ZIMBABWE NATIONAL FAMILY PLANNING COUNCIL
versus
SIMBARASHE MABAYA

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 1 October 2018 and 10 October 2018

Stated Case

K. Kachambwa, for the plaintiff
T. Zhuwarara, for the defendant

MUZENDA J: The plaintiff instituted action proceedings against the defendant claiming the following:

'(i) a declaration that defendant breached the bonding agreement;

(ii) payment in the sum of US$12 614-98 being money owed to the plaintiff due to a breach of the agreement;

(iii) interest on the amount of US$12 814-98, calculated at the prescribed rate of interest from 31 October 2015, being the date of resignation.

STATEMENT OF AGREED FACTS AND DOCUMENTS

1. On 5 October 2011, the plaintiff offered defendant the employment position of Medical Officer on a fixed term contract of three (3) years running from 1 November 2011 to 31 October 2014.
2. The defendant accepted the offer for employment by signing a confirmation and acceptance of conditions of contract page on 12 October 2011.
3. On 9 May 2013, the parties signed a staff development bonding agreement. The bonding period was for three (3) years ending in May 2016.
4. The defendant successfully undertook a Masters Degree study programme from 1 September 2013 to 15 July 2014. The tuition fees for the programme was €16 960. The cost was covered by a grant.
5. On 7 July, the plaintiff offered the defendant through an internal memorandum a lateral transfer the position of Medical Officer to the post of Assistant Director Service Delivery and Training.

6. The internal memorandum was followed up by an official offer letter on 24 July 2014. The defendant accepted the offer for lateral transfer by signing the confirmation and acceptance page on the offer letter on 29 July 2014.
7. A handover takeover process for the position of Assistant Director Service Delivery and Training was done on 1 and 2 August 2014.
8. The defendant wrote to the plaintiff on 13 October 2014 for the plaintiff's approval for defendant to be allowed not to renew "the contract. The plaintiff took the request as a resignation and responded to this effect in a letter dated 29 October 2014. The subsequent exchanges and letters disagreed on whether the defendant had resigned or he had requested for his contract not to be renewed at the end of the fixed term period.
9. The parties agreed to the use of the following letters:

9.1 Letter from the plaintiff dated 14 January 2015
9.2 Letter from the plaintiff dated 20 February 2015
9.3 Letter from the defendant dated 24 February 2015
9.4 Letter from the plaintiff dated 16 March 2015
9.5 Letter from the defendant dated 19 March 2015
9.6 Letter from the plaintiff dated 13 May 2015
9/7 Letter from the defendant's lawyers dated 28 May 2015
9.8 Letter from the plaintiff dated 10 June 2015
9.9 Letter from the plaintiff dated 12 August 2015
9.10 Letter from the defendant's lawyers dated 17 August 2015
9.11 Letter from the plaintiff dated 14 September 2015
9.12 Letter from defendant's lawyers dated 16 September 2015

10. The plaintiff alleges that the defendant breached the bonding agreement by failing to complete the bonding period when he resigned.
11. The defendant counter-claimed and alleges the plaintiff breached the bonding agreement by failing to refund the tuition fees paid for the masters programme upon its successful completion.
12. The parties' both claim damages arising from the alleged breach. The plaintiff claims US$12 814-98 and the defendant claim €16 900-00. The quantum of damages claimed is admitted by both parties. It is the liability which is in issue.

THE ISSUE FOR DETERMIANTION

13. The issue for determination is whether the plaintiff or defendant breached the bonding agreement and is liable for damages as claimed.

PLAINTIFF'S SUBMISSIONS

Mr *K. Kachambwa,* for the plaintiff addressing the question whether the defendant breached the bonding agreement, submitted that the bonding agreement created rights and obligations as between the plaintiff and the defendant. He argues that the bonding agreement required the defendant to serve a bonding period of three years ending on May 2016. Failure to serve this bonding period required defendant to refund the loans salary and allowances paid to him whilst on study leave. Counsel for the plaintiff added that the expiry of the contact for the position of Assistant Director Service Delivery and Training on 31 October 2014 did not terminate the Bonding Agreement, it remained valid and its terms had to be adhered to.

