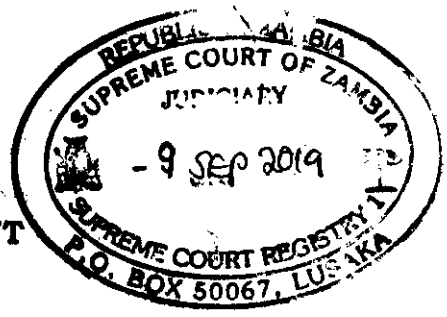
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 187/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

SIBAMBA MWANDEZI **APPELLANT**

AND

LAFARGE ZAMBIA PLC **RESPONDENT**

Coram : Malila, Kabuka and Mutuna, JJS

On 3rd September 2019 and 9th September 2019

For the Appellant : Mr. T. Chali of Messrs H. H. Ndhlovu and Company

For the Respondent : Mr. N. Nchito SC of Messrs Nchito and Nchito

---

J U D G M E N T

MUTUNA JS, delivered the judgment of the court.

Cases referred to:

1) **Mike Musonda Kabwe v BP Zambia LTD (1995-1997) ZR 218**
2) **National Milling Company Limited v Grace Simataa and others (2000) ZR 91**
3) **Nkhata and Four others v The Attorney General (1966) ZR 147**
4) **The Attorney General v Marcus Kampumba Achiume (1983) ZR 1**
5) **Pao On v Lan Yin Lang (1979) 3 ALL ER**

Legislation referred to:

1) **Industrial and Labour Relations Act, Cap 269**

Works referred to:

1) **Practical Law UK 2019 - Contracts: Invalidity.**
2) **Chitty On Contracts, 24th edition (1977) Vol 1 general Principles by H.G. Beale**

Introduction

1) This is an appeal against the judgment of a High Court Judge (Mwansa J) of the Industrial and Labour Division, sitting with two members of that Court.

2) The judgment dismissed the Appellant's claim for various orders which in effect sought that he be deemed as having reached retirement age and that he be paid a retirement package, following the termination of his employment by the Respondent.

Background

3) The facts of this case are fairly straight forward and undisputed. The Appellant was employed by the Respondent on 20th February 2014 as a Traffic

Controller. His letter of employment revealed a monthly salary of K4,950.00 in Hay Grade H7.

4) The Appellant and Respondent signed a contract of employment to that effect. The employment commenced on 11th March 2014 and was on a permanent and pensionable basis.

5) At the month end of March 2014, the Appellant was not paid his salary for the month and when he queried the Respondent's officer he was informed that he had not yet been placed on the payroll and that he would be paid for the months of March and April at the month end of April.

6) Later, the Respondent's officers informed the Appellant that there was an error in his letter of appointment in regard to the monthly salary. He was informed that the grade he was in entitled him to a monthly salary of K4,200.00 and not K4,920.00 indicated in his letter and contract of employment. To this end he was given a fresh letter of appointment and contract of employment. He signed these two documents.

7) At the month end of April 2014, the Appellant was paid his salary for the month and arrears in respect of the salary for the month of March.

8) On 12th May 2015, the Appellant wrote to the Respondent giving him notice of its intention to terminate his employment in accordance with Clause 16.3 of the contract of employment. He was informed further that the notice period was to run from 16th May 2015 to 16th June 2015 and that at the end of his employment he would be paid a salary and accrued leave days, less statutory deductions.

9) The Appellant was aggrieved by the termination and instructed his lawyers to write to the Respondent demanding an explanation as to which contract of employment had been terminated. Here, the Appellant was contending that there were two contracts of employment and if the Respondent was terminating the second contract of employment the Appellant should be paid terminal benefits for breach of the first contract of employment based on the alleged unilateral change in

the salary from K4,950.00 to K4,200.00 by the Respondent.

The Appellant's claim in the High Court and the evidence tendered before the Court

10) The Appellant commenced the action in the High Court by way of notice of complaint pursuant to section 85(1) and (A) of the ***Industrial and Labour Relations Act***. The grounds of the complaint were that: the Respondent unilaterally, without consent and by threats of dismissal, reduced the Appellant's salary; and, the Respondent terminated the Appellant's employment on 12th May 2015.

