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Zambia Breweries Plc v. Betternow Family Limited Selected Judgment No. 48 of 2016

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Zambia Breweries Plc v. Betternow Family Limited Selected Judgment No. 48 of 2016
*Chanda Chungu*⁸

Facts

This matter dealt with a distributorship contract between Zambia Breweries and Betternow Family Limited. Betternow paid K100, 000 as a pre-condition to trading Zambia Breweries' products – but after three (3) months of trading, Zambia Breweries terminated the supply of its products to Betternow Family Limited.

In this case, the contract provided that the contract can be terminated with one month's notice. The contract was cancelled by Zambia Breweries and Betternow Family Limited sued for breach of contract. The trial court awarded damages equivalent to the unserved or remaining period of the contract.

Holding

The Supreme Court per Malila JS (as he was then) held that:

Any damages awarded should have taken the notice period for determination of the agreement into account. As we stated in *Swarp Spinning Plc v. Chileshe and Others* in assessing damages to be paid and which are appropriate in each case, the court should not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent.

The Supreme Court was adamant and confirmed the principle from *Mobil Oil* that the award of damages should take into consideration the fundamental principle that where the contract breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option.

Therefore, in this case, an award of damages for the unserved portion of the contract was set aside because this award went beyond the loss that Betternow Family Limited would have incurred as the contract provided for one month's notice and as such that amount that would have been earned during the notice period should have been awarded as damages and not what would have been earned had the contract ran its full course.

The Supreme Court held that Betternow Family Limited was only entitled to be paid damages for breach of contract equivalent to the notice period for termination of the contract – because that was the extent of the loss that needed to be compensated with damages. This case underscores the principle that damages should be awarded to compensate a party for the extent of their loss, which in this case was what would have been earned during the one-month notice.

Significance

This case is significant because it deals with the crucial topic of liquidated damages under the law of contract. Liquidated damages are an amount that is a genuine pre-estimate of the loss likely to be caused to or suffered by one party if the contract is broken by the other party. In

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this case it is called ‘liquidated damages’ and it constitutes the amount, no more or less, that the plaintiff is entitled to recover in the event of the breach without being required to prove actual damage. Malila JS (as he was then) in another decision of the Supreme Court in *Damales Mwansa v Ndola Lime Company Limited*⁹ defined liquidated damages as

damages which have been agreed between the contracting parties in advance of any breach of contract. They are not the equivalent of compensation, rather they form an acceptable and agreed alternative to compensation. The amount agreed needs to be a genuine estimate of what loss is likely to be, but in the event that amount could be, indeed is likely to be, either greater or less than the actual loss.

In other words, liquidated damages are ascertained and agreed beforehand by the parties to the contract. Having laid down the amount to be paid by either party on breach, it follows that the only dispute will be as to the breach itself, not the damages.

These damages are embodied in clauses in the contract that effectively make a genuine assessment of the losses which are likely to occur because of a breach of contract. Thus, liquidated damages will generally stipulate what sum is payable in the event of a breach. Another type of clause is the penalty clause, which is intended as a punishment for the person breaching the contract. Penalty clauses are void and are disregarded in actions for breach of contract. This is because any clause providing for a greater sum than the actual loss is prima facie void. In *Bridge v Campbell Discount Co*,¹⁰ a depreciation clause in a hire purchase agreement for a car bore no relation to actual depreciation in value. The clause was declared void as a penalty.

Secondly, the amount may be a threat held over the other party in *terrorem* (to frighten the other party)-a security to the promisee that the contract will be performed. A sum of this nature is called a ‘penalty’ and is designed to compel the other party to perform the contract. Liquidated damages are enforceable, and penalty clauses are not enforceable beyond the amount of the injured party’s actual loss. Thus, the party who brings an action for the enforcement of the penalty can recover compensation only for the damage that he in fact suffered, and as such he is not entitled to recover the amount stated in the contract if he has not in fact suffered so much loss.

Sometimes, the amount of damages payable on breach is not merely an agreed and reasonable compensation, but is more and amounts to a penalty. The law does not permit penalty clauses because they seek to put the innocent party in a far greater position than compensating them for the loss they suffered. The *Zambia Breweries v. Betternow* decision is helpful as it seeks to distinguish between liquidated damages and penalties.

Whether a particular sum is a liquidated damages or penalty is a matter of construction and depends on the intention of the parties. In *Law v. Redditch Local Board*,¹¹ the court per Lopez J stated that:

The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum

⁹ (2012) ZR (3) 268.

¹⁰ [1962] AC 600.

¹¹ [1892] 1 QB 127.

specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.

To guide on excessive damages, that could be punitive in nature, Malila JS made reference to the Supreme Court's decision in *Mobil Oil Zambia Limited v Ramesh M Patel*¹² which dealt with a dealership contract whereby Mr Patel operated the Mobil Oil's service station for a monthly licence fee. The contract could be terminated by either side on one month's notice. The respondent frequently complained, inter alia, of losses through leakages of fuel from tanks. When Mr Patel fell behind with payments for products sold and delivered, Mobil Oil commenced proceedings for money owed and possession of the premises. Mr Patel counter-claimed for losses through leakages and loss of profits from the date when the appellant stopped deliveries of fuel until the date of the hearing. Ngulube DCJ said:

it seems obvious to us that the defendant should not have been allowed to recover loss of profits in respect of the breach by the plaintiff, for what was virtually an indefinite period. The defendant had calculated his loss of profits, by the month, from October 1984, when deliveries of fuel stopped, right down to 11 March 1986, when he gave evidence in the witness box. This is clearly an unacceptable way of compensating a party for loss of profits as a result of the deliberate refusal, of which he was aware, by the other party to perform his part of the contract. The renunciation of the contract by the plaintiff in effect resulted in its wrongful termination. Where, as here, the contract-breaker had a contractual option to terminate the contract, the Court should assess the damages on the footing that the party in breach would have exercised the option ... Indeed, this is frequently done in employment cases and the principle is equally applicable to the facts of this case. In our considered view, therefore, the damages for breach of contract, in terms of loss of profit for non-supply of fuel, should be limited to a period of one month, such being the period of notice to terminate specified in the contract.

