A.C CONTROLS (PRIVATE) LIMITED
versus
EMMANUEL MIDZI
and
ALPADETAIL (PRIVATE) LIMITED
t/a E AND Z ENTERPRISES P/L

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 6 and 28 April 2010

Urgent Chamber Application

S Kampira, for the applicant
A Rubaya, for the respondents

UCHENA J: The applicant is a company duly incorporated in terms of the laws of Zimbabwe. It carries on the business of electrical engineering. The first respondent was its employee. He was its Chief Executive Officer. He tendered his letter of resignation on 8 February 2010. The second respondent is the first respondent's company duly registered in terms of the laws of Zimbabwe. It like the applicant carries on the business of electrical engineering.

In terms of clause 16.1 of the applicant and first respondent's contract of employment the first respondent is restrained from competing with the applicant. Clause 16.1 provides as follows:

> "You are required to devote your attention at work to the affairs of A C Controls. You may not be involved either directly or indirectly, during or after business hours in any undertaking that is adverse to, prejudicial to or competing with the interests of A C Controls. All business interests must be declared at commencement of this appointment, and approval for subsequent outside business interest must be obtained from the Chairman."

The first respondent believing he had resigned and was no longer bound by clause 16.1, on 8 March 2010 wrote to Netone on behalf of second respondent seeking to be put on its contractors list. The request was brought to the applicant's attention by Netone. Netone is the applicant's client. The first respondent in his capacity as the applicant's CEO used to communicate with it on the applicant's behalf.

The applicant believing the first responded was still its employee filed this application to stop the first and second respondents from competing with it. It sought a provisional order on the following terms.

> "(a) That the first and second respondents are hereby interdicted from engaging in any business in competition with the applicant.
>
> (b) That the first and second respondents are barred from providing any service to Netone."

The applicant's counsel submitted that the second respondent though not the applicant's employee is being sued on the understanding that it is the first respondent's *alter ego*.

The respondents opposed the applicant's application raising the defence that the first respondent is no longer the applicant's employee, as he resigned from its employment on 8 February 2010.

This case depends on the interpretation of clauses 16.1 and 23.4 of the applicant and first respondent's contract of employment, and the determination of whether or not the first respondent's letter of resignation dated 8 February 2010 terminated the employer employee relation which existed between the applicant and the first respondent.

Mr *Kampira* for the applicant submitted that clause 16.1 is still binding between the applicant and first respondent because the first respondent in spite of the purported resignation is still the applicant's employee. He argued that the unilateral resignation violates the terms of clause 23.4 of the contract of employment which reads as follows;

> "Where neither party is in breach but termination is desirable, this shall be settled by mutual agreement."

Mr *Rubaya* for the respondents submitted that the relationship between the applicant and the first respondent was terminated by the first respondent's letter of resignation. He further submitted that resignation is a unilateral act which need not be accepted by the employer. He further submitted that there was breach of contract which led to the first respondent's resignation.

Clause 16.1and 16.2

Clause 16.1, clearly deals with a situation where the employee is still in the employer's employment. It does not extend to a period after the employee's resignation. Once the employer employee relationship has come to an end it ceases to be of any effect. Mr *Kampira* sought to argue that the first respondent is a director of the applicant and a shareholder of its subsidiary, and is therefore by virtue of those positions still barred from competing with the applicant. That argument is not tenable. It does not fall within the terms of clause 16.1 and 16.2, and the first respondent's acceptance of those positions has not yet been agreed. In his letter of resignation the first respondent sought to be informed of the terms on which he was being offered those positions. This means there is no agreement on those positions. The applicant's argument cannot succeed because clause 16.1 does not restrain trade for the first respondent's directorship, or his being a shareholder of applicant's subsidiary and the agreement between the parties on these appointments has not yet been finalized.

Clause 23.4

The applicant's counsel submitted that this clause was not breached, and because there was no breach therefore the applicant's letter of resignation did not terminate the contract of employment. Mr *Rubaya* for the respondents submitted that the first respondent's letter of resignation clearly states that there was breach of contract and specifies the aspects of the contract which were breached. He on p 1 of the letter of resignation said;

> "I also indicated that the current revenue base does not allow the company to pay for my family's (immediate and extended) needs and basic survival. Since October 2009 I had to liquidate family assets to survive. I should underline that I have no ill feelings on the company for this situation. The business environment dictated the present situation."

The letter of resignation is complaining of the applicant's failure to meet its contractual obligations. The fact that he says he understands the underlying reasons for the breach does not mean that there was no breach. In the circumstances the applicant breached the first respondent's conditions of service, resulting in his having to liquidate his family assets to survive. Applicant cannot in these circumstances be heard to say that there was no breach and the first respondent had to resign by mutual agreement in terms of clause 23.4. The first responded was entitled to resign in the manner he did because there was a breach of contract by the applicant.

Notice

The first respondent resigned without giving the applicant notice. He in para 4 of his opposing affidavit states:

> "I am no longer an employee of the applicant company since I resigned from my post as its Chief Executive Officer on the 8th of February 2010, and the applicant's representative had knowledge of the resignation as from the 9th February 2010."

The letter of resignation in the first paragraph states:

> "I hereby formally advise that I am resigning from the position of Chief Executive of A C Controls with effect from 8 February 2010"

The letter is dated 5 February 2010, and the first respondent says the applicant's representative became aware of it on 9 February 2010. There was therefore no notice at all, and this was a unilateral termination of the contract of employment. If a contract of employment can be terminated unilaterally the first respondent is now free to compete with his former employer the applicant as clause 61.1 is restricted to the period during which he was under the applicant's employment. On the other hand if a contract of employment can not be terminated unilaterally then the first respondent is still the applicant's employee and can not compete with his employer the applicant until the contract of employment is properly terminated.

The resignation

Mr *Rubaya* for the respondents submitted that resignation is a unilateral act, which entitles the employee to terminate the contract of employment without the consent of the employer. Mr *Kampira* for the applicant submitted that resignation does not terminate the contract until it is accepted by the employer.

I agree with Mr *Rubaya*'s submission that an employee's resignation unilaterally terminates the contract of employment. His submission is supported by the decision of this court in the case of *Muzengi* v *Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (HC) were it was held that a letter of resignation constitutes a final act of termination by an employee, the effects of which he cannot avoid without the permission of the employer. This means once the employee tenders a letter of resignation to his employer, the contract of employment is

terminated as the employer cannot refuse to accept his resignation, but can only agree to the employee's withdrawal of his resignation if he is inclined to doing so. The employer can however institute a claim for the damages he may suffer as a result of the employee's resignation without giving him adequate notice. See also the case of *Mudakureva* v *Grain Marketing Board* 1998 (1) ZLR 145 (SC) were the Supreme Court confirmed the finality of a letter of resignation pointing out that the employee could only have avoided it by proving that the employer forced him to resign, and thereby turning it into a constructive dismissal.

In the result the first respondent's unilateral resignation terminated the contract of employment which existed between him and the applicant. In view of the termination of the contract of employment the first respondent is no longer bound by clause 16.1 of the contract of employment. It therefore follows, that the second respondent whom the applicant sought to restrain on the basis of its being the *alter ego* of the first respondent, cannot be bound by a contract which no longer binds the first respondent.

The applicant's application is therefore dismissed.

The applicant shall pay the respondent's costs.

Chinamasa, Mudimu, Chinogwenya & Dondo, applicant's legal practitioners
Nyamushaya, Kasuso & Rubaya, 1st and 2nd respondents' legal practitioners