THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 48 OF 2009

KABAALE ERNEST PAUL ::: PLAINTIFF

VERSUS

1. **CHEVRON UGANDA LIMITED**
2. **TOTAL UGANDA LIMITED :::DEFENDANTS.**
3. **TOTAL MARKETING UGANDA LIMITED**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

a) Introduction

1. The Plaintiff's claim against the Defendants is jointly and/or severally for recovery of special, aggravated and general damages for the unlawful termination of his employment contract and breach of the terms governing his assignment to South Africa, interest at 23.5% per annum from the date of breach of the contract till payment in full, costs of the suit and any other relief which the court deems fit. The Defendants deny these claims.

2. The Plaintiff is represented by Mr. Kituuma Magala of M/s. Kituuma- Magala & Co. Advocates and the Defendants are represented by Mr. Ernest Sembatya of M/s. MMAKS Advocates.

3. It is the Plaintiff's case that by letter dated 23rd January 2004, he was appointed by Caltex Oil (U) Ltd (which later changed its name to Chevron (U) Ltd) as its logistics manager Uganda. The Plaintiff was transferred internationally to Nairobi Kenya under an international resident assignment and took up the position of senior logistics operational excellence/health, environment and safety specialist. On 8th July 2008 the Plaintiff

relocated to Cape Town, South Africa as an expatriate to take up the position of emergency management specialist from around 28th July 2008 to 31st July 2011. The Plaintiff's expatriate assignment to South Africa was terminated on 26th September 2008 by an email from Sylvia F. Cecilia which required him to repatriate from South Africa to Uganda. On 4th March 2009, the Plaintiff's employment with Chevron (U) Ltd was terminated with two months' salary in lieu of notice. The Plaintiff claims that his assignment to South Africa constituted a separate and new contract whose terms and conditions were governed by the offer/secondment letter dated 4th July 2008, the international resident relocation assignment letter and the Chevron resident assignment policy. The termination of his assignment constituted a breach of contract thereby entitling him to all the benefits he was to get while there.

4. The Plaintiff further avers that all the Defendants were severally and jointly liable for the breach since the second Defendant bought the majority shares in the first Defendant and changed its name to the third Defendant. He also avers that the Defendants' actions were unfair, unjust, arbitrary, irregular, illegal and constitute a breach of contract by the Defendants against the Plaintiff's terms of employment for which he now seeks damages.

5. The second Defendant contends that the plaintiff has no cause of action against it and the Defendants jointly deny the Plaintiff's claims. They aver that the assignment did not constitute a new contract and that it was terminated by Sylvia F. Cecilia who was neither an employee nor a director of any Defendant companies. They further aver that the Plaintiff's employment with Chevron (U) Ltd was terminated in accordance with the terms of his employment.

6. When the suit came up for scheduling, the following issues were framed for determination;
   i) whether the first Defendant is liable for the termination of the Plaintiff's expatriate assignment in the Republic of South Africa and if so whether it was lawful.
   ii) whether the Plaintiff is entitled to the remedies sought.

The parties proceeded by witness statements in lieu of examination in chief. The Plaintiff testified on his own behalf and was the only witness. The Defendants had one witness; Ms. Susan Matovu, the Human Resource and Administration Manager of Total E & P Uganda and formerly the company secretary of Total Marketing (U) Ltd.

Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise. See **Ronald Kasibante v. Shell (U) Ltd, HCCS No. 542 of 2006; [2008] ULR 690.**

7. Section 61(1) of the Contracts Act provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. Subsection 4 provides that in estimating the loss or damage arising from a breach of contract, the means of remedying the inconvenience caused by non performance of the contract, which exist, shall be taken into account.

8. **In Bank of Uganda v. Betty Tinkamanyire SCCA NO. 12 OF 2007,** it was held that "the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law."

b) Analysis

9. I have carefully considered all the pleadings and submissions. It is not in dispute that initially the Plaintiff was an employee of the first Defendant. It is not clear whether the second Defendant singularly bought the first Defendant or just bought some shares with other buyers in the first Defendant. The Plaintiff claimed that the second Defendant

bought majority of the shares in the first Defendant while Ms. Matovu who testified for the Defendants testified that the second Defendant only bought some of the shares of the second Defendant. However when requested to avail proof of this shareholding purchase in court, the Defendants did not bring any.

10. Be that as it may, it is not in dispute that on the second Defendant purchasing shares in the first Defendant, a new company - the third Defendant was created. Clearly in all his employment and dealings in issue, the Plaintiff dealt with the first and third Defendants. All his employment obligations directly or impliedly lay with these two and not the second Defendant. I am therefore inclined to consider as valid the defence submission that this suit was improperly brought against the second defendant and it is accordingly dismissed against the second Defendant.

11. I will now turn to the claim of unlawful deductions of over base expatriate allowances for the months of October, November and December 2008 totaling Ug. shs. 32, 541,294/= (Uganda shillings: thirty two million five hundred forty one thousand two hundred ninety four).

