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IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 153 OF 1979



BETWEEN:

ROY DENIS KHOSWE ..... PLAINTIFF

and

TERRAZZO AND BUILDING LIMITED ..... DEFENDANTS

Coram: Topping, Ag. J.

For the Plaintiff: Munthali of counsel

For the Defendants: Msisha of counsel

Official Interpreter: Nsandu/Sonani

Court Reporter: Kelly/Brown

JUDGMENT

In this civil case the plaintiff Roy Denis Khoswe claims against his former employers Terrazzo and Building Limited for K3,850.70. The claim is under two heads. The first head relates to salary and is a claim for K350. It is pleaded as follows:-

- "1. .... By a written agreement made in Blantyre on 3rd day of February, 1978 the defendants employed the plaintiff as a Plant Operator Mechanic, doing the work of a mechanic and operator at a salary of K200.00 per month on probation for a period of three months.
2. It was an express term of the agreement that after the three months probation the plaintiff's salary would be at K250.00. After the plaintiff had completed the said probation period the defendant never paid the K50 to the plaintiff. The plaintiff's employment was terminated on 30th November, 1978. The plaintiff therefore claims arrears for 7 months which amounts to K350.00."

The second head of claim relates to the use by the plaintiff of his motor vehicle at the defendants' request and upon his business. This is pleaded as follows:-

- "3. The Plaintiff was transferred from Blantyre to Lilongwe on the 9th day of February, 1978. The plaintiff used his own vehicle travelling 222 miles. 222 x 35 miles per mile K77.70.
4. Whilst in Lilongwe the defendants by their agent or employee, Mr. A. M. da Costa, asked the plaintiff to use on company work the plaintiff's own vehicle Reg. No. BC 2157. A. M. da Costa told the plaintiff that the company would pay reasonable hiring charges.



5. The plaintiff was working every day of the month.
- (a) For one month and 8 days that is 38 days his place of work was at Alimaunde, 10 miles from the plaintiff's office. The plaintiff therefore drove 760 miles.
  - (b) For two months and two weeks that is for 74 days the plaintiff's place of work was at mile 35. 35 miles from the defendant's office. The plaintiff was driving 70 miles every day. In 74 days he drove 5,180 miles.
  - (c) For one month three days the plaintiff's place of work was at the New Army Aerodrome about 7 miles after Mvera. 45 miles from the plaintiff's office. The plaintiff was travelling 90 miles every day. For 33 days the plaintiff drove 2,970 miles.
  - (d) For one week the plaintiff's place of work was at mile 55 from Lilongwe, a few miles to Salima Boma. This is at Kambwiri Village. The plaintiff was driving 110 miles every day. For 7 days he drove 770 miles.

Total miles driven by the plaintiff on the defendant's work is - 9,780 miles @ 35t per mile = K3,423.00."

In their defence the defendants denied that the plaintiff was to have an increase in his salary after a probationary period and allege that the plaintiff's salary was K200 per month without any limitation as to time. In relation to the claim for transfer to Lilongwe which is part of the second head of claim the defendants allege that no transfer took place and state that the plaintiff was aware that he would be based in Lilongwe when offered employment. The defendants denied that the plaintiff was entitled to any transfer allowance to Lilongwe. In relation to the use by the plaintiff of his motor vehicle upon the defendant's business it was pleaded that the plaintiff was entitled to a mileage allowance of K60 per month only.

A reply was filed in which it was stated that the increase of K50 per month was offered to the plaintiff in February 1978 by Mr. da Costa on behalf of the defendants and a further increase of K55 was offered in July 1978. No amendment was made to the statement of claim and the court was informed by counsel that the averment as to K55 per month was not to be proceeded with. The reply further stated that Mr. da Costa on behalf of the defendants authorized the plaintiff to use his vehicle on company business in February 1978 and agreed to pay the plaintiff travelling expenses. Alternatively it was pleaded that there was an implied term of contract that the defendants would pay for the travelling expenses incurred by the plaintiff on behalf of the defendants.

The onus of proving this claim rests upon the plaintiff, who must prove his case on the balance of probabilities.