According to the plaintiff, defendant held the view that his contract would be renewed and this legitimate expectation was reasonably premised on the Bonding Agreement. This is why the defendant saw the need to ask for approval from the plaintiff to be allowed not to renew it. To the plaintiff the defendant's letter seeking permission not to renew the contract amounted to resignation thereby breaching the bonding agreement, the defendant knew that the contract was going to be received at least until May 2016. The plaintiff further submitted that the Bonding Agreement was a stand-alone agreement which placed an obligation on the defendant to tender his services until May 2016 failing which he was in breach of the agreement. The bonding agreement was per the benefit of the plaintiff and not for the employee. It gave the employer the right to insist that the employee remain in its employ. The defendant should have made his services available after 31 October 2014, the plaintiff contends that did not do so and breached implied and express terms of the Bonding Agreement the plaintiff prays that the defendant should be ordered to pay US$12 814-98 as claimed by the plaintiff.

On whether the plaintiff itself breached the bonding agreement Mr *K Kachambwa* for the plaintiff submitted that the basis of breach is that upon the successful completion of the defendant's studies and certification, the plaintiff refused to refund the tuition fees paid for the defendant's course. The plaintiff's view is that tuition fees were paid through a grant, therefore the defendant cannot claim a refund he never paid. To the plaintiff the purpose was to assist with staff development funding, however this could not be achieved due to financial constraints the plaintiff could not do so. Further the plaintiff argues that the refund clearly applies where the defendant has used his own money. An interpretation that the employee is entitled to tuition fees refund upon successful completion of the programme regardless of who paid for the tuition

would lead to absurdity. The employee would benefit twice from the employer, first from the payment of the tuition fees and second from the refund payment. The defendant cannot be refunded that which he did not pay. The plaintiff thus prays for the dismissal of the defendant's counter-claim with costs.

DEFENDANT'S SUBMISSIONS

Mr *Zhuwarara* for the defendant submitted that the defendant did not resign. The letter of 13 October 2014 did not amount to resignation. Resignation is unilateral or final act of termination which ordinarily does not require an employer's consent. Counsel for the defendant cited the cases of *Muzwengi* v *Standard Chartered Bank & Anor*200 (2) ZLR 137, *Lee Group of Companies* v *Elder* 2004 (2) ZLR 193 (S) *and Rustenburg Town Council* v *Minister of Labour & Ors* 1942 TPD 220. The defendant by the letter of 13th October 2014 intended to find out whether the plaintiff was prepared to release him from his obligations. The plaintiff did not communicate its intention to renew the defendant's contract.

On the aspect of legitimate expectation (clause 2 of the contract of employment) the defendant averred that in the matter of *Magodora & Ors* v *Care International Zimbabwe* SC 24/14, the court held that the import of such a clause is that an employer cannot have an expectation to have his contract renewed. The import of such a clause is that continued employment is at the mercy of the employer. It is the plaintiff who repudiated the contract of employment, the defendant cited the matter of *Nyerere* v *Fraser N.O.* 1994 (2) ZLR 234 (H).

The defendant further submitted that it did not breach the bonding agreement. It was the conduct of the plaintiff which frustrated the defendant and the defendant was released from such obligations. It was the plaintiff who breached the bonding agreement by failing to pay or refund the defendant's tuition fees. The plaintiff provided those obligations in the agreement itself and is obliged to honour them, the defendant argued. The defendant urged the court to grant the relief being sought by the defendant with costs.

THE EVIDENCE

1.0 Offer of employment 5 October 2011.

1.1.0. TYPE AND DURATION OF CONTRACT

1.1.1. Further to the interviews you attended on 7 September 2011, this letter serves to formally offer you employment with the Council as Medical Officer on a fixed term contract of 3 years.

1.1.1. By accepting this contract the employee does not hold any expectation that there will be a renewal of this contract even despite any further renewals."

4.0. NOTICE OF TERMINATION OF EMPLOYMENT

4.1. Since this is a fixed term's contract of three years, either party is required to give three months' notice or pay equivalent cash *in lieu* of notice. Failure to give the requisite notice will result in forfeiture of some or all of your terminal benefits."

2.0 STAFF DEVELOPMENT BONDING AGREEMENT – MASTER OF PUBLIC HEALTH DEGREE-UNIVERISTY OF BELGIUM dated 24 January 2013.

2.1.10. STAFF DEVELOPMENT FUNDING

(a) Due to financial constraints council is not in a position to fund your studies. Accordingly you are responsible for the payment of your tuition/school fees.

(b) Depending on availability of funds, short or long term loans may be considered to assist in financing your studies and monthly deductions will be processed through the pay roll in line with applicable rules.

(c) The relevant loan application forms must be completed to which the relevant supporting documents should be attached for consultation and approval"

Clause 3: REFUND OF TUTION provides:

(a) Upon successful completion of your studies and certification, council shall refund the full proven amount paid in tuition fees.

