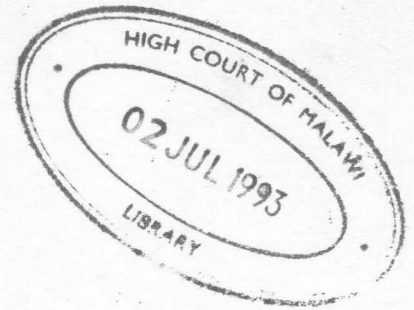


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 277 of 1987



BETWEEN:

F. S. NYASULU PLAINTIFF

- AND -

ELECTRICITY SUPPLY COMMISSION OF MALAWI.. DEFENDANT

Coram: MTEGHA, J.

Nakanga of Counsel for the Plaintiff
Chirwa of Counsel for the Defendant
Kadyakale, Official Interpreter
Phiri, Court Reporter

JUDGMENT

The plaintiff in this case, F. S. Nyasulu, is claiming a sum of K8,809.04 being salary due to him from the defendant, Electricity Supply Commission of Malawi (ESCOM), during the period 1976 to 1980 when he, the plaintiff was on training in the United Kingdom. It was pleaded, by the plaintiff, that there was an express term or implied term of agreement that whilst the plaintiff was on training, sponsored by the defendant, overseas, the local salary would remain payable to him in Malawi. The plaintiff was sponsored by the defendant to do a degree in electrical engineering overseas in 1976 and was there until 4th July, 1981, when he returned to Malawi, when he discovered that his salary was not paid despite the fact that his pension contributions had been deducted from his salary. The particulars of salary have been set out.

The defendant denies the claim. It has pleaded, inter alia, that there was no express or implied term in the employment agreement that the plaintiff's local salary would remain payable to him in Malawi whilst he was overseas on training. The defendant has further pleaded that it is the defendant's laid down policy not to pay salaries to their self sponsored staff on training overseas unless such employees are going for a second degree qualification. Further, the defendant has pleaded that even if the salaries alleged ~~TO BE DUE~~ for the years 1976 to 1981 are payable, they are statute barred.

The defendant is also counterclaiming and setting off the sum of K6,744.66 due to it on various items the particulars of which are set down.



The defendant has further pleaded that if the defendant is found liable to the plaintiff for the alleged claim of salary, the defendant will further counter-claim from the plaintiff the sum of K4,098.06 being money paid by the defendant for and on behalf of the plaintiff - these are particularised.

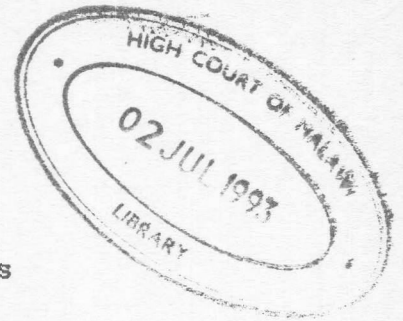
It was the plaintiff's evidence that in July, 1975, he was employed by the defendant as an assistant control engineer and at that time he had qualification as having a diploma in electrical engineering. While in the employ of the defendant, he was awarded a scholarship by the defendant in 1976 to do a degree course in the United Kingdom and left in September of the same year. He completed his degree in 1981 and came back in July of that same year. He signed two bonds, Exhibit 1 and Exhibit P2 binding him to work for the defendant for at least 5 years after his return from the United Kingdom.

It was his evidence that it was agreed that while he was in the United Kingdom studying, the conditions were that his salary was to be paid here and an allowance to be paid to him in the United Kingdom and the usual allowances were to be paid to his family here. It was his evidence, in support of this claim, that the defendant had adopted a Government Circular dated 31st March, 1982. This Government Circular emanated from the Secretary for Personnel Management and Training, signed by Mr. A.N.C. Chadzala. It was addressed to all Principal Secretaries and Heads of Departments. As this Circular is a vital piece of evidence for the plaintiff, I reproduce it hereunder. It states:

"PAYMENT OF SALARIES TO MALAWI STUDENTS
TRAINING WITHIN OR ABROAD

You will recall that in my Training Circular No. 119, Ref. No. PD/FIN.6/1/165 of 1st May, 1980, I informed all addressees that with effect from 1st April, 1980, Government had approved that all serving Civil Servants, including those below EO/TO Grades or equivalent grades undergoing training abroad would continue to receive their salaries irrespective of the duration of the course. This provision also applied to civil servants who were selected and approved by Government to undergo training at institutions within the Country.