The courts are reluctant to allow a plaintiff to recover for 'virtually an indefinite period'. In essence, the Supreme Court only awarded one month's worth of loss of profit as damages, as this is the greatest possible loss and would put the entity in a position it would have been but for the breach, as the contract itself provided for one month's notice.

The approach has been maintained in subsequent Zambian cases dealing with damages. In the *National Airports Corporation Limited v Reggie Ephraim Zimba and Savior Konie* case,¹³ the court awarded the payment of damages equal to the period of notice, in part because the employee managed to find alternative employment and hence the employee's greatest loss was limited to the three months' notice.

The court referred to the landmark English decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*¹⁴ cited above where the House of Lords held that even if there is a fixed sum to be paid when a party fails to perform under a contract, the court will not award the amount in damages if the amount is unconscionably high. The English court held that the court will in such circumstances award damages equivalent to the greatest loss that could conceivably be proved following from the breach. Ngulube CJ, who delivered the judgment on behalf of the Supreme Court held:

¹² SCZ Judgment No 2 of 1988.

¹³ SCZ Judgment No 35 of 2000.

¹⁴ [1914] UKHL 1; [1915] AC 79.

We find and hold that the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as proposition by Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited vs New Garage and Motor Company Limited ...*, especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This part of the appeal has to succeed and the damages directed to be assessed as we have indicated and not as ordered below ... where the contract-breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option.

The Supreme Court in *Reggie Ephraim Zimba* was therefore on *terra firma* when it varied the quantum of damages of the court below by ordering that the respondent was only entitled to damages relating to the period of three months' salary and perquisites and any other accrued benefits, such as gratuity over that period. The Supreme Court provided that if they awarded damages equating to the remaining part of the contract, such a sum of damages would be too extravagant and unconscionable, as the role of the courts is to award the greatest loss that could conceivably be proved to have followed from the breach – to put the innocent party in the position they would have been but for the loss.

Guided by the decisions in *Mobil Oil Zambia* and *Reggie Ephraim Zimba*, the court in the *Zambia Breweries* case, confirmed that damages are limited to the notice period that is provided for in the contract. Damages amounting to the duration of the contract defeat the purpose of damages in contract law which is to compensate one for the loss suffered. Anything more, such as damages equivalent to the unexpired period of the contract amounts to a penalty which is not permitted in contract law. The objective of damages is not to punish the guilty party, but rather, compensate the innocent party only for the extent of the loss, taking into consideration the fact that any party can terminate the contract.

A slight criticism of an otherwise brilliant judgment is the failure by the Supreme Court to take the opportunity to give guidance on the factors that could be used to determine what constitutes a penalty clause. At the moment, the only guidance is from the British case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*,¹⁵ which laid down various tests to determine whether a liquidated damages clause is a penalty clause:

- (1) If the sum stipulated is 'extravagant and unconscionable' in relation to the greatest conceivable loss that could follow the breach, then it will be held to be a penalty.
- (2) Payment of a large sum for a failure to settle a small debt is probably a penalty.
- (3) Where breach consists of the non-payment of a sum of money and the sum payable upon breach is greater than the sum which was meant to be paid, then this is penalty.
- (4) A single sum operating in respect of a variety of different breaches is likely to be a penalty.
- (5) In the event that a lump sum is payable on the occurrence of one, or more or perhaps several events, some harmful and some not so harmful, then the lump sum is presumed (but no more) to be a penalty.

¹⁵ [1914] UKHL 1; [1915] AC 79.

- (6) However, a sum is not prevented from being liquidated damages merely by the fact that precise pre-estimation of the loss is impossible.¹⁶
- (7) The wording used by the parties is not necessarily conclusive.
- (8) It is no bar to recovering a liquidated sum that actual assessment of the loss was impossible before the contract.

The above principles can be read in conjunction with the Supreme Court decision to determine whether the nature and scope of liquidated damages in contracts are valid or amount to a penalty clause that will not be enforced.

Lastly, the Supreme Court confirmed the principle of mitigating one's loss which entails taking reasonable action to minimise or reduce the amount of loss when you have suffered loss from breach of contract or unfair conduct. Malila JS on behalf of the Supreme Court held that: -

In any case, the learned trial judge did not take into account the need to mitigate. In *Eastern Cooperative Union Ltd. v. Yamene Transport Ltd* we pointed out that it is always the duty of the plaintiff to minimize his loss and where the plaintiff fails to do so he cannot expect the court to award damages which will be limitless both as to time and extent. The aspect of mitigation should have exercised the learned trial judge's mind if he believed that this was a proper case in which to award damages beyond those calculable with reference to the notice period for termination.

Put simply, mitigating loss, means lessening or diminishing the effects and gravity of a serious or severe situation resulting from breach of contract. Therefore, when courts award damages, the Supreme Court affirmed that they will only award the greatest possible loss an innocent party would face.

¹⁶ See also *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20, which seems to suggest that the amount payable is limited to the amount stipulated in the liquidated damages clause. This is the case regardless of the fact that possible damages have been underestimated.