IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 267 OF 1986

BETWEEN:

R.A. CHUPA .................................................. PLAINTIFF

- and -

MALAWI HOTELS LIMITED ......................... DEFENDANT

Coram: MAKUTA, C.J.

Saidi, Counsel for the Plaintiff
Mbendera, Counsel for the Defendant
Chigaru, Official Interpreter
Manda, Court Reporter

JUDGMENT

By writ of summons dated 22nd April, 1986, the plaintiff claims the sum of K4,263.47 being money received by the defendant on behalf of the plaintiff.

Briefly, the facts are that the plaintiff was in the employ of the defendant company. He thus became a member of a Pension Scheme operated and administered by the Association Pension Trust whereby the plaintiff and the defendant made monthly contributions towards the plaintiff's retirement benefit.

On 10th December, 1985, the plaintiff retired from the services of the defendant and hence became entitled to retirement benefit. The plaintiff alleges that by a letter dated 13th January, 1986, the defendant acknowledged to have received the sum of K4,268.47 from the Association Pension Trust with direction from the Association Pension Trust to pay the same to the plaintiff. The plaintiff further alleges that by the same letter of 13th January, 1986, the defendant held and refused to pay the said sum to the plaintiff without the plaintiff's authority as is required under the rules and regulations of the Association Trust Scheme.

The plaintiff, therefore, claims a declaration that the defendant are not entitled to withhold the money without his authority. He also claims the release of the money together with interest at the current bank rate.

I would observe that the figure mentioned in the statement of claim is K4,263.47 whereas the full particulars mention K4,268.47. There was no application to amend this. It would appear, however, that the claim is based on a staff current account of K208.79 plus a loan account in the sum of K4,059.68. These amounts are attached to Exhibit D7 and are shown as owing to Malawi Hotels Ltd. The total comes to K4,268.47, not K4,263.47.
However, the amount of the claim is K4,263.47.

The letter of 13th January, 1986, is Exhibit D7 and it reads:

"Our Ref. MCJ/APMC/MHL
13th January, 1986
Mr. R.A. Chupa
BLANTYRE.
Dear Mr. Chupa,

I attach herewith a cheque in the sum of K4,119.50 being the balance on the refund from your pension contributions after having deducted the various amounts outstanding to Malawi Hotels Limited as agreed with you.

We have further retained the amount of K680.10 in respect of your wife's hospital charges which we have not yet received from MASM but will pass on as soon as the cheque arrives and a contingency of K200 against your final house telephone and electricity account. As soon as we know the exact figures any further refund will, of course, be made straight away.

Yours sincerely,

M.C. Jones
GROUP GENERAL MANAGER"

Close examination of this letter does not show where the defendant acknowledges to have received the sum of K4,268.47 from the Association Pension Trust. Nor does the letter show where defendant purports to hold and refuse to pay the said monies to the plaintiff without his authority. There is no mention in the letter of the rules and regulations governing the pension scheme. When the plaintiff was in the witness box I thought he was going to adduce evidence in this regard. The rules and regulations were not produced, nor was there any evidence of their existence. The direction from the Association Pension Trust to pay the sum to the plaintiff was not in evidence either.

On 14th February, 1986, the plaintiff replied as follows:

"Trade & Marketing House,
P.O. Box 2471,
BLANTYRE.
14th February, 1986

Mr. M.C. Jones,
Group General Manager,
Malawi Hotels Ltd.,
P.O. Box 284,
BLANTYRE.

Dear Mr. Jones,

Thank you for your letter of 13th January, 1986, to which you attached a cheque of K4,119.50 as balance of the refund
I have taken note of your retention of some of my monies and comment as follows:

1) Loan in the amount of K4,059.68. needs a detailed breakdown with supporting documents as I do not have enough confidence in Malawi Hotels' accounts department in that it is manned by personnel I don't consider efficient.

2) House rent 10th-27th December, 1985, in the amount of K503.01 should be house rent 11th-20th December, 1985, amounting to K453.28 at K28.33 per day.

3) The hospital bill amounting to K684.10 please advise MASM that you changed your decision and that the refund is now payable direct to me. This should be done as soon possible so that I can chase the refund without reference to Malawi Hotels.

4) October 24, 1985, United Nations's Day, was declared a public holiday. I was not paid for it as I had already drawn my pay for up to and including 10th December, 1985. My claim for that day is, therefore, as follows:

(a) Salary ............ K53.00
(b) House ............ 28.33
(c) Car ............ 20.00
(d) Pension ........... 5.50
(e) Electricity ...... 1.33

108.16

5) When I moved out of the Company house the removal companies did not have trucks available and Malawi Hotels' Office was closed for business. I therefore hired a private transporter to do the removal at a cost of K150.00 whose receipt is enclosed. Also please find Malawi Hotels Local Purchase Order for the same for your cancellation.

6) Please arrange for my pension compensation from 1st October, 1985, to 11th December 1985 which the Company defaulted payment after a senior employee gave instructions to postpone my withdrawal date. The amount being demanded here is K383.00 times 2 as pension fund would have doubled it resulting into K760.00 less tax, if any.
To conclude I am asking you to make the necessary refunds to me as soon as possible. No one is to construe this as me looking for a favour as I don’t need Malawi Hotels’ favour.

