

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 528 OF 1986



BETWEEN:

M.L. KADAM'MANJA

PLAINTIFF

- and -

AGRICULTURAL DEVELOPMENT & MARKETING

CORPORATION

DEFENDANT

CORAM:

MAKUTA, Chief Justice
Chirwa, Counsel for the Plaintiff
Banda, Counsel for the Defendant
Manda, Court Reporter
Chigaru, Official Interpreter

J U D G M E N T

By his amended statement of claim the plaintiff seeks (a) a declaration that the defendant is liable to pay a gratuity and pension; and (b) an order that the defendant do pay to the plaintiff the sums which may be found due in respect of gratuity and pension after assessment by the underwriters of the scheme.

The facts of the case are that by agreement dated 1st October, 1970, the defendant employed the plaintiff as a Technical Assistant in the Building Section. It was an express term of the agreement that the plaintiff would be obliged to join the defendant's pension scheme after six months probationary period. It would appear the plaintiff joined the pension scheme in April, 1971. The scheme was arranged with the Old Mutual Life Assurance Society. Under the scheme the defendant contributed 15% of the plaintiff's salary and the plaintiff contributed 5% of his salary to cover the cost of pension and life assurance benefit. The retirement age under the scheme is 60 years. This was shown in Appendix J of the defendant's condition of service, Exhibit P4.

By a letter dated 3rd August, 1983, the defendant retired the plaintiff. The letter stated that the defendant had been advised by the Department of the Controller of Statutory Bodies that His Excellency the Life President had directed that due to the plaintiff's involvement in financial malpractices with the proprietors of Hanson Limited and Lilongwe Hardware, the plaintiff be retired in the public interest from the services of the Corporation with effect from 7th July, 1983. The amount alleged to have been received by the plaintiff from the proprietors is K300. The letter further stated that it had been directed that any gratuities so far accrued from the plaintiff's pension should revert to the defendant to cover the above loss and any indebtedness to the defendant and any

difference in excess would have to be paid to the plaintiff. The plaintiff denies the allegation of financial malpractices. He, however, admits receiving small sums of money from the proprietors of Lilongwe Hardware. The smallest amount he received at any time was K10 and the highest amount was K30. According to him the total amount of these small sums was K150 and not K300.

In order to appreciate involvement in financial malpractices it is pertinent to know some of the responsibilities the plaintiff was carrying out. The defendant does construct buildings, and it also maintains them. It was the plaintiff's responsibility to buy building materials from various suppliers. ~~Hanson Limited and Lilongwe Hardware were some of the suppliers.~~ It would appear Lilongwe Hardware were involved in some financial malpractices which led to the closure of their shop by Government. When arrested the proprietor of Lilongwe Hardware revealed to the Police that he gave K300 to the plaintiff. This money was not in the form of a loan. The plaintiff's version on these dealings is that this money had nothing to do with his official duties as a buying officer for the defendant. According to him it was all private transaction.

After being retired the plaintiff received a letter dated 20th October, 1983, from the defendant advising him of his retirement benefits. According to that letter a sum of K4,214.47 was payable to him. The plaintiff had, in his letter dated 26th November, 1983, queried the figure as being wrongly computed and that the defendant's contributions were multiplied by 2 instead of 3. This is because defendant's contribution was 15% while that of the plaintiff was 5% making a total of 20%. As a result of the query the defendant revised the figures and the sum of K7,452.10 became payable. This was conveyed to the plaintiff in the defendant's letter dated 26th January, 1984, Exhibit P8. The plaintiff was duly paid after what was owing to the defendant was deducted.

What appears to have prompted this litigation is a form which is headed "NOTIFICATION OF RETIREMENT AND AUTHORITY TO PAY PENSION." This is a printed form by Old Mutual Pensions Services, Exhibit P9. The form was signed by the defendant on 1st December, 1983, and the plaintiff signed it on 11th January, 1984. It shows the plaintiff's annual pensionable salary as K6,400 and the amount of Group Life Assurance cover as K25,000. It also shows the type of retirement as early. On 10th January, 1985, the plaintiff wrote to the Old Mutual to find out why no action had been taken on the form. As a result on 21st January, 1985, the Old Mutual forwarded two copies of the plaintiff's letter to Hogg Robinson (Malawi) Ltd. who, it would appear, are the defendant's brokers. The forwarding letter from the Old Mutual, Exhibit P11, stated that they had not received any formal application to pay pension to the plaintiff and the matter was being referred to Hogg Robinson (Malawi) Ltd. to sort it out with the defendant. On 24th January, 1985, Hogg Robinson (M) Ltd. forwarded the copy of the plaintiff's letter to the defendant. They, i.e. Hogg Robinson (M) Ltd., too stated that they had not received any formal application to pay pension to the plaintiff but also advised that the plaintiff was below the qualifying pension age and further advised that the defendant should sort it out with him. The matter went on further. The plaintiff's stand is that having signed the form he should get some pension and gratuity.