11) In terms of the relief sought, the Appellant claimed for:

11.1 an order that his contract dated 11th March 2014 terminated when the Respondent reduced his salary without his consent;

11.2 an order that as per the conditions of service, he be deemed to have reached retirement age;

11.3 an order that all moneys due to him under the 11th March 2014 contract of employment be paid to him as if he had reached retirement age;

11.4 an order that he was forced into signing the 27th February 2014 contract of employment and, therefore, did not willingly consent;

11.5 any other relief the Court may deem fit;

11.6 Interest on any monetary awards.

12) In the affidavit in support, the Appellant contended that after he was given the first letter of employment he was informed by an employee of the Respondent, one Phaebe Musonda, that he was earning more than the other members of staff who had served for a longer period. That the Respondent would reduce his salary to the sum of K4,200.00.

13) During this same period he had been following up payment of his salary for the month of March which he needed desperately because he had to pay rentals for his house and meet his day to day living expenses.

14) Later, he was given a second letter of employment and contract of employment which were backdated to 20th and 27th February 2014, respectively. When he received these two documents he was reluctant to sign them but

was induced by the Respondent's officers to sign the documents with threats of dismissal and withholding of the salary.

15) In May 2015, his employment was terminated on the ground that he had embarrassed the Respondent's management by refusing to consent to a salary reduction.

16) In his *viva voce* evidence, the Appellant restated that he was threatened with dismissal and withholding of his salary if he did not sign the new letter of appointment and contract of employment. He however, said that he did not complain in writing about the Respondent's conduct.

17) In its answer, the Respondent contended that the Appellant's termination of employment was in accordance with the contract of employment and that he was paid all the moneys due to him.

18) The Respondent also explained the mistake with respect to the first letter of offer which indicated the Appellant's salary as K4,950.00 instead of K4,200.00. That the

Respondent's other staff who were at the same level as the Appellant were receiving a salary of K3,875.00.

19) It denied issuing threats to compel the Appellant to sign the correct letter and contract of employment. It also explained the delay in paying the Appellant his March salary as being due to the error in the contract in respect of the salary which was only corrected after the payroll was closed.

20) The Respondent's *viva voce* evidence was tendered by Felistus Tembo. She explained that at the time of signing the first contract of employment with the Appellant, the Human Resources department had omitted to consult the Head of Function who was responsible for salary grading. As a result, the wrong salary amount was put on the Appellant's letter and contract of employment.

21) Later, the Head of Function noticed the mistake in the salary and the Appellant was accordingly informed that his salary would be reduced to the correct amount of K4,200.00. He did not object and signed the corrected letter and contract of employment.

22) As for the delayed salary for the month of March, the witness explained that the Respondent's payroll closes on the 15th day of every month. By the time it was closing in March, the Appellant's appointment notice had not yet reached payroll.

Consideration by the Learned High Court Judge

23) In his consideration of the evidence, the Judge found that the salary initially offered to the Appellant of K4,950.00 was not approved by the Head of Function. Although it was approved by the head of department and human resources manager. This finding followed his examination of the appointment notice of March 2014. He found further that the Respondent's administrative procedure shows that the Head of Function was responsible for designating the salary for each category of salary grade.

24) The Judge concluded that the second contract of employment with the corrected salary of K4,200.00 per month superseded the first contract which indicated a salary of K4,950.00 per month. In doing so, he found

that the Appellant agreed to the variation in the salary when he was given the new appointment letter and second contract of employment and signed them. He, therefore, found no merit in the claim and dismissed it. In doing so he dismissed all the reliefs claimed which are at paragraph 11 of this judgment.

25) The Appellant has contested the High Court judgment by launching this appeal.

