

IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.555 OF 1985

BETWEEN:

B.D. MUNDE (MALE) PLAINTIFF

and

ELECTRICITY SUPPLY COMMISSION OF MALAWI DEFENDANT

Coram: UNYOLO, J.

Chizumila, Counsel for the Plaintiff
Chirwa, Counsel for the Defendant
Mkumbila, official Interpreter
Phiri, Court Reporter

J U D G M E N T

This is an action for damages, in the sum of K10,545.76, for an alleged breach of contract of employment.

The material facts lie in a narrow compass. By its letter, Exhibit P10, the defendant communicated an offer to employ the plaintiff as a senior security officer. The plaintiff responded by his letter, Exhibit D2, accepting the offer herein. The parties then proceeded to execute a formal agreement, Exhibit P1, the body of which reads as follows:

"Contract made this 30th day of April, 1985 between the Electricity Supply Commission of Malawi (hereinafter called the "Employer") and B.D. Munde of Katolola Village, Traditional Authority Kyungu, Karonga District (herein after called the "Employee") for the post of Senior Security Officer at a salary of K5166-5814 with effect from 1st April, 1985.

The period of the contract is 24 working months at the end of which the contract may be renewed by mutual agreement between the Employer and the Employee.

The Employee shall be eligible to receive a gratuity at the rate of 15% of basic salary accruing monthly and payable on termination of service or on completion of the contract. Interest on the earned gratuity at the rate of 10% per annum shall be payable on satisfactory completion of the contract.

In all other aspects, the contract will be subject to the Commission Staff Conditions of Service applicable to the post from time to time in force."

The plaintiff was posted to the power station at Nkula/Tedzani and he worked there as a senior security officer up to the 12th August, 1985 when the defendant, by its letter Exhibit P2, terminated his services by giving him three months' salary in lieu of notice. It was stated in that letter that following a reappraisal of the defendant's security requirements, it was considered no longer necessary to continue to employ the plaintiff. Such are the facts. Perhaps I should comment that the defendant was discredited during cross-examination of its witnesses when it was shown that the idea was really to get rid of the plaintiff and have him replaced by someone else.

The first point taken by the plaintiff is that the contract in this case was one for a fixed period, namely a period of two years certain, and that in those circumstances it could not validly have been terminated by giving the plaintiff three months' notice as happened here. It is contended that the contract had to run the full period of twenty-four months. The plaintiff therefore contends that the defendant acted in breach of the contract in terminating his services only four months after his appointment and before the full period was served and he claims, on this aspect, salary for the twenty remaining months.

In reply, it has been contended by the defendant that the contract was subject to, and must be read with, the defendant's Senior Staff Conditions of Service (hereinafter referred to as "the conditions of service"), Exhibit P3. The defendant contends that it has powers under clause 2-3-5 and clause 2-4 of the Conditions of Service to terminate the services of an employee and that it exercised its said powers in terminating the plaintiff's services. The defendant accordingly denies having acted in breach of the contract in terminating the plaintiff's services.

One of the questions posed is whether the conditions of service formed part of the contract in this case. In argument, Mr. Chizumila, learned counsel for the plaintiff, submitted that the answer to this question must be in the negative. He pointed out that the conditions of service were neither signed by the plaintiff nor shown to him either before or at the time the contract was concluded or at the time Exhibit P3 was executed. Learned counsel submitted that on those facts the conditions of service cannot be held to be part of the contract. He cited the case of

Olley -vs- Marlborough Court Limited (1949) 1KB 532. The question there was whether a notice in the bedroom of a hotel formed part of the contract between the plaintiff as guest and the defendants as proprietors of the hotel. It was held the notice formed no part of the contract because the contract was concluded at the reception before the plaintiff moved into the bedroom and before she was able to see the notice in question. Indeed she was not told of the existence of such notice.

With respect the Olley case can be distinguished from the facts of the case in hand in that in the case here, the plaintiff was made aware that there were conditions of service attaching the employment he was offered. There was mention of the conditions of service first, in the letter of offer of employment, Exhibit P10 and secondly in the formal contract itself, Exhibit P1. I shall come back to this aspect shortly.

A further question was raised in the case as to whether the conditions of service themselves were applicable to the plaintiff. Mr. Chizumila referred the court to clause 2:2 of the conditions of service which deals with the question of appointment. This clause provides as follows:

"No person shall be appointed to the Senior Staff unless:

- 2.2.1 he is over 21 years of age;
- 2.2.2 he has served a probationary period up to but not exceeding 12 months;
- 2.2.3 he has passed such examinations, or possesses such qualifications as the Commission may prescribe from time to time in respect of the office to which he is to be appointed;
- 2.2.4 he has submitted to an examination by a medical practitioner nominated by the Commission and is certified free from any physical or mental disease or defect which could affect his efficiency;
- 2.2.5 Government approval has been obtained."