2. I would like to inform you that Government had directed that with effect from 1st April, 1982, the payment of salaries to civil servants undergoing training within the country or abroad shall be limited to two years only and thereafter their salaries shall be frozen.



3. All conditions stipulated in our training circular quoted above shall apply except that for courses lasting more than two years, dependants allowances will be paid to officers' dependants after the salaries have been frozen.

For officers already on training ... the two year period shall count from 1st April, 1982..."

It was his contention that the defendant adopted this Circular for all its employees. He fortified his argument by producing Exhibit P4 dated 19th August, 1980. This was a memorandum from the Technical Training Manager to the Acting Secretary of the defendant. He was seeking directions in respect of one employee - Mr. G. T. Pete, who was going on training abroad. The memorandum states:

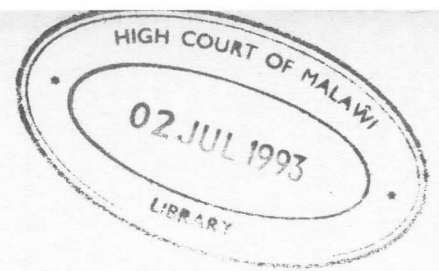
"The above-named has been sponsored by the Commission to do a Masters Degree in Electrical Engineering at the University of Manchester Institute of Science and Technology ... The minimum duration of the course is the calendar year. However, we have been informed that it is impossible to guarantee that the work he will be carrying out would be completed within the prescribed minimum time. He has been advised therefore to plan for the contingency that his work may extend beyond this period. The course would therefore take 12-15 months approximately...

Management directive is sought as to whether he should continue to be in receipt of his salary here while attending the course in United Kingdom. We have been informed by the Training Office in Lilongwe that Government Officers who go abroad for training continue to receive their salary here at home for as long as they are out with effect from 1st April, 1980."

On the top left hand side of this memorandum there are handwritten observations. These state:

"It has been a long standing Government policy that any civil servant sent to courses overseas of not more than 18 months duration retained his salary. This absolves Government of any responsibility for payment of dependent allowance. We have followed the same pattern.

As stated in the attached memo I believe now the duration is not specified as long as he is away on course he continues to receive his salary. 20/8/80".



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Then at the left hand side of the memo there are some handwritten minutes stating:

"I suppose we have to do the same.

20/8/80"

Then at the top right hand side there is a minute stating:

"Approved. He continues receiving his salary.

21/8/80"

It was the plaintiff's contention that he believed he was entitled to receiving salary until he returned on 4th July, 1981. When he commenced work his salary was adjusted from K2554 to K4802.00 per annum.

When he did not find his money in the bank he contacted the Training Officer by a memo dated 3rd September, 1981.

It was his evidence that after some time he got a reply from the defendant's secretary. This memorandum, Exhibit P8, dated 13th November, 1984, stated:

"You will recall that during your five-year period of training in the United Kingdom ESCOM paid dependent allowance to your wife and child as one of the conditions of your sponsorship. Apart from this and on humanitarian reasons when your wife had a problem of accommodation, ESCOM provided her with free accommodation, electricity, water and medical facilities which were not part of the conditions of your sponsorship.

Payment of salaries to students was never an issue at the material time in 1976 when you were sponsored and, therefore, cannot be so now in 1984.

Your claim cannot, therefore, be entertained."

