DANIEL MUDENDA
v
LION MATCH LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 10, 2012 & SEPTEMBER 3, 2014

The applicant, in person
L Uriri, for the respondent

Before **MALABA DCJ,** in Chambers.

This is an application for leave to appeal against a judgment of the Labour Court. The Senior President refused leave to appeal. After the hearing of the application, the applicant indicated that he wished to withdraw the matter. The respondent correctly insisted that the question whether leave to appeal be granted or not should be determined. The applicant did not tender costs when he purported to withdraw the application.

Apart from the failure by the applicant to tender costs, the respondent is entitled to a decision on the merits of the issues raised once the application for leave was heard. The application was heard so that the issue whether or not leave to appeal should be granted was determined. There cannot be a hearing which is not followed by a determination of the issue in

respect to which the hearing is held. The applicant had no right to withdraw the application at the stage of the proceedings in which judgment is awaited.

The appeal intended to be made to the Supreme Court should leave be granted would have no prospects of success. The application is without merit. The facts show that the applicant agreed with the respondent that a new contract of employment be entered into taking into account changes brought about by the dollarization of the economy in March 2009. Both parties understood that the services rendered by the applicant in the performance of his work with the respondent needed to be valued and paid in United States Dollars.

The applicant received the document containing the proposed terms and conditions of the new contract of employment. The new contract made no reference to certain allowances. The applicant had three days within which to study the terms and conditions on which the new contract was being offered. He then had to decide whether to accept or reject the offer.

After careful consideration of the terms and conditions of the new contract, the applicant decided to accept them and signed the document. He said he decided to sign the document because he wanted the money. The applicant knew that by signing the document he was entering into a new contract of employment with the respondent. The applicant was a Purchasing Manager. He knew the legal effect of his actions. The conduct of the parties brought about the mutual termination of the old contract of employment. The argument accepted by the arbitrator that the respondent unilaterally varied the old contract of employment had no basis in the facts.

There is a principle of law to the effect that employment conditions do not remain static. Contracts of employment will respond to the changes in the fortunes of business. *Chirasasa v Nhamo N.O. & Anor* 2003(2) ZLR 206(S) at 220B-C. It was not difficult for the applicant to appreciate why there was need for the changes that took place. If the parties appreciated that fact and freely acted in accordance with its demands, there can be no scope for a court to interfere with their conduct.

In the light of the proven circumstances in which the applicant entered into the new contract, the allegation that he signed the document under duress could not be proved. In *Broodryk v Smuts* 1942 TPD 47 at 51-52 the elements necessary to set aside a contract on the grounds of duress were expressed as follows:

> "(1) Actual violence or reasonable fear.
> (2) The fear must be caused by the threat of some considerable evil to the party or his family.
> (3)It must be the threat of an imminent or inevitable evil.
> (4) The threat or intimidation must be *contra bonos mores*.
> (5) The moral pressures used must have caused damage."

What was proved to have happened between the applicant and the respondent leading to the signing of the agreement would not be found by a reasonable court to constitute duress. There was no evidence of the applicant acting under the agony of a moment of compulsion of a threat by the respondent of considerable and imminent unlawful harm to his person, or family or economic interests if he did not sign the contract of employment.

What was established is that the respondent prepared the contract and gave it to the applicant to study and decide whether or not to sign it. There is no suggestion that the communication was accompanied by any compulsion to sign the document. After a free and rational consideration of the advantages and disadvantages of the agreement proposed by the respondent, the applicant came to the conclusion that there were more benefits in signing the contract than rejecting it. The respondent did not have to coerce him to enter into the agreement.

The amount of time and freedom the applicant had to weigh the advantages and disadvantaged of signing the contract without any direct or indirect threat of harm from the respondent should he not sign disprove the allegation that he entered into the contract under duress.

Accordingly, it is ordered that the application for leave to appeal against the judgment of the Labour Court (LC/H/284/11) be and is hereby dismissed with costs.

Gill, Godlonton & Gerrans, respondent's legal practitioners