

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1418 OF 1997**

BETWEEN:

H. HARAWA.....PLAINTIFF

-and-

SUCOMA.....DEFENDANT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Mr Maulidi, of Counsel for the Plaintiff

Mr Tsingano, of Counsel for the Defendant Company

Mrs Tembo, Official Interpreter/Recording Officer

Dates of hearing : 30th July 1998, 8th October 1998,

19th October 1998, 11th January 1999,

12th January 1999, 29th January 1999,

18th October 1999, 19th October 1999

and 2nd November 1999

Date of judgment : 2nd May 2002

Kapanda, J

JUDGMENT

Introduction

This is one of those matters that was heard by Justice Ndovi (retired) but no judgment was delivered. I will hand down the judgment of the court instead.

The Plaintiff commenced this legal action on 3rd July 1997. In it he is claiming, from the Defendant, damages for wrongful and unlawful dismissal from employment. The claimant has particularised what he alleges he lost as a result of the alleged wrongful and unlawful dismissal from employment. The Plaintiff's allegations of fact will shortly be set out in this judgment. The Defendant is contesting this legal suit and to this end it caused to be filed, and served, on the Plaintiff a statement of defence to the Plaintiff's

claim.

I now propose to set out in full the pleadings that were exchanged between the parties herein. These are the contents of the Amended Statement of Claim and the Statement of Defence.

Pleadings

Plaintiff's Averments

In the Plaintiff's amended statement of claim the following apposite allegations of fact:-

"1. The Plaintiff was employed by the Defendant as a Medical Assistant and at the material time the Plaintiff was receiving a salary of K2,945.00 per months, he was entitled to K1,100.00 secondary education fees for each child and K900.00 primary education fees for each child.

2. On or about 13th February 1997 without any or just cause in disguise of termination of employment wrongfully and unlawfully dismissed the Plaintiff from employment.

Particulars of Dismissal

(a) Severance long service gratuity pay was not paid at half present monthly salary multiply by number of years worked.

(b) False and malicious allegations of instigating other employers not to receive cooked food on 11th February 1997 were levelled against the Plaintiff.

(c) The Defendant's contributions towards pension benefits were not paid.

(d) No sufficient or any notice was given by the Defendant to the Plaintiff to terminate the employment.

3. As the result of the wrongful and unlawful dismissal the Plaintiff has suffered loss and damage.

Particulars of Loss and Damage

(a) Loss of salary from February 1997 to date when the service will be lawfully termination at K2,945.00 per month.

(b) Loss of severance pay long service gratuity for a period of 24 years worked at half of K2,945.00 multiplied by 24 years K35,340.00.

(c) Loss of all the benefits for secondary and primary education fees for the 4 childred.

(d) Loss of monthly pension benefits.

(e) Loss of the Defendant's company contribution of 10% of the salary."

Defendant's Statement of Defence

It is apparent that the Defendant did not serve an amended statement of defence on the

Plaintiff after the latter amended his statement of claim. This meant that the Defendant stood by its defence served in response to the Plaintiff's unamended statement of claim. In answer to the Plaintiff's claim the Defendant had averred that:-

"1. It is admitted that the Defendant employed the Plaintiff as a Medical Assistant. Save as aforesaid the Defendant denies that the Plaintiff was entitled to the salary and benefits enumerated in paragraph 1 of the Statement of Claim and puts the Plaintiff to strict proof thereof.

2. The Defendant did not dismiss the Plaintiff from the said employment as alleged in paragraph 2 of the Statement of Claim or at all.

3. The Defendant states that by a contract of employment between the Plaintiff and the Defendant dated 28th December 1973 it was provided that the Plaintiff's employment was terminable on one month's notice or one month's salary lieu of notice.

4. Pursuant to the said provision of the contract of employment, the Defendant by a letter dated 13th February 1997 terminated the said employment as on 14th February 1997 and paid out sums due to the Plaintiff. In the premises the wrongful dismissal alleged is denied.

5. The particulars of dismissal enumerated under paragraph 2 of the Statement of Claim are denied.

6. The Defendant denies that the Plaintiff has suffered any loss and/or damage as particularised in paragraph 3 of the Statement of Claim or at all.

7. Save as herein expressly admitted the Defendant denies each and every allegation of fact contained in the Plaintiff's Statement of Claim as if the same were herein set out and traversed seriatim."