It was conceded in this case that the plaintiff's appointment was not subject to any probationary period nor was the plaintiff required to pass any examination or possess any specific qualification. It was conceded further that the plaintiff's appointment was not subject to the plaintiff submitting to a medical examination or subject to Government approval being obtained in the first place. It was argued by Mr. Chizumila that on these facts the plaintiff could not

be said to have been appointed as a senior staff within the ambit of the conditions of service, having failed to comply with what was required of an employee before appointment as a senior member of staff. In reply to this, it was submitted by Mr. Chirwa, learned counsel for the defendant, that the application of the conditions of service was open to variation depending on the individual's terms of employment. With respect, I think that this submission is valid. Clause 2-1 of the conditions of service is relevant. Paragraph 2 thereof provides as follows:

"Employees shall be subject to such Conditions of Service as shall be in force from time to time except insofar as they are varied or excluded by the provisions of any individual employee's contract of employment."

To recapitulate I find that although the plaintiff was not furnished with a copy of the conditions of service nevertheless it was made known to him both before and at the time the contract was concluded that his appointment was subject to the conditions of service. In the end I find that the conditions of service did form part of the contract. I would only comment that I will have something to say later in this judgment on the question of the extent the conditions of service were applicable.

I further find that the conditions of service were general and that they were susceptible to variation or exclusion by an individual employee's contract of employment. I find that the plaintiff was a senior member of staff although he did not fully comply with the procedures set out in the conditions of service.

I would go on. As indicated earlier, the defendant's case is that it was entitled to terminate the plaintiff's services in accordance with clause 2-3-5 and clause 2-4 of the conditions of service. The latter clause provides that except in the case of dismissal without notice, an employee would be given three months' notice of termination of services or paid three months salary in lieu of notice.

Fortunately, the contract between the parties was, as I have already indicated, reduced to writing. And referring to the law, it is a general rule that where the words of any written instrument are free from ambiguity in themselves, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves.

I have already reproduced the text of the contract which was executed by the parties. Perhaps I should comment that the terms expressed therein are plain and clear. It will be seen that the first paragraph gives the date of the agreement, the parties to it, (i.e. the plaintiff

and the defendant) and the position and salary offered the plaintiff. The second deals with the period of the contract and provides:

"The period of the contract is 24 working months at the end of which the contract may be renewed by mutual agreement between the Employer and the Employee."

Then follows the third paragraph which provides for the payment of gratuity and interest and when the same would be payable. Finally comes the last paragraph which I would like to reproduce again. It provides:

"In all other aspects, the contract will be subject to the Commission's Senior Staff Conditions of Service applicable to the post from time to time."

This paragraph is illuminating. In my judgment it is significant that no reference to the conditions of service is made in either the first paragraph or the second paragraph. What this means to me is that on both those aspects the contract itself is self-sufficient and that it is only in respect of "all other aspects" namely those not covered under the two preceding paragraphs that were meant to be subject to the conditions of service.

Put briefly I come to the conclusion that the contract here was for a fixed term and find that the defendant acted in breach of the contract in terminating the plaintiff's services before the term was up. The East African Appeal Court came to a similar conclusion in the case of H. McGovern -vs- Maize Marketing Board (1966) EALR 40.


Accordingly I find that the plaintiff has proved his case against the defendant.

I now turn to the question of damages. The general measure of damages for wrongful dismissal is prima facie the amount that the plaintiff would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the plaintiff, in minimising damages, either had obtained or should reasonably have obtained - See McGregor on Damages, 14th Edition, paragraph 933 at page 635. However the issue of mitigation of damages is not in issue in this case. It is neither pleaded nor argued.

The plaintiff claims first the sum of K8,590 being salary for the 20 months to the end of the period of contract. Here I have no difficulty in finding that he is entitled to this amount. It is the amounts claimed for gratuity and interest in the sums of K1,549.80 and K309.96 which gave me some difficulty. As indicated earlier,

gratuity and interest were in accordance with the contract, Exhibit P1, stipulated to be payable "on termination of service or on completion of the contract." To make sense to the matter the phrase "on termination of service" must be construed in my view to mean on lawful termination of services. Having found that the defendant was at fault in terminating the plaintiff's services, I hold that the plaintiff is entitled to the full sums claimed on this aspect. There was finally a claim for camping allowance in the sum of K96.00. However, that claim was not pursued. In the end I enter judgment for the plaintiff for salary, gratuity and interest in the aggregate sum of K10,449.76 and costs.

PRONOUNCED in open Court this 30th day of October, 1986 at Blantyre.

L. E.  Unyolo
JUDGE