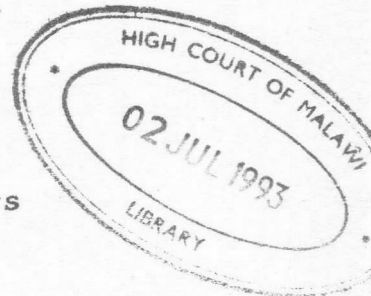
There followed, after this memo, a number of correspondences from the plaintiff to the defendant. Then finally the defendant wrote to the plaintiff on 21st November, 1986. I reproduce hereunder what the memo said:

"Your request has been duly examined and from the previous correspondence available on your file the following points have been observed as cause for not paying you the salary while you were on training overseas:-

5/.....

- (a) That there was an arrangement made by the Commission to accommodate and support your family while you were away on training.
- (b) That you were not in financial hardship as a result of your being abroad for training as you were being paid a reasonable allowance to cover the costs while going under training.

The point of being treated differently from other students is valid since the fact that you were entitled to the salary, in terms of Government Circulars quoted in your previous letters, is indeed there. Considering that this matter has been left too long to be resolved and while we would like to correct anomalies that have been allowed to take place in the past, I am directed to advise you that Management feels that it would not be fair to resolve this problem now."



This memo was written by Mr. Chadzala, who, ironically was the one who wrote the circular of 1980 while he was in Government employment but now with the defendant as Personnel Manager.

It was his evidence that if he was not entitled to earn a salary the defendant would not have been paying his pension contributions during the period he was abroad on training, but in his case, they did deduct from his salary as evidenced by exhibit P12.

It was his evidence that on 5th January, 1987, he gave notice to resign from the defendants employment on 27th February, 1987, and before he left, he said, Mr. Chadzala and Management accepted the resignation but advised him that according to the notice, he was "supposed to give three months notice of your intention to resign." Accordingly, the notice should take you up to 4th April, 1987. On the other hand, you would be required to pay to the Commission the equivalent salary for the period which is short of your notice." The letter went on to state "By copy of this memorandum, the payroll officer is requested to work out the equivalent salary for the period which is short of notice. I will advise of the amount later so that you can indicate to me how you propose to pay it to the Commission."

Subsequently, the defendant advised the plaintiff of the amount as follows:

"Balance on car loan	K7784.46
Interest on car loan	358.38
19 days short notice	449.67
Commission furniture	<u>461.66</u>
 TOTAL	 K9054.17
 Less Pension Contribution as advised by INDETRUST	 <u>K2309.51</u>



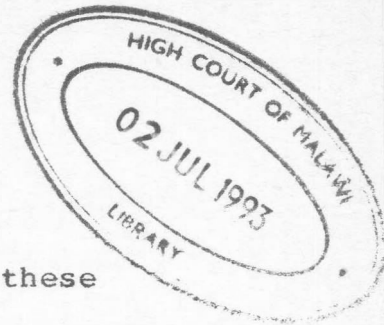
You are, therefore, required to pay the K6,744.66 to the Commission as soon as possible." This was dated 11th March, 1987.

It was his evidence that he arranged to pay the balance at K140.00 per month, and accordingly, he arranged with the New Building Society for a stop order, and indeed the Society sent the cheques but the defendant did not accept them, and demanded to repossess the vehicle. After the demand the plaintiff wrote the defendant that according to his calculation, after taking into account the pension contributions, there was a balance of K1,039.80 which represented payments for over 8 months and therefore according to the loan agreement he has not defaulted and the defendant was not justified in repossessing the vehicle. He based this argument on Clause 3 of the agreement. This Clause stipulates:

- "3(a) If the purchaser (1) dies or leaves the Commission Service, or (2) makes default in the punctual payment of any one instalment of the sums repayable together with interest (if any) under this agreement and the Commission conditions applicable thereto, or (3) commits any breach or the terms and conditions of this agreement and the Commission conditions applicable thereto, or (4) sells or otherwise disposes of the said motor vehicle, or
- (b) If the said motor vehicle shall be lost, destroyed or rendered unfit ... then in each and every such case the whole of the balance of the advance then outstanding shall become payable forthwith by the purchaser or his executors or administrators as the case may be."