Grounds of appeal to this Court and the arguments by the parties

26) The Appellant has presented five grounds of appeal to this Court as follows:

26.1 The Learned Trial judge erred both in law and in fact when he held that the second contract of service with the amended salary of K4,200.00 per month superseded and nullified the first contract of service with a salary of K4,950.00 per month;

26.2 The Learned Trial Judge erred both in law and infact when he held that the Appellant having been given a copy of the appointment notice thus agreed to the variation in the salary;

26.3 The Learned Trial Judge erred both in law and in fact when he held that the Appellant could not have been deemed to have attained retirement age;

26.4 The Learned Trial Judge erred both in law and in fact when he did not make a finding on the argument that an administrative procedure was used by the Respondent to breach a legally binding contract;

26.5 The Learned Trial Judge erred both in law and in fact when he held that the Appellant voluntarily signed and accepted the new offer of K4,200.00 in the absence of evidence in rebuttal of the allegations of coercion and duress.

27) In the written heads of argument counsel for the Appellant, Mr. Chali argued grounds 1, 2, 4 and 5 of the appeal together. He contended that clause 16 of the contract of employment sets out the manner of termination of the contract and payment as a consequence thereof. This is by, automatic termination, immediate dismissal and by notice. That there is no provision under that clause for termination by way of a second contract of employment. We understood counsel's argument to mean that the Respondent terminated the

Appellant's contract of employment wrongly by giving him a second contract of employment.

28) Counsel argued further that the validity of the contract of employment was not based on approval by the Respondent's management of the appointment notice. He was in effect arguing that the Appellant's salary ought not to have been withheld on account of the Head of Function refusing to approve the appointment notice because it amounted to making the contract of employment subject to the appointment notice. That the contract of employment was a standalone document which could not be subjected to the appointment notice for interpretation purposes.

29) Counsel argued that the finding by the Judge that there is an administrative procedure in the Respondent company which requires the appointment notice to be accepted by the Head of Function prior to the salary being paid was flawed. He argued that since the appointment notice did not form part of the term of the contract, the decision by the High Court amounted to

consideration of extrinsic evidence in interpreting a written contract. This he said is contrary to the Learned author ***Chitty on Contracts, General Principles, Vol 1*** which is that parties who reduce their agreement to writing shall be bound by it whether or not they are ignorant of its precise legal effect.

30) The second limb of counsel's argument was a repetition of the evidence tendered in the High Court that the Appellant signed the second contract under protest or economic duress. As a result, the reduction in the salary without the Appellant's consent amounted to the Respondent unilaterally varying the terms of the contract of employment. We were urged to refer to our decision in the case of ***Mike Musonda Kabwe v B.P. Zambia Limited***[1] where we said that any conditions that are introduced which are to the detriment of the workers do not bind the workers unless they consent to them.

31) In ground 3 of the appeal counsel argued that since clause 1.2 of the contract of employment stipulates that the Appellant was employed on permanent and

pensionable basis, he was entitled to be deemed to have reached retirement age and be paid accordingly as a consequence of the illegal termination of the contract. Alternatively, the Judge should have awarded the Appellant reasonable damages tied to the notice period, such as a year's notice.

32) In the *viva voce* arguments, Mr. Chali continued to argue that the introduction of the second contract resulted in the breach of the first contract. He also argued that the appointment notice was not a term of the contract of employment, as such, the Judge misdirected himself when he found that the appointment notice was an administrative procedure leading up to approval of the pay grade and placing a new employee on the payroll. Lastly, that there was failure on the part of the Respondent to rebut the evidence by the Appellant of economic duress. We must pose here and immediately state that these three arguments by Mr. Chali, show a failure on his part to appreciate the real issues in this

appeal as we have demonstrated in the latter part of this judgment.

33) We were urged to allow the appeal.

34) Responding to all five grounds of the appeal, counsel for the Respondent, Mr. N. Nchito SC, argued that the High Court did not misdirect itself when it found that the second contract of employment superseded the first contract of employment because the Appellant consented to the variation of the first contract. This was evidenced by the documents on record which show that the Appellant signed off the change in salary.

35) He argued further that our decision in the case of ***Mike Musonda Kabwe v B.P. Zambia Limited***[1] which we explained in a later decision in the case of ***National Milling Company v Grace Simataa and other***[2] is not applicable to this case because in that case the employee did not consent to the variation of his conditions of service.