It is so obvious, from a reading of the pleadings set out above, that there were issues that arose and required to be resolved at a trial. In this regard it was required of the parties, or any one of them, to offer evidence to prove the facts in dispute in this action. I will later enumerate the questions that require determination in this matter. For now I will proceed to review and analyse, in a narrative form, the evidence of the witnesses who testified before the court. It will, however, not be possible to give a whole narration of the testimony of the witnesses. For this reason, only the salient aspects of the witnesses evidence will be set out in this judgment. Further aspects of the said testimony, if it becomes necessary, will be given later in this judgment when I am dealing with the issues for determination.

Evidence

The Plaintiff's side called two witnesses viz the Plaintiff himself and another person, (a fellow employee) who previously was in the employ of the Defendant Company. On the other hand, the Defendant called three people to testify on its behalf.

Plaintiff's evidence

The Plaintiff, Henderson Harawa, told the court that he was employed by the Defendant Company, as a Medical Assistant, on 28th December 1973 and he was so employed until

the 14th day of February 1997 when he was discharged from employment after being given a written one month notice. The Plaintiff further testified that the reason he was given for the termination of service was that he had instigated other employees to refuse a donation of food items made by the Defendant Company in response to a disaster that struck the Defendant's Nchalo Sugar Estate. But in another breath the Plaintiff told the court that his services were terminated on 9th March 1997 without any reasons for the termination being given to him. It was the further testimony of the Plaintiff that at the time his services were terminated he was entitled to the following benefits:-

: a salary of K2985.00 per month

: education allowance for his children

The Plaintiff further testified that on termination of his services he was supposed to be given long service gratuity and pension benefits.

I wish to observe that the Plaintiff told the court that there were no formal or written conditions in connection with his employment. Further, it is to be observed that on the question of pension benefits the Plaintiff did not produce the Pension Scheme Rules that were applicable to him but he instead tendered a Memorandum dated 1st March 1985 which essentially informed employees of the changes that were to be made with regard to the Pension Scheme operating at the Defendant Company. The memo which was tendered in evidence by the Plaintiff was framed as follows:-

“MEMORANDUM

FROM : L.G. BLACKWELL

TO : MEMBERS OF THE LONRHO (MALAWI) LIMITED SUPERANNUATION
SCHEME

DATE : 1ST MARCH 1985

PENSION

At present within the Lonrho Group in Malawi there are three Pension Schemes which produce different kinds and levels of benefits.

These Schemes are:

The Central Africa Company Pension Scheme.

The Lonrho (Malawi) Limited Superannuation Scheme.

and

The Halls Holdings Limited and Associated Companies Pension Scheme.

After completion of the Job Evaluation Exercise which has now resulted in the establishment of an integrated system of grading, salary levels and appropriate basic

terms and conditions of employment throughout the Group, Management has decided that, with effect from 1st April 1985 all pension schemes should be integrated and amalgamated into one improved scheme to be called the Lonrho Group Pension Scheme (Malawi).

As a member of the existing Lonrho (Malawi) Limited Superannuation Scheme your benefit entitlement in respect of service up to 31st March 1985 will remain unaltered. As from 1st April 1985 you will be entitled

to benefits in terms of the new scheme which will provide a substantial improvement in the overall level of benefits.

A summary of the benefits provided by the new scheme is attached. If you have any questions please contact your Head of Department.

Please complete the tear off slip below and return it to your Head of Department.

L.G. Blackwell

MANAGING DIRECTOR”

Moreover, the Plaintiff told the court that he received the sum of K13,000.00 representing his own pension contribution plus interest on his said own contribution. In another breath he told the court he was not given a break down of this payment of K13,000.00. He further testified that the sum he received was not his full pension as he was entitled to a monthly pension plus 10% company contribution and 3 frac12%

interest which was not paid to him.

As will be observed from the Memo, that has been quoted above, there were no specific terms provided as regards the pension benefits that employees would get, and under what circumstances, upon ceasing to be employees of the Defendant Company. It therefore follows that, in the absence of the Pension Rules, the Plaintiff’s testimony, as regards the rates of interest payable that were allegedly payable to him and other employees should not be relied upon and must be excluded: H.R. Makawa -vs- Indefund Civil Cause No. 1778 of 1994 [unreported][High Court].

The Plaintiff, during cross examination, conceded that his letter of appointment provided that either party would give the other one month notice of termination of the contract of employment. It is further noted that the Plaintiff admitted that exhibit D1, a Pension Refund Form, shows that the Defendant Company’s pension contribution, was paid to him.