Finally, I wish to inform you that Malawi Hotels has no right at all to hold back any pension monies from any employee without the employee’s consent. You asked me for authority to hold back some of the money to repay loans and so forth. I never granted you the authority. You are, therefore, hereby requested to pay me all my monies before I act against you personally and your organization. You better check your facts on this one in order to avoid humiliation and subsequent embarrassment.

Yours sincerely,

ROBINSON A. CHUPA"

The figure being claimed in this action is, as already mentioned above, made up of K4,059.68 plus K208.79. It would, however, appear the K4,059.68 is the same figure which is being challenged in paragraph 2.1 of the plaintiff’s reply. The basis of the challenge is hard to appreciate especially when a substantial part of the claim is based on the figure. The allegations in the statement of claim are not, in my judgment, proved.

I now turn to a submission by Mr. Saidi that the defendant should not have deducted the money owing to them because a very substantial amount, or to put it in his own words, the “bulk” of it was in respect of liquor. When the plaintiff was in the defendant’s employ he was allowed to have free meals at the Hotel. But any raw food taken to be cooked at home had to be paid for and so was any liquor taken from the cellar. He had, however, an entertainment allowance. The allowance was intended for drinks ordered across the counter or during meals. The purpose was to assist the plaintiff to entertain customers. But the allowance had a limit. If the cost of the drinks exceeded K300.00 a month he was expected to pay the excess.

Under section 76 of the Liquor Act Cap. 50:07, any licensee under an on-licence who sells liquor for consumption on the premises and does not get paid before or at the time of such sale shall be guilty of an offence. Furthermore he cannot bring an action to recover any debt incurred.

The section reads as follows:

"76(1) Any licensee under an on-licence issued pursuant to the Act, who sells liquor for consumption on the premises otherwise than for money actually received before or at the time of such sale shall be guilty of an offence and liable to a fine of Fifty Kwacha and to imprisonment for a term of three months: Provided that if liquor is supplied to any person who is in bona fide occupation of a room or rooms at such licensed premises, as a tenant, paying guest or lodger, for consumption in such room or rooms, or to
a person having a meal at such premises, for consumption with such meal, the provisions of this sub-section shall not be deemed to have been contravened if the price of such liquor is paid for before or immediately upon such person ceasing to occupy such room or rooms or during or immediately after such meal, as the case may be.

(2) No action shall be brought upon any debt incurred in contravention of this section."

It is the plaintiff's submission that since a substantial amount owing was in respect of liquor the section had been contravened and the debt was, therefore, irrecoverable. "The contract", the plaintiff asserts, "was illegal." It was further submitted that the unenforceable part of the contract cannot be severed by the Court. Volume 1, Chitty on Contract, 25th Edition, paragraph 1183, was cited as authority for this.

I will make a few observations. The authorities on the doctrine of severance are not easy to reconcile. However two underlying principles seem throughout to have guided the courts. First, the courts will not make a new contract for the parties whether by rewriting the contract or by basically altering its nature. Secondly, the courts will not sever the unenforceable parts of a contract unless it accords with the public policy to do so. For example, part of the consideration for the promise may be so tainted with illegality that there may not be any ground of public policy requiring the courts to sever the offending parts. A distinction is taken between merely void and an illegal consideration. In this context illegal means that which amounts to a criminal offence or immoral: Bennett v. Bennett (1952) 1 K.B. 249. Agreements, the object of which is to defraud the revenue or which involve trading with the enemy have been held to be incapable of severance.

Where a contract is founded upon several promises, some of which are legal and others illegal, the illegality of some of the promises will not affect the right of action in respect of such of them as are legal, provided the latter are distinct and separable from the former: Kearny v. Whitehaven Colliery (1893) 1 Q.B. 700; Goodinson v. Goodinson (1854) 1 Q.B. 118.

So far as pleadings are concerned a party must, subsequent to a statement of claim, plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:

(a) which he alleges makes any claim or defence of the opposite party not maintained; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the preceding pleading: see 0.18 r.8.

The plaintiff did not plead specifically subsequent to the statement of claim the alleged illegality. He applied, at the beginning of the trial, to file a reply. I rejected the application because, in my judgment, it raised issues of fact not arising out of the preceding pleading. It would, therefore, take the other party by surprise.

There is one further point. If the illegality is disclosed on the plaintiff's own evidence and it appears that he was implicated therein, the court will not enforce the contract: Scott v. Brown (1892) 2 Q.B. 724, followed in Biggs v. Boustead (1951) 1 All E.R. 92. If the illegality is common to both parties no court will enforce the contract: Alexander v. Rayson (1936) 1 K.B. 169. In the instant case the plaintiff was the Operations Manager at Mount Soche Hotel and must have been aware of the illegality, if there were any, and it cannot, with respect, be said that he was free from blame in the transactions. In my view he was a party to it.

The action is dismissed with costs.

PRONOUNCED in open Court this 30th day of July, 1987, at Blantyre.

[Signature]
F.L. Makuta
CHIEF JUSTICE