12. From annexures B11 at pages 166 to 174 and B12 at pages 175 to 176 of the Plaintiff trial bundle as well as the testimony of DW1, it is inferable that although there was no specific date give, the Plaintiff's assignment in Cape Town ended in September 2008. It is also inferable that from October onwards, the Plaintiff was considered as repatriated back to the Kampala office. He therefore cannot claim over base expatriate allowances for the months of October to December 2008.

13. According to PW1 Exhibit 32, the Plaintiff's employment at Chevron (U) Ltd was terminated on 4th March 2009. The Plaintiff's claim of base salary for the months of March 2009 to July 2011, the date his assignment to Cape Town was initially estimated to last cannot stand in the face of his termination. He was not in employment for these months and therefore cannot claim the base salary for them.

14. In the same way the Plaintiff cannot claim residue over base expatriate allowances from January 2009 to July 2011 because he was no longer an expatriate in South Africa during this period. Equally, the Plaintiff cannot claim spousal allowance entitlement for the years 2009, 2010 and 2011 when he was not an expatriate in South Africa, and had returned to Uganda during these years. I therefore find no basis for this claim.

15. According to clause 4 of the Plaintiff's employment contract dated 23rd January 2004 tendered in evidence as PW1 Exhibit 6, on successful completion of the probation, the Plaintiff would become a regular employee of the company and join the provident fund on the 1st of May following his confirmation on appointment.

16. At page 8 of the relevant human resource manual titled "You and Your Company Chevron Uganda Limited", under the title probationary period, it is provided that "all new employees are considered on probation for the first six months of employment. During this period you will not be eligible for certain benefits reserved for longer service employees. At the end of the probation and on receipt of a satisfactory appraisal by the Manager, the employee will be confirmed and will be accorded regular employee status."

17. At page 21 of the same manual under the subtitle payment of benefits, it is provided that "if you leave the company for any reason, you will receive your own contributions, plus credited earnings. In addition you will receive a percentage of company contributions plus accredited earnings, depending on years of completed continuous services as follows:" It is further provided that an employee gets 0% of company contribution if they serve for less than five years. 50% for five years and for more than five years, an increase by 5% per year, up to 100% after 15 years. The grand effect of this clause is that an employee who serves less than five years is not entitled to any company contribution.

18. The above clauses on benefits and probation as well as clause 4 of the Plaintiff's employment contract and his confirmation letter when read together clearly demonstrate

that the Plaintiff's probation period ended on October 22nd 2004 when he was confirmed in his appointment as Logistics Manager.

19. More specifically, clause 4 of the Plaintiff's employment contract and the benefits clause above in the manual reveal that for the Plaintiff to be eligible for the company's contribution, he needed to have worked at least five years from May 2005. The Plaintiff was terminated in March 2009. From May 2005 to March 2009, it is approximately three years and nine months. This means that, unfortunately, the Plaintiff did not qualify for the 50% company contribution to the fund.

20. For purposes of this benefit calculation, continuous service has to be read in the context of the company's human resource manual and his employment contract. The provision of continuous service in the Employment Act cannot be read in abstract as the Plaintiff suggests. The Plaintiff therefore cannot claim this contribution.

21. Regarding the unlawful retention of the Plaintiff's 2008 annual bonus, according to annexure C6 dated 18th December 2008, referenced Uganda social plan, in a communication from the Defendants to the Plaintiff, the terms of calculation of the bonus and when the bonus applied were communicated to the Plaintiff. It appears therein that the annual bonus was applicable to those employees who opted for voluntary severance or resignation. Since the Plaintiff did not make any of these two options, he did not qualify for the same. The Defendant's witness who was best placed to inform court being the Human Resource and Administration Manager Total E & P Uganda and formerly the Company Secretary of Total Marketing (U) Ltd also verified this position. The Plaintiff could not have his cake and eat it at the same time. Therefore I have no basis to say that the Defendants unlawfully detained his 2008 annual bonus.

22. The Plaintiff claims that his repatriation allowance worth USD 5000 and earned 22 days unused vacation allowance of Ug. shs. 424,073 amounting to Ug. shs. 12,924,073/= were not paid. The Defendants on the other hand claim that this was paid through the amounts at page 175 of the trial bundle and an EFT to the Plaintiff's account in Standard Chartered bank on 19th December 2008 totaling 5, 310,294. In the Plaintiff's said bank

statement, this amount is listed as staff allowance. I cannot satisfactorily verify if this was his repatriation and 22 days unused vacation days. Since it is not disputed that the Plaintiff was entitled to these two allowances, I hereby direct the Plaintiff and the Defendants to verify if these two were calculated and paid. If they were not, then the same should be calculated and paid to the Plaintiff by the Defendants with interest of 10% per annum from the date of filling his suit to date.

23. Based on all the above, save for the verification and payment (if not previously paid) of the repatriation and unused vacation days, the Plaintiff's suit is dismissed. In my discretion to avoid acrimony between the parties who previously had an employer-employee relationship, I will not sanction the Plaintiff in costs. Each party shall bear its own costs.
    I so order.

Lydia Mugambe
Judge
13th March 2020.