The Plaintiff called a Mr Wilbert Magombo to testify on his behalf. I must put it here that I found his testimony to be irrelevant in so far as the determination of this matter is concerned. For this reason I do not find it necessary to give a full sketch of the evidence that he offered in this matter. This notwithstanding, it will suffice to put it here that he was a former employee of the Defendant Company and that he was sent on forced retirement. Moreover, it is important to note that, during cross examination, he told the court that the circumstances surrounding the Plaintiff’s termination of employment were

different from his own.

The foregoing is what there is as evidence in support of the allegations of fact made by the Plaintiff in his amended statement of claim. I will now have to consider the evidence that was adduced by the Defendant Company.

Defendant's evidence

As stated earlier there were three witnesses who testified on behalf of the Defendant Company. The first to testify was Mr Silvester Timange Banda, DW1, who at the material time was the Defendant's Station Manager. DW1 told the court that

the Plaintiff, together with two other employees of the Defendant Company, encouraged people not to receive food that had been provided by the Defendant Company to its employees affected by flooding.

Mr John Cyril Malewezi, DW2, also testified on behalf of the Defendant Company. It was his sworn testimony that he was the Pension Manager of the Lonrho Group Pension Scheme, a fund or trust, charged with the responsibility to administer pensions for members of companies belonging to the Lonrho Group of which the Defendant Company was a member. DW2 further testified that a member, after withdrawing from the scheme, would be his contribution to the scheme plus 5% and the member would also be entitled to cumulative interest on monthly basis. It was also deposed by Mr Malewezi that a longer duration with the scheme carried with it an additional benefit. Mr Malewezi further told the court that in terms of the Rules of the Pension Scheme, both old and new scheme and as reflected in exhibit D1, the Plaintiff got his contribution, cumulative interest, compound interest on monthly basis, the Company's contribution and additional benefits calculated at 55% of the total refund that was due to the Plaintiff.

The last witness to testify on behalf of the Defendant company was its Human Resource Manager, a Mr Ronald Manda, the author of the letter of termination of services of the Plaintiff with the Defendant Company. It was his testimony that management terminated the Plaintiff's contract of employment for instigating fellow workers not to receive good aid donated by the Defendant Company to avert a food crisis that arose due to floods that hit part of the Nchalo Sugar Estate and affected the Defendant's employees. Mr Manda further told the court that the Plaintiff got all the terminal benefits he was entitled to at the time his services were terminated. It was further given in evidence, by Mr Manda, that the Plaintiff was not entitled to long service pay because he was on pension. Mr Manda further deposed that the Plaintiff

could not get ex-gratia payment because he offended the Company by committing a dismissible offence of inciting fellow employees.

The above is, in a summary, the evidence that was adduced by the Defendant Company in its defence of the Plaintiff's action.

Facts in Issue

At this point in time it is necessary that I should isolate the facts in issue as raised by the

pleadings and the evidence on record. The questions that have arisen from the said pleadings and evidence, and which must be determined by this court, are:-

(a) whether the Plaintiff was wrongly or unlawfully dismissed from employment under the guise of termination of employment.

(b) whether the Plaintiff suffered any loss or damage or at all as a result of the alleged wrongful or unlawful dismissal.

I do not intend, notwithstanding the categorical isolation of the issues above, to make specific reference to each one of the issues enumerated above. I will now, without much delay, proceed to consider and analyse, the said issues that require determination in this action.

Consideration of the Issues

burden and standard of proof

Before embarking upon the exercise of making findings of fact on the issues set out above, and all the other issues that will arise, let me point out that it is trite law, and I have reminded myself of same, that in a civil action the burden of proof (onus probandi) lies upon the party who has, in his pleadings, maintained the affirmative of the issues in dispute between the contending parties. Further, it is a settled principle of law that the standard of proof, in a civil action, like the one before this court, is on a balance of probabilities. Moreover, I am mindful of the principle of law that in contested proceedings, like in the instant case, that party succeeds whose evidence establishes a preponderance of probability in his favour.

Was the Plaintiff dismissed or were his services terminated?

It will be seen, in paragraph 2 of the Plaintiff's amended statement of claim, that the Plaintiff is contending that he was

dismissed from employment under the guise of termination. This, it is argued, made the discharge of the Plaintiff, from his employment, wrongful or unlawful.

I wish to point out that the Defendant, in its letter of 13th February 1997 addressed to the Plaintiff, clearly stated that it was terminating the Plaintiff's employment. I am at a loss as regards the Plaintiff's assertion that he was dismissed from employment in the disguise of termination. Indeed, at law, whether one is dismissed from employment or his services are terminated, the dismissal or termination only becomes wrongful or unlawful if the terms of the contract of employment are not complied with.

