pretences, this was in the teeth of the letter written by the respondent himself in which the respondent confirmed that DW2 objected to any arrangement for the sharing of the money. Any attempt, therefore, by anyone to take advantage of the approved ceiling of inducement allowance, was not with the blessings of the appellant company, such that it was necessary more or less to punish them by holding against them. We have said in many cases that we do not interfere with findings of fact made by a trial court, unless the court had fallen into error in some way. From what we have been saying, it is clear that, having regard to the evidence that was on record both oral and written, the learned trial judge came to a wrong conclusion and applied an estoppel which did not arise, This is, therefore, a suitable case in which to reverse the findings of the trial court. We allow this appeal. The finding that the respondent was entitled to $1,500 per month is set aside. Quite clearly, the evidence fully justifies a finding that the respondent

was entitled to $750 per month as inducement allowance and this is the amount which we substitute. The consequences of this substitution are clearly a matter for arithmetical calculation by the parties and should this result in any further dispute, there is liberty to apply to District Registrar at Chambers. The appeal succeeds with costs.