(b) No refunds shall be made for the purchase of stationery and textbook for purposes studying for the course.

(c) Refund of tuition does not apply as you are studying to attain the maximum qualification required for your position.

Clause 5:BONDING PERIOD provides

(a) because Council will grant you study leave, allow you to attend classes during the working week, you shall be bonded from the date of course completion, whether you are successful on the course or not.

(b) your bonding period shall be 3 years since your course of study is at the Masters Degree level in terms of the Staff Development Policy.

(c) a breach in serving the bonding period shall entail a refund to the Council of full or the proportional cost of sponsorship received for the course and the salary and

allowances paid to you while on the staff development course and outstanding balances of loans will become due at the prevailing staff loan rates.

3.0 LATERAL TRANSFER DATED 7 JULY 2014.

The first paragraph of that letter is relevant to this matter reads this:

> "Further to your discussion with Director Technical Services on the above, this serves to formally offer you a lateral transfer from the post of Medical Officer to Assistant Director Service Delivery and Training. The two posts are on the same grade E5 (2) hence the offer letter of a lateral transfer. This means that your terms and conditions of service will remain the same."

The letter of 24 July 2014 written by the plaintiff addressed to the defendant contained the same terms as the letter cited above more particularly on the terms and conditions of employment and the termination date of employment remained 31 October 2014.

4.0. DEFENDANT'S LETTER DATED 13 OCTOBER 2014: RENEWAL OF CONTRACT OF EMPLOYMENT.

The first paragraph of that letter is pertinent and it is phrased as follows:-

> "My fixed term contract of employment comes to an end at the end of this month October 2014. I kindly ask for your approval for me to be allowed not to renew it. I am grateful for the time I spent at ZNFPC…."

5. LETTER WRITTEN BY PLAINTIFF DATED 29 OCTOBER 2014

The first and second paragraphs relates to the dispute between the parties and they read thus:

> "I acknowledge receipt of your memorandum dated 13 October 2014 in which you advised that you were not seeking renewal of your employment contract which will be expiring on the 31 October 2014. Your resignation from Council employment has been accepted and it has been noted that your last day of service will be 31 October 2014.
>
> However, I wish to bring to your attention that you breached the Bonding Agreement for your recently completed Master's Degree in Public Health Staff Development Program which you undertook in Belgium from 1st September 2013. You failed to serve the full bonding period of 3 years from 15th July 2014 the date you resumed duty after completing your studies. In this regard, you only served 3 months and 16 days leaving a shortfall of 2 years 8 months and 14 days"

6. LETTER OF 24 FEBRUARY 2015 WRITTEN BY DEFENDANT

The third paragraph of that letter reads as follows:

> "The Ministry in a letter to you dated 16 December 2014 had accepted to have the bond be transferred to them given the existing relationship between your two organisation. I had delivered the said letter to you and you had indicated to me that it would be considered by the ZNFPC board of directors".

On 16 March 2015 plaintiff advised defendant that the bonding obligation with plaintiff could not be transferred to the Ministry of Health and Child Care. On 19 March 2015 the defendant pleaded with the plaintiff for the transfer of the bonding terms and conditions and on the 13 May 2015 the plaintiff reconfirmed the position that it was virtually impossible to transfer the bonding agreement.

DID THE DEFENDANT RESIGN FROM PLAINTIFF'S EMPLOYMENT?

In the letter of 13 October 2013 written by the defendant addressed to the plaintiff, the defendant did not use the word "resign" but requested for permission from plaintiff for leave or approval not to renew the contract. The plaintiff interpreted this letter to mean resignation. The offer of employment whose critical clauses have already been cited hereinabove is very unambiguous to the fact the contract was of a fixed term of 3 years and the employee does not hold any expectation that there will be a renewal of the contract even despite any further renewal. Clause 4.1 to the offer of employment provides that either party was required to give three (3) months notice, that is for termination of employment or by equal implication renewal of employment if it was the plaintiff exercising that option. Defendant only wrote the letter on 13 October 2014 eighteen (18) days before the date of termination. On either side the period of notice had been breached, the question to decide is which document takes precedence? The contract of employment or the bonding agreement in deciding this matter. The plaintiff's cause of action is the bonding agreement allegedly breached by the defendant. The bonding agreement was entered into after the parties had already signed the contract of employment. The lateral internal transfer alluded to the 2011 contract of employment but did not allude to the bonding agreement. The bonding agreement does not allude to the contract of employment. Hence there were two agreements relating to the parties. The contract of employment was due to terminate on 31 October 2014 and the bonding agreement was due to terminate in 2016 and the plaintiff did align the 2 conflicting agreements. I agree with the defendant's submission that where there is a conflict between the two documents, the contract of employment and the Bonding agreement. In clause 5 of the Staff Development Bonding Agreement was inconsistent with clause 1 of the contract of employment, the employment contract should prevail. The plaintiff had a duty to relate the 2 agreements so as not to confuse the defendant. It never offered to renew the contract of employment prior to its termination and in any case the intention of the parties was that a renewal of the contract would be done in express terms and surely the onus was on the employer to communicate an intention to renew the contract. I am persuaded by the defendant that he did not resign from employment but left upon the expiry of the