Was the Plaintiff's contract of employment wrongfully terminated so as to amount to a wrongful or unlawful dismissal, or termination of employment?

I will begin by pointing out that the words "dismissal from employment" and "termination of employment" are used interchangeably and they both mean the determination of an employment: Words and Phrases Legally Defined, J.B. Sanders Vol.

2, D-H 2nd Ed. Page 84, Cotrin -vs- Dos Santos [1970-74]7 MLR 111, New Honda Centre -vs- Sagawa [1984-86]11 MLR 212. and Duhda -vs- North End Motors [1984-86]11 MLR 425. From the foregoing observation it follows that our issue for consideration under this head is whether the determination of the Plaintiff's employment was wrongful or unlawful and/or was in breach of the contract of employment that was there between the Plaintiff and the Defendant Company.

As rightly put by learned Counsel for the Defendant, the events giving rise to the present action arose before the Employment Act No. 6 of 2000 was passed. To this end, and in view of the fact that a law does not apply retrospectively, the

applicable law to the instant case ought to be the Old Employment Act (Cap; 55:02) of the Laws of Malawi and the Common Law.

This court finds, and concludes, that the termination of the Plaintiff's employment was lawful and was in compliance with the previous Provisions Employment Act and the Common Law. Firstly, it must be observed that the Plaintiff was given his salary in lieu of notice. The salary was for one month in lieu of one month notice. The Plaintiff, as stated earlier when this court was considering the evidence on record, conceded that either party was supposed to give the other party a month notice or the equivalent of one months pay instead of the said one month notice. The payment of K4,218.30, representing leave pay and notice pay in lieu of notice, as shown in exhibit D2, was in keeping with the condition of service as contained in his letter of appointment. Moreover, this payment was in compliance with the provisions of previous Employment Act. Secondly, there is clear evidence that the Plaintiff was given all the terminal benefits that were due to him in terms of his conditions of employment. These benefits were: outstanding leave pay; twenty-six(26) days pay in lieu of notice; all the pension withdrawal benefits. This court does not accept the allegation made by the Plaintiff that he was entitled to a long service gratuity and education allowance for his children. The Plaintiff did not offer any credible evidence to substantiate his claim that he was entitled to a long service gratuity and education allowance for his children. I expected the Plaintiff to bring to court some documentary proof of his entitlement to education allowance. As regards long service gratuity the court accepts the testimony offered by the Defendant Company that the Plaintiff could not get that because he was on pensionable terms and that he got his pension benefits. In any event no document was produced to support the Plaintiff's claims in this regard. It is difficult to accept that a big organisation like the Defendant Company would have had no written document providing that employees, on their contracts being determined,

would be entitled to a long service gratuity apart from the pension benefits that they would get.

This court does not buy the argument that this termination is wrongful or unlawful because of the reasons that were given by the Defendant Company. The position at law is that a bad motive can not render the termination of a contract of employment wrongful if the Defendant legally terminates the Plaintiff's contract by giving him the appropriate

notice and all the benefits to which a Plaintiff is entitled under the contract: Mkwanda - vs- Press (Holding) Ltd 10 MLR 321. Moreover, having been given the relevant notice and all his other terminal benefits that he was entitled to, on being discharged from employment, the termination of his employment can not be called unlawful or wrongful simply because of the reasons that were given for the termination of his employment for the Defendant Company was not, in the first place, obliged to give

reasons for the determination of the employment contract: Malawi Railways Ltd -vs- PTK Nyasulu MSCA Civil Appeal No. 13 of 1992.

In view of the finding, and conclusion, that the termination of the Plaintiff's employment with the Defendant Company was lawful it is not necessary to consider whether or not the Plaintiff has suffered any loss or damage. For the avoidance of any doubt this court would like to put it here that it finds, and concludes, that the Plaintiff has not suffered any loss or damage since the determination of his employment is not anywhere near being characterised as wrongful or unlawful at common law or the previous Employment Act.

Conclusion

The Plaintiff's action is dismissed with the costs of, and occasioned by, this action being awarded to the Defendant

Company. The costs are to be taxed, by the Registrar, if there is no agreement as regards same.

Pronounced in open Court this 2nd day of May 2002 at the Principal Registry, Blantyre.

F.E. Kapanda
JUDGE