In their defence the defendant denies liability. It said, in effect, that by involving himself in financial malpractices the plaintiff failed to protect the interests of his employers and this amounted to misconduct, creating a situation which disentitled him any benefits. But in fair exercise of their discretion the defendant retired the plaintiff on 3rd August, 1983, and computed his pension benefits on early retirement basis.

It is an implied term in a contract of employment that an employee will serve the employer with fidelity and in good faith. This, indeed, means that an employee does not do anything which is incompatible with due or faithful discharge of his duty. An employee should not, during the period of employment, deal with his employer's customers or suppliers on his own behalf. In Boston Deep Sea Fishing and Ice Company v. Ansell (1888) 39 Ch. D. 339 the defendant, who was employed as Managing Director of the plaintiff, contracted on behalf of the company, for the construction of fishing-smacks and, unknown to the company, took commission from the shipbuilders on the contract. The company dismissed the defendant. On appeal the Court of Appeal held that the receipt of the commission was a good ground for dismissal. It was also held that the defendant must also account for the bonuses as they had been paid in respect of the plaintiff's smacks. Bowen, L.J. in his judgment stated thus:

"I will, first of all, deal with what is the cardinal matter of the whole case; whether the plaintiffs were justified or not in dismissing their Managing Director as they did. This is an age, I may say, when a large portion of the commercial world makes its livelihood by earning, and by earning honestly, agency commission on sales or other transactions, but it is also a time when a large portion of those who move within the ambit of the commercial world, earn, I am afraid, commission dishonestly by taking commissions not merely from their masters, but from the other parties with whom their master is negotiating, and with whom they are dealing on behalf of their master, and taking such commissions without the knowledge of their master or principal. There never, therefore, was a time in the history of our law when it was more essential that Courts of Justice should draw with precision and firmness the line of demarcation which prevails between commissions which may be honestly received and kept, and commissions taken behind the master's back, and in fraud of the master."

In my judgment although the sentiments expressed in the above passage were said a century ago they still obtain today. In another passage in the same judgment the Learned Judge said:

"He does the wrongful act whether such profit be given to him in return for services he actually performs for the other party, or whether it be given to him for his supposed influence or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it or keep it, or bargain for it, or receive it without bargain, unless his master k

knows it."

In Reading v. Attorney General (1951) A.C. 507 a Sergeant in the British Army on active services abroad consented on several occasions to accompany civilian lorries transporting illicit spirits to specified destinations. He always wore military uniform in order to avoid inspection by police. He received £20,000 for his services. On being discovered he was court-martialled and convicted of conduct prejudicial to good order and military discipline. After his release from prison he claimed the return of the money seized. It was held that the official position which this soldier held enabled him to earn the money by its use and this gave the employers the right to the money so earned as money had and received and even though it was earned by criminal act and even though his employers suffered no loss. It was held further that his employers were entitled to the money on a separate independent ground that a fiduciary relationship existed between the soldier and his employers.

In the present case it is not disputed that while still in the employment of the defendant, the plaintiff solicited and in fact obtained money from the proprietors of Lilongwe Hardware knowing full well that they were his employer's suppliers and he was their buying agent. In my view, in the light of the authorities cited above, his actions amounted to misconduct and were, therefore, incompatible with due and faithful discharge of his duties. The argument that it was all private transaction is untenable because one wonders whether the favours he was getting could not influence his decisions in preferring Lilongwe Hardware to other suppliers even if it meant buying at a higher price. The plaintiff admits to have received less than K300. I do not think that this matters. Even a smaller amount than the K150 would, for this purpose, suffice.

I now turn to the terminal benefits the plaintiff received. In spite of the misconduct which I have found above, the defendant retired the plaintiff with some benefits. This was done in accordance with the Conditions of Service. Clause 6 of Appendix J stipulates, as already mentioned above, that the defendant would contribute 15% and the plaintiff would contribute 5% to cover the cost of pension and life assurance benefit. This was how the calculations were done. Clause 10 of the same Appendix J provides that if an officer leaves the Corporation before retiring age of 60 he will receive all his own contributions back. If he has completed more than 10 years service he will receive the cash value of his own and the Corporation's contributions. The plaintiff completed more than ten years service and in compliance with this Clause he received what is stipulated in it. This, in my judgment, may be taken as early retirement because the plaintiff was only 39 years old when he left the Corporation. Considering the misconduct, I am of the view that the defendant was generous in paying what the plaintiff received. In the circumstances of the case, the defendant could have refused to pay anything. I, therefore, do not agree with Mr. Chirwa's submission that the defendant did not implement the directive that the plaintiff be paid terminal benefits.