The plaintiff gave evidence on oath. He described himself as a plant operator and mechanic and described how he was employed with various construction firms. Although he did not expressly give this evidence it is clear from the evidence of the defendants' witness that the plaintiff operated a mechanical shovel which was described



as an M.50. He began work in 1969 and he continued to work until finally he was operating the M.50 shovel for a firm called Flanders. Apparently the defendants had need of such a shovel in connection with the building of the railway line by Malawi Canada Railways for which the defendants were sub-contractors. They bought the machine from Flanders and acquired the services of the plaintiff to operate it. The recruitment of the plaintiff was done by Mr. Freitas, who did not give evidence. As to the recruitment the plaintiff himself gave evidence that he began work on the 2nd of February 1978 and that on the 6th of February he was told to prepare for a transfer to Lilongwe. The terms of the plaintiff's employment were set out in a letter which he signed and which is before the court as Exhibit C. This letter, which is dated the 2nd of February 1978, is addressed to the plaintiff and reads as follows:-

"Terrazzo and Building Limited,  
P.O. Box 680,  
BLANTYRE.

2nd February, 1978.

Mr. Roy Dennis Khoswe,  
Kanzingeni Village,  
T. A. Kwataine,  
NTCHEU.

PROBATION AGREEMENT

You are being employed by this firm with effect from 3rd February 1978 on the following conditions:-

1. You will be on trial for three months.
2. If your driving and conduct is satisfactory, you will be employed as a permanent driver.
3. Your salary will be two hundred kwacha per month.
4. If your services are found to be unsatisfactory, you will be given one month's notice at the end of the probation period.

SIGNED: R. D. KHOSWE

MR. ROY DENNIS KHOSWE."

As the defendants' work in connection with this machine was in Lilongwe the defendants told the plaintiff to move to Lilongwe. According to Mr. da Costa who gave evidence for the defendants, the plaintiff was well aware that he would have to work in Lilongwe and was recruited on this basis. According to the plaintiff this was not so.

As the engagement of the plaintiff was conducted by Mr. Freitas, who although available was not called as a witness, and as the engagement was conducted in the absence of Mr. da Costa, I prefer the evidence of the plaintiff in this connection, and I find that he was not told that he was recruited for work in Lilongwe. The defendants told the plaintiff that he was transferred to Lilongwe and offered transport to him on the lorry which was taking the shovel to

Lilongwe. According to the defendants the plaintiff then pointed out that he had a motor vehicle which he did not wish to leave in Blantyre and that he wished to take it to Lilongwe. The plaintiff was told that it was a matter for him, and that if he wished to use his car they would give him a full tank of petrol. This was done. According to the plaintiff he was told that he could use his car to Lilongwe and that he would be given mileage. When the plaintiff arrived at Lilongwe he was living near Biwi Location, about two miles from his office. He was working on the Malawi Canada Railway. His work required him to travel to various locations where the machine was needed. I have no doubt, and it is not disputed, that the plaintiff worked at Alimaunde, Kambwiri near Salima, Dowa turn-off, and Mvera. According to the plaintiff he was travelling when he was at Alimaunde 10 miles from the office and 10 miles back, that is 20 miles per day; when he was at Dowa he was travelling 70 miles a day; when he was at Kambwiri 55 miles per day; and when he was at Mvera 45 miles per day. He claims that the defendants agreed to pay him mileage at the rate of 35 tambala per mile. The defendants say that the plaintiff was paid a mileage allowance of K60 per month to cover all his mileage in connection with his work. They say that transport would have been available for him with Malawi Canada Railways or, alternatively, that a house would have been available for him on site. They deny agreeing to make any further payment for mileage. It was while the plaintiff was at Mvera that his car broke down on the 11th of July 1978. His employers said that they had no transport and they gave him transport for only one further trip, and the machine was collected from the site. The plaintiff remained at Terrazzo until November 1978, when his services were no longer required and he was given notice.

Dealing first with the claim for salary, it is to be noted that the plaintiff was employed on terms contained in Exhibit C. He was to begin work on the 3rd of February and was on trial for three months. His salary was stated to be K200 per month and, if his services were found to be unsatisfactory, he was to be given one month's notice. As he was not given any notice it must be concluded that his services were satisfactory. Exhibit C makes no promise of an increase in salary as alleged by the plaintiff in his particulars of claim, and I am satisfied that at the time he was recruited there was no such agreement. The plaintiff went to Lilongwe where he worked with Mr. da Costa. Mr. da Costa agrees that he promised the plaintiff that if his work was satisfactory throughout the probation period he would give him an extra K50 per month.

In support of the plaintiff's claim there is the evidence of Mr. Kumwenda. Mr. Kumwenda described himself as a head clerk in Terrazze and clearly considered that the position he held was something in the nature of a personnel officer. If his evidence is accepted it is clear that junior employees used to consult him about their difficulties and ask him to intercede with Mr. da Costa on their behalf. At the end of May 1978, which is the time he would have completed his probationary period, the plaintiff complained to Mr. Kumwenda about his salary. It is the evidence of Mr. Kumwenda that Mr. da Costa did not deny knowledge of this K50 increase which the plaintiff says he had agreed to give but simply said that it was not paid because of a mistake in the accounts office in Blantyre.