Clause 4 of the agreement stipulates, inter alia that:

"Upon the happening of any of the events specified in Clause 3(a) hereof, the Commission shall be entitled to immediate



possession of the said motor vehicle and to sell or otherwise dispose of the same..."

It was the plaintiff's evidence that according to these Clauses, he had not breached the conditions.

The plaintiff then closed his case by saying that all what the defendant paid to his wife, such as allowances, electricity, medical expenses and accommodation were free and had nothing to do with the payment of salary in Malawi while he was on training.

In cross examination it was revealed that the plaintiff came home on leave from the United Kingdom, but he did not bother to check if his salary was being paid, further, when he finally came he wrote the defendant asking for an advance of salary of K80.00 because his salary was not due until the end of August. It also came out from cross-examination that the plaintiff sold the vehicle, while in examination in chief he said he had the vehicle.

The defendant also called a number of witnesses. DW1, Alexon Alan Watch Chiwaya told the court that he was employed by the defendant in 1977 and during the same year he proceeded to the United Kingdom to study. He was in U.K. during the period when the plaintiff was there, but he never got his salary here at home, but an allowance in the U.K., and since he was single, and childless no dependant allowance was paid to him. It was his evidence that if other employees were being paid a salary while on training, he himself did not receive any. It was his evidence that anybody going for a first degree as he and Nyasulu did were not entitled to salary at home.

It was the evidence of DW2, Errick Dean Namate that he was employed by the defendant in 1975 and he is now Chief Internal Auditor. It was his evidence that between 1976 and 1981 the plaintiff was on training in the U.K. and the defendant were paying dependant allowances to his wife and child. It was his evidence that the defendant also paid for house rent, water bills, medical bills and electricity for his wife and child. Further, he went on to say, in order to keep the plaintiff's pension alive while on training, the defendants were paying 5% and during this period, the defendants paid K499.66 for pension; K1,860.00 dependant allowance, K1313.35 rent, K527.35 water rates and K397.42 medical expenses. It was his evidence that if the plaintiff was entitled to salary during this period, the defendant would not have paid these expenses. It was his evidence that ESCOM did not waive its rights under the agreement to allow the plaintiff to pay his motor car loan by instalments after he left work.

The last witness for the defendant was DW3, Duncan Wanderson Level Chideya. He told the court that he has been in the employ of the defendant for 17 years and he is now Senior Personnel Officer. It was his evidence that between



1976 and 1981, Mr. Chadzala was not with the defendant but joined in 1985 November, on secondment, so that when the plaintiff was in the United Kingdom Mr. Chadzala was not present. It was his evidence that the policy of the defendant was that whenever any employee went for a first degree abroad he was paid an allowance at College; and if he had a wife and children she was getting dependant's allowance, but the trainee did not get a salary, and as such no arrangements were made for Mr. Nyasulu to be paid a salary here, and if the defendant paid him a salary, the defendant would not have paid dependants' allowance to his wife and child. It was his evidence that if the plaintiff was expecting a salary he would not have written Exhibit D1 requesting for salary advance after he arrived in 1981. It was further his evidence that it is not correct that the defendant automatically adopted Government circulars, and in case of Exhibit D2, Circular No. 199 of 1st May, 1980, the defendant did not adopt it. It was his evidence that Exhibit P4 had not been adopted otherwise Mr. Uko would not have been seeking directives in respect of Mr. Pete's case. In any case, Mr. Pete was going for a masters degree. It was his opinion that in Exhibit P11 Mr. Chadzala expressed the views relating to Civil Servants and not the defendants employees, but Mr. Kazembe expressed the correct view. He further stated that the defendant did not allow the plaintiff to pay the balance of the loan by instalments otherwise it would not have returned the cheques on D3 and D4.