So far as the "NOTIFICATION OF RETIREMENT AND AUTHORITY TO PAY PENSION" form is concerned, I do not see what else Old Mutual could do on it after being advised by Hogg Robinson (M) Ltd. that the plaintiff was below the qualifying age. I do not think that the mere signing of the form by the plaintiff would oblige Old Mutual to pay even if the plaintiff did not qualify. It is observed that the signing of the form by the plaintiff took place on 11th January, 1984, and he received his terminal benefits later, and after his query on the calculations of the benefits had already been considered. One, therefore, wonders what further benefits he expected.

In the course of argument Mr. Chirwa cited the case of Liponda v. United (M) Ltd. Civil Cause No. 413 of 1983. In that case the plaintiff sought a declaration by the court that the defendant was liable to pay pension and gratuity and an order for payment of the money which might be found due in respect of such gratuity and pension. Briefly, the facts of the case were that the defendant employed the plaintiff as a bus driver on 16th March, 1960. It was an express term of the contract that while it subsisted the plaintiff would be a member of the defendant's provident fund and when his salary rose to over K100 per month he would transfer to a pension scheme. The plaintiff did, indeed, transfer to the pension scheme. He was required to make contributions towards the pension scheme which he did by monthly deductions from his salary. In breach of the agreement the defendant purported to retire him without paying his pension and gratuity. The defendant denied liability on the ground that the plaintiff did not qualify because he had not reached 65 years, which was an age of retirement. The plaintiff was, in fact, retired when he was 57 years old. The court made the declaration sought because under the defendant's rules the employee qualified for an early retirement pension if he attained at least the age of 55 years and had completed five years continuous service. The plaintiff had satisfied both conditions.

In another case Rajab v. United Transport (M) Ltd., Civil Cause No. 381 of 1985, again the plaintiff sought, inter alia, a declaration that he is pensionable and an order that he be paid gratuity and pension in accordance with the defendant's Pension and Life Assurance Scheme. Briefly, the facts are that the plaintiff was employed by the defendant as a bus conductor on 2nd March, 1956, and had risen to the rank of a Depot Superintendent by January, 1985, when the defendant retired him. He received three months' pay in lieu of notice and on 30th January, 1985, a "NOTIFICATION OF RETIREMENT AND AUTHORITY TO PAY PENSION" form was sent to the Old Mutual Life Assurance Society. It would appear that the form was sent after the plaintiff had signed it, and he was informed that he would eventually receive gratuity and pension. The Old Mutual Life Assurance Society declined to pay because, according to the defendant's rules governing the scheme, the plaintiff could not go on early retirement since he was only 47 years old. He would go on early retirement at the age of 55. This information was passed to the plaintiff, who responded by saying that since it was the defendant who retired him, it should pay him his terminal benefits as promised. The defendant denied liability on the ground that having realised the mistake in retiring the plaintiff it withdrew and revoked the purported early retirement. The defendant also alleged that since revoking the early retirement, it orally and in writing urged the plaintiff to return. The court found that

this allegation was not true and that the plaintiff was never urged to return. The court, therefore, made the declaration and the order sought by the plaintiff.

Mr. Chirwa urged the court that in the light of these authorities, the plaintiff should have the declaration and the order sought in his favour. It should be noted that in both cases the defendant decided to retire the plaintiffs on its own free will without any fault on the part of the plaintiffs. In the present case, the plaintiff was involved in malpractices. Mr. Chirwa has also argued, in effect, that since the alleged malpractices were not proved in that the plaintiff was not prosecuted and convicted, he should succeed. I would observe that although he was not prosecuted he nevertheless admitted to have received the money from the proprietor of Lilongwe Hardware. The defendant did not have to wait for more malpractices to be committed. The decision not to prosecute does not, in my judgment, minimise the seriousness of the conduct.

Finally, I would like to say a few words on what Mr. Banda said about the jurisdiction of the court. He in fact submitted that since the defendant had been delegated by the Minister charged with the authority to discipline and dismiss the plaintiff, this court has no authority to review the action of the defendant. This was not part of the pleadings and I do not intend to consider it. However, for what it is worth, I have doubts as regards its merit.

I have very carefully examined the facts of this case and on the balance of probabilities I do not find the defendant liable. I, therefore, dismiss the plaintiff's action with costs.

PRONOUNCED in open Court this 17th day of June, 1988,
at Blantyre.



F.L. Makuta
F.L. Makuta
CHIEF JUSTICE