Mr. da Costa's version of events is that he told the plaintiff that if the work went well the company might consider an increase of K50 per month. He gave evidence that he was not satisfied with the plaintiff's work and that he told him so. He said that he told the plaintiff that he might continue on the same basis, that is at K200 a month, if he wished to do so. He complained that the plaintiff's



time-keeping was poor and that he failed to look after the machine properly. None of this was put to the plaintiff when he gave his evidence so that the plaintiff was unable to confirm or deny it.

On the question of the arrears of salary I prefer the evidence of the plaintiff to that of the defendants' witness, and I have no real doubt that Mr. da Costa on behalf of the defendants offered to increase the plaintiff's wages to K250 after the probationary period of three months if his work was satisfactory. I am satisfied that at the end of May 1978 the plaintiff had completed three months' work and that he was still employed by the defendants.

The defendants now say that the plaintiff's work was not satisfactory, but this was never suggested to the plaintiff when he gave his evidence, nor does it appear anywhere in the pleadings. It is true that the original claim alleged that there was an express agreement in connection with the additional sum paid, but the reply and the particulars delivered by the plaintiff make it clear that the agreement was an oral one. Counsel for the defendants must clearly have understood this for he made no application to strike out either part as inconsistent. I am satisfied on the evidence of the plaintiff and his witness that when asked why the increase had not been paid Mr. da Costa for the defendants said that it was an accounting mistake and did nothing to show that such increase was not due to the plaintiff. I therefore find as a fact that the defendants did offer to give additional wages at the rate of K50 per month and instructed that these should be paid to the plaintiff starting on the 30th of May 1978.

What now falls to be considered is whether this was an ex gratia act or whether the money is recoverable at law. It is trite law that a contract as to wages can be varied by the agreement of both parties. It is clear from Exhibit C that by the end of May the plaintiff would either have to be dismissed or confirmed. The plaintiff was not dismissed and it is a necessary inference from that fact that his conduct must have been satisfactory. As I have rejected Mr. da Costa's evidence that the plaintiff's work was unsatisfactory and that he agreed to stay on at the same wage, the only reasonable inference from Mr. da Costa's offer and the defendants' failure to discharge the plaintiff is that so satisfactory was his conduct that he was worth extra money to them because of the work that he did. It is clear therefore that in consideration of the plaintiff remaining in the services of the defendants and operating their machine he was to receive extra money. I find on the balance of probabilities that the plaintiff has proved his case as to the arrears of salary, and he succeeds in the amount of K350 as claimed.

Turning to the question of the mileage allowances claim, I find that the plaintiff had his own car BD 2157 which he bought from a Mr. Sibande in January of 1978. I did not find the plaintiff to be impressive as a witness on the question of the purchase of the car or of the mileage in general. There is no doubt, and the plaintiff agrees, that he was paid a monthly sum by way of mileage of K60. This continued whether he was on the road or not. He claimed that this amount simply covered the two miles which he ran from house to office and return. He stated in examination in chief that he used to ask Mr. da Costa frequently for the money and that Mr. da Costa told him to trust him. This must be contrasted with Mr. Kumwenda's evidence on the question of the mileage payments. Also the plaintiff's evidence on the question of the mileage allowance lacks the ring of truth and he was particularly unimpressive when asked why he did not ask for house to office allowance when in Blantyre. The defendants claim that this allowance was an inclusive sum to cover



all the plaintiff's mileage whether he travelled or whether he did not. I find as a fact that the sum was paid both when the plaintiff was using his motor vehicle and when he was not, that is to say after it had broken down.

The plaintiff was not an impressive witness. He was evasive in cross-examination. But Mr. da Costa for the defendants was equally unimpressive. Even making allowances for the difficulty which was caused by having to give evidence at one stage through a Portuguese/English interpreter and at another stage through a Portuguese/Chichewa/English chain of interpretation, I did not get the impression that he was being frank. He was prepared to say one thing at one stage of the trial and then swear on oath later that he had never said it. I therefore looked for some independent confirmatory evidence as to which side was telling the truth. I think this may be found in the evidence of Mr. Kumwenda, who may be said to be a disinterested but slightly ambivalent witness. The plaintiff's claim is that in February 1978 he was promised 35 tambala per mile for the use of his vehicle. I do not think that this can be supported in view of the evidence of Mr. Kumwenda. It is perfectly clear from the tenor of Mr. Kumwenda's evidence that there was no such agreement, because the plaintiff approached Mr. Kumwenda with a view to obtaining payment of a mileage allowance over and above the K60 per month which he was receiving to cover his travelling expenses from his house to the office. It is clear that the plaintiff told Mr. Kumwenda that he was getting K60 per month house to office allowance for the use of his car, and Mr. Kumwenda confirmed in evidence that a cheque for this amount payable to the plaintiff was received each month.