36) The other argument by counsel in relation to the five grounds of appeal was that the decision by the Judge on

the two contracts of employment was a finding of fact which could only be reversed if the Appellant satisfied the test in ***Nkhata and Four others v The Attorney General***[3]. In that case the then Court of Appeal said that a trial judge can be reversed where it is demonstrated that:

> **"... (a) by reason of some non-direction or otherwise the judge erred in accepting the evidence which he did accept; or**
> **(b) in assessing and evaluating the evidence the judge had taken into account some matter which he ought not to have taken into account; or**
> **(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
> **(d) in so far as the judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."**

Counsel argued that none of the conditions set out in the ***Nkhata*** case are applicable to this case to warrant the

reversal of the findings of fact. The Court was thus on firm ground in its findings.

In his *viva voce* arguments, Mr. Nchito SC, set out the issue in contention in the appeal as being whether the Appellant signed the second contract willingly? In answer to the issue he contended that the second contract superseded the contract of employment because the Appellant signed it willingly. That he had failed to discharge the burden placed upon him of proving the economic duress. This, he argued, was revealed by the Appellant's failure to discredit the evidence of the Respondent's witness who deposed to the affidavit in opposition and gave *viva voce* evidence on the issue of economic duress.

37) In addition Mr. Nchito SC, argued that the withholding of the Appellant's March 2014 salary was explained by the administrative procedure evidenced in the appointment notice. Here, he set out the evidence showing how the Head of Function rejected the first appointment notice

which had the wrong salary scale and accepted the second one with the correct salary scale.

38) We were urged to dismiss the appeal.

Consideration by the Court and decision

39) We have had opportunity to consider the record of appeal and arguments by counsel.

40) This appeal questions the finding of fact made by the Judge that the second contract of employment superseded the first contract of employment. His decision arose out of his finding that the Appellant voluntarily executed the second contract of employment which varied his salary.

41) The Appellant's evidence was that he signed the second contract under economic duress by way of threats of continued withholding of his salary and dismissal from employment. The Respondent's evidence was that there was no economic duress and explained the delay in paying the Appellant's March 2014 salary as arising from

the closure of the payroll prior to his salary being approved by the Head Functions.

42) The issues we have found to arise out of the five grounds of appeal are, has the Appellant satisfied the test to warrant the reversal of findings of fact made by a trial Court by an Appellate Court; and, was there economic duress applied by the Respondent prior to the Appellant signing the second contract of employment?

43) We have already set out the test in the ***Nkhata*** case at paragraph 36 of this judgment. In the case of ***The Attorney General v Marcus Kampumba Achiume***[3], in line with the ***Nkhata*** case, we said that an appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of evidence, no trial court acting correctly can reasonably make. This is the test the Appellant in this appeal must satisfy.

44) Our consideration of the arguments by counsel for the Appellant show that they do not address the test we have set out above as argued by Mr. Nchito SC. In addition the arguments do not refer to any authority on when findings of fact by a trial court will be set aside by an appellate Court. They focus on an allegation that the Judge used extrinsic evidence in interpreting the contract of employment and the binding nature of a contract executed by the parties. Mr. Chali argued that the Judge considered extrinsic evidence when he found that the appointment notice was an administrative procedure that actualized the contract of employment. That this reasoning was flawed because the contract of employment was not subject to the appointment notice. We are of the firm view that these arguments are misplaced because the Judge's decision on the issue was in no way an attempt at interpreting the contract of employment by use of the appointment letter or that the same formed part of the terms and conditions of the contract of employment. The appointment letter, as the

Judge correctly found, was merely a device by which new employees in the Respondent were placed on the payroll.

45) Further, the Appellant took the position that the imposition of the second contract by the Respondent on him terminated the first contract wrongly because there was no provision for termination of the contract in that manner. The position we have taken once again is that the argument is misplaced because it fails to address the point that the second contract did not terminate the first one but rather varied it resulting in it superseding it by way of alteration of the salary.