contract. (See *Tel-One (Pvt) Ltd* v *B Singende* SC 64/15 *Magodora & Ors* v *Care International Zimbabwe* (*supra*). I would not agree with plaintiff's averments that defendant resigned from plaintiff's employment. Plaintiff wanted to take advantage of defendant's letter in order to pin the defendant so as to compel him to pay the money in *lieu* of breach of the bonding agreement. The 13 October 2014 letter was written by the defendant whilst defendant was still at work, why did plaintiff accept the termination? If the plaintiff wanted to retain the defendant at work, it ought not to have accepted his offer not to have the contract renewed. In other words the defendant's notice to terminate the contract at the effluxed time, though belated was joyously accepted by the plaintiff who confirmed the very date of 31 October 2014 as the date the contract came to an end. The plaintiff was at liberty to reject the defendant's request and demand specific performance up to the end of the bonding agreement which is 2016. The plaintiff did not.

DID THE PARTIES BREACH THE BONDING AGREEMENT

(a) Whether plaintiff breached he Bonding Agreement

Clause 2 (a) of the contract is written as follows:

> "Due to financial constraints Council is not in a position to fund your studies. Accordingly you are responsible for the payment of your tuition /school fees"

Clause 3 (a) of the agreement provides as follows:

> "3 Refund of Tuition
> (a) Upon successful completion of your studies and certification, Council shall refund the full proven amount paid in tuition fees."

Item 15 of the statement of agreed facts signed by the parties is phrased as follows:

> "5. The parties claim damages arising from the alleged breach. The plaintiff claims US$12 814.98 and the defendant claims €16 900. The quantum of damages claimed is admitted by both parties. It is the liability which is in issue."

It is not in dispute that plaintiff agreed to refund the full proven amount paid in tuition fees upon successful completion of defendant's studies and certification. The plaintiff does not dispute that defendant had successfully completed the Masters Programme and had incurred tuition fees of €16 900. It however disputes that the defendant paid for his tuition fees. According to the plaintiff defendant received a grant. If the defendant received a grant then the plaintiff should not have agreed to the statement of agreed facts that the defendant's tuition damages are €16 900. The plaintiff should have put that item to dispute. Clause 3 (a)

of the agreement provides that the "Council shall refund the full proven amount and in tuition fees". There is a peremptory requirement on the part of the plaintiff. There is no clause cited by the plaintiff talking of a grant. In any case as already remarked above if the defendant was paid through a grant, what costs then constitute the damages of €16 900?

The plaintiff and defendant explicitly agreed between themselves that the plaintiff shall refund the tuition fees and that is clause 3 of the bonding agreement. That is the relevant term of the contract. It is not the business of the court to compel parties to contract nor is its duty to draw up a contract for them. The court's business is to ensure that parties which conclude a contract abide by its terms and conditions. Where one party breaches the contract and the aggrieved party approaches the court for redress, the aggrieved party will, in all probability, receive the sympathy of the court. It will, in the mentioned regard, call upon the offending party to abide by the terms and conditions of the contract which it signed with the other.

In the matter of *Natal Joint Municipal Pension Fund* v *Endumeni Municipality 2012* (4) SA 593 (SCA) the approach to interpretation of contracts is crisply outlined as follows:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose of the document

Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used… The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision in the background to the preparation and production of the document.

(See also *Scottish Union & National Insurance Company Ltd* v *Native Reciputing Corporation Ltd* 1934 AD 458 at 465.)

Counsel for the plaintiff submitted that the tuition fees were paid through a grant and defendant cannot claim a refund of money he never paid. That averment is outside the contract, the bonding agreement, yet clause 2 (a) explicitly directs that due to financial constraints

Council is not in a position to fund defendant's studies, defendant had to pay his own tuition fees and shall be refunded in terms of clause 3. R H Christie *Business Law in Zimbabwe,* 2 ed, Juta and Co. Ltd at p 67 is seminal and has been cited with celebrated approval in a number of cases:

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme."