There seems to me to be a certain contradiction inherent in the evidence of Mr. Kumwenda. He stated that the plaintiff told him that there was an agreed mileage rate for the use of the plaintiff's car which he, Mr. Kumwenda, could not remember but which might have been either 13 tambala per mile or 30 tambala. The plaintiff's claim is for 35 tambala per mile. This amount was to be used to cover his expenses from the office to the site. However, in cross-examination Mr. Kumwenda described how in early June 1978 the plaintiff approached him and said that he should tell the management that he, the plaintiff, was working very far from the office and he was asking for company transport as his car was too small for the rough roads. The witness continued he wanted either an allowance or company transport. This was in June 1978. It is plain that this evidence cannot be reconciled with the plaintiff's evidence that there had previously been some sort of agreement for payment of a mileage allowance to cover the travelling from the office to the site. It was after this that Mr. Kumwenda mentioned the matter to the defendants' representative Mr. da Costa, and he was sent to inspect the place where the plaintiff was working and to see how far away it was. Again it was after this that the defendants agreed to pay something towards the cost of the plaintiff's travelling. It is my view that this evidence is more consistent with the defendants' story being true rather than the plaintiff's. It is clear that if such agreement as the plaintiff alleges in his pleading existed, that is, an agreement to pay 35 tambala per mile from February 1978, then the plaintiff would have approached Mr. Kumwenda to obtain the money from the defendants in exactly the same way as he did in connection with the arrears of increment which he says the defendants promised him. There would clearly have been no need for Mr. Kumwenda to go and confirm the distance to the place where the plaintiff was working and for Mr. Kumwenda to intercede with Mr. da Costa about it as he says he did. A certain Mr. Nyandaro may have been present at some of the discussions on the matter of mileage payments but he did not



give evidence. I therefore find that the plaintiff has failed to prove the agreement pleaded for payment of 35 tambala per mile for use of his vehicle.

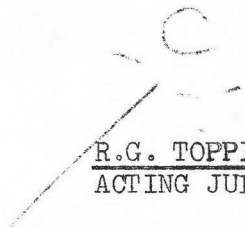
I have been asked to find that an amount should be payable to the plaintiff in respect of the period after which it is alleged that Mr. da Costa agreed to pay an additional sum. However no evidence was led to show when such agreement was made or when it was to take effect. It seems probable that the agreement was made in June 1978 but there is no evidence before the court to show the number of miles run by the plaintiff which were to be paid for and consequently I am unable to make any finding or award in relation thereto.

It has also been suggested that an award might be made on a quantum meruit basis. It has been suggested that a reasonable award should be made to cover the amount of mileage run. Quite apart from the difficulties in assessing such an award which I have set out previously, in my view it would be wrong for the court to make such an award. In relation to the use by the plaintiff of his motor vehicle prior to June 1978 the parties agreed that the plaintiff would receive a mileage allowance of K60. The plaintiff alleged that he was to be paid an additional 35 tambala per mile from his office to the site. This is what he has pleaded. I have rejected this claim as it is not supported by the evidence and it would be wrong for the court to substitute a figure based on quantum meruit in view of the finding that the plaintiff used his motor vehicle on the basis of the K60 per month mileage allowance. Quite apart from this, in relation to the period after June it would be virtually impossible to quantify such an award for reasons already set out. Equally, having found that the plaintiff was given a sum of K60 per month to cover all his mileage, it would be inconsistent therewith to find that there was an implied term to pay reasonable mileage. The parties are bound by their pleadings. The plaintiff's claim on this head must fail.

The remaining question is as to the plaintiff's transfer to Lilongwe. It is clear from the evidence that the plaintiff was offered transport in the defendants' lorry. I accept the defendants' evidence that the plaintiff chose to use his car as a matter of convenience and that he was given a tankful of petrol as an ex gratia matter. The plaintiff's claim as to that mileage fails.

There will be judgment for the plaintiff in the sum of K350.00 with costs on the subordinate courts scale.

Pronounced in open court this 29th day of March, 1980, at Blantyre.

  
R.G. TOPPING  
ACTING JUDGE