46) In addition, the decision of the High Court was anchored on the finding that there was no economic duress applied by the Respondent on the Appellant prior to his signing the second letter and contract of employment. The position we have taken is that this finding was on firm ground because the Appellant merely made the allegation of economic duress which was rebutted by the evidence of the Respondent. Mr. Chali suggested in his *viva voce* arguments that it was incumbent upon the Respondent

to disprove the allegation of economic duress. That it was not enough for the Respondent's witness to say that she was not aware of any threats directed at the Appellant prior to his signing the second contract and that, in any event, she was not one of the persons present at the time the alleged threats were made.

47) We agree with the argument by Mr. Nchito SC that counsel for the Appellant had a duty to discredit the Respondent's witness in cross examination. Further, we are of the firm view that the duty to call the persons who witnessed the alleged threats lay with the Appellant by way of subpoenas because it is he who alleged and as such, was obliged to prove the allegation.

48) In addition, the Appellant did not endeavor to set out and prove the test for economic duress. The English authorities on economic duress show that a Court determining whether or not there was economic duress must consider the following factors:

48.1 the seriousness of the impropriety;

48.2 whether the person exercising the pressure acted in good faith or bad faith;

48.3 whether the Claimant had a real choice or a realistic alternative;

48.4 whether the threat was a grave one;

48.5 whether the Claimant protested. (See Practical Law UK Practice 2019 - Contracts: Invalidity)

49) The Privy Council had occasion to lay down a test similar to the one in the preceding paragraph in the case, of ***Pao On v Lan Yiu Long***[5]. In that case, the Claimant had threatened not to complete the main contract for the purchase of shares unless subsidiary agreements were met including a guarantee and an indemnity. The Defendant was anxious to complete the main contract as there had been a public announcement of the acquisition of shares and did not want to undermine public confidence in the company and the consequent effect on shares prices. The Defendant could have sued for specific performance of the agreement but this would have delayed matters and damaged the company's reputation. The Defendant had taken legal advice in all these matters

before agreeing to the guarantee and indemnity. The Claimant then sought to enforce the guarantee and the Defendant sought to have the agreement set aside for economic duress.

50) The Privy Council found that there was no economic duress and in doing so identified four factors to be considered in assessing whether economic duress was present as follows:

50.1 did the person claiming to be coerced protest?

50.2 did that person have any other available cause of action?

50.3 was he independently advised?

50.4 after entering into the contract did he take steps to avoid it?

We are persuaded by these English authorities and as such, are of the view that in contending economic duress the Appellant ought to have led evidence to prove that the test as set out by the Privy Council had been met.

51) In relation to the last test, ***Chitty on Contracts***, 24th edition (1977) Vol 1 para 442, P.207 puts it this way:

> **"... consequently a person who has entered into a contract under duress, may either affirm or avoid such contract after the duress has ceased; and if he has so voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it."**

52) The facts of the case with which we are confronted show that the Appellant contends that the economic duress took the form of withholding his salary and threats of dismissal. He needed the salary to enable him pay rental and attend to other living expenses. They reveal further that in April 2014, his March salary which he alleges was deliberately withheld, was paid to him along with the April salary. As for the threat of dismissal, the facts do not show that beyond April 2014 the threat of dismissal continued. Therefore, even if we were to assume that there was indeed economic duress, it ended in April. The Appellant, despite this, continued in employment and receiving the reduced salary without complaint and only complained a year later, after his contract of employment

was terminated. He made no effort to opt out of the contract of employment or insist on being paid the original salary. There is no evidence to this effect on the record. He, in our opinion, affirmed the second contract of employment.

Conclusion

53) The net result of our decision in the preceding paragraph is that the appeal fails on all five grounds of appeal and we dismiss it. We accordingly uphold the judgment of the trial Judge. As for the costs, we order that the parties will bear their respective costs, in view of the nature and origins of this case.

.....

M. MALILA
SUPREME COURT JUDGE

.....

J. K. KABUKA
SUPREME COURT JUDGE

.....

N. K. MUTUNA
SUPREME COURT JUDGE