(See also *Fitwell Clothing* v *Quoran Hotel* 1966 (3) SA 407 (RA) & *Magodora* v *Care International* 5-24-14).

That is equally applicable to Bonding Agreements. Plaintiff's plea to the claim in reconvention para 3, states that defendant was granted a study fellowship by the Institute of Tropical Medicine in Belgium, not by the plaintiff. If such a grant was granted how then did the defendant accrue tuition fees of €16 900? The defendant used his money to pay tuition fees and the plaintiff apparently agrees that quantum of damages are due to the defendant in form of tuition fees. I discern no absurdity at all. That amount is not undue to the defendant as plaintiff contends. Any other interpretation will defeat clause 3 (a). By refusing to honour clause 3 (a) I conclude that the plaintiff is in breach of the Bonding Agreement. Plaintiff is liable to repay defendant's tuition cost towards the defendant's attainment of the Master's Degree Programme. In any case such a conclusion will be in tandem with the cause of action by the plaintiff where it seeks an order by this court declaring the defendant to be in breach of the bonding agreement.

Whether the defendant is in breach of the Bonding Agreement?

Defendant's pleadings seem to indicate that he disputes that he was in breach of the Bonding Agreement. However the reading of the defendant's own letters addressed to the plaintiff's agency speak of a clear position showing that he personally admits that he was in breach of the agreement. On 24 February 2015 defendant wrote to the plaintiff.

> "The Ministry in a letter to you dated 16 December 2014 had accepted to have the bond be transferred to them given the existing relationship between your two organisations."
>
> On 19 March 2015 the defendant wrote to plaintiff the following:
>
> "Ref: BREACH OF STAFF DEVELOPMENT BONDING AGREEMENT"
>
> I appeal to the collective goodwill of the board through your office for consideration of any of the following proposals make with regards to the above mentioned matter:
>
> 1. May the board kindly reconsider the request of the MOHCC, in the light of the relationship between the two organisations and the fact that a similar arrangement has been made before

> with ZNFPC benefiting. You have previously indicated to me that the practice of bonded employees moving between MOHCC and ZNFPC was not new and you had come to ZNFPC from the MOHCC Malaria Programme on a similar arrangement."
>
> Paragraph 3.2 of defendant's plea issued on 15 April 2016 reads as follows:
>
> "3.2 Defendant denies that he is in breach of the Staff development agreement as alleged or at all."

This court quoted the letters of 20 February and 19 March 2015 authored by the defendant himself. No attempt is made by the defendant to explain the contents of these letters *vis-a-viz* his plea. Plaintiff's letter of 29 October 2014 clearly brought to defendant's attention the contents of the Bonding Agreement. Logically defendant ought to have immediately offered himself available for employment in fulfilment of the bonding agreement, he could not because he had already found a new employer yet he had bound himself to a 3 year contract expiring in 2016. I agree with plaintiff's submissions that defendant is in breach of the Bonding Agreement and is liable to pay plaintiff its $12 814.98.

(See also *Commercial Producers Association* v *Tobacco Sales Ltd* 1982 (2) ZLR 154 (SC) at p 164.)

Having made the above decision in respect of the parties, this is a classical case where a set off could be ordered. Parties have to agree on the exchange rate to compute €16 900.00 into United States Dollars and then deduct from that amount the amount of $12 814.98 and the residual figure is paid to the defendant by the plaintiff.

Both parties have succeeded in their matters to a significant extent and I see no basis for ordering costs on either side. Accordingly the following orders are issued.

1. Both plaintiff and defendant are declared to be in breach of the Bonding Agreement and plaintiff's claim of $12 814.98 being money owed to plaintiff due to breach of the agreement by the defendant, succeeds with no order as to costs.
2. Judgment is entered for the defendant in the sum of €16 900.00 or the United States dollar equivalent thereof as at the date of payment being refund of tuition fees incurred by the defendant which plaintiff undertook to repay upon the successful completion of the Master's programme by the defendant with no order as to costs.
3. The amount of $12 814.98 due to plaintiff is set off from the amount of the United States dollar equivalent of €16 900.00 due to the defendant and plaintiff is to pay the difference to the defendant.

Dube, Manikai & Hwacha Commercial Law Chambers, plaintiff's legal practitioners
Danziger & Partners, defendant's legal practitioners