This then is the evidence of both parties before me.

There is no dispute at all that the plaintiff was sent to the United Kingdom to study for a degree course from 1976 to 1981. It is not in dispute that during that period he was being paid an allowance in the United Kingdom and that his wife and child were being paid a dependant allowance by the defendant. She was also accorded free accommodation, water and electricity.

It has been submitted by Mr. Chirwa that the plaintiffs' claim is based on Exhibit P3, i.e. the Circular which was addressed to all Permanent Secretaries and Heads of Departments from the Secretary for Personnel Management and Training, but that this Circular was not adopted by the defendant; or at least there is no evidence. The circular was meant for Civil Servants. Further, it has been submitted by Mr. Chirwa, that if the defendant adopted this Circular, then there was no need for the Technical Training Manager to have sought directions for Mr. Pete as to whether or not Mr. Pete should get a salary while he was in the United Kingdom. Further, he argues, the plaintiff knew very well that he was not entitled to a salary while he was on training because on 8th July, 1981, when he had just returned, he wrote a letter to the defendant requesting for a salary in advance because he was not expecting his monthly salary until the end of August. Furthermore, when he was on leave he came to Malawi, but never queried about his salary. All this evidence shows that he knew that he was not entitled to salary.

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Furthermore, there was evidence from DWL, who was together with the plaintiff in the United Kingdom during the relevant period, which shows clearly that the defendant was not paying salaries to undergraduates at home. It was his submission that Exhibit P11 which stated that he was entitled to the salary should be used as a shield and not a cause of action.

On the other hand, it has been submitted by Mr. Nakanga, on behalf of the plaintiff, that there is abundant evidence that the plaintiff was entitled to salary while he was on training, for example, Exhibit P11 and Exhibit P12. Exhibit P12 clearly shows that the defendant deducted pension contributions from the plaintiff's salary and therefore there must have been a salary from which the deductions were made.

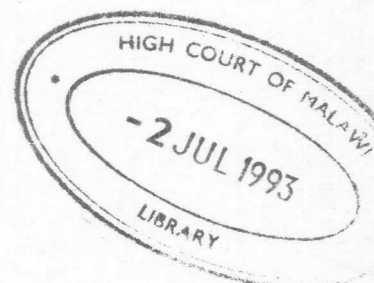
This is a civil case, and for the plaintiff to succeed, he must prove his case on a balance of probabilities.

In my judgment the position is quite clear. Exhibit P3 does not say that defendant's employees were affected by this Circular. There is no evidence to show that this Circular from Personnel Management and Training was adopted by the defendant. There is overwhelming evidence that this Circular was not adopted by the defendant. Indeed, if we take the Exhibit P4 as evidence connecting this Circular with the adoption of the same by the defendant, it would only come into effect from the 1st of April, 1982, and not before. It follows, therefore, that prior to this Circular letter, there was no evidence to show that the plaintiff was entitled to salary. All the defence witnesses say this; and I have no reason to disbelieve them. It was Mr. Nakanga's submission that the fact that the defendant paid pension contributions during the period the plaintiff was in U.K. is evidence that he was entitled to salary. I fail to understand this reasoning. It was clearly stated by the defendant's witnesses that pension contributions were paid by the defendant from their own resources in order to keep the plaintiff's policy alive otherwise it would have lapsed. This explanation is, in my view, plausible. It cannot be said, therefore, that the payment of the contributions was evidence to show that a salary was to be paid. Further, I agree with the defendant when he says that if the plaintiff were entitled to a salary during his training in the U.K., the defendant would not have paid dependant allowance, electricity, water and house rent to the plaintiff's wife and child, because the plaintiff would have been paying these himself. This is quite logical. Even if Exhibit P3 were adopted by the defendant, the mere fact that his wife was in receipt of dependent allowance would have precluded him from receiving a salary here. The claim for salary must therefore fail. I dismiss it.

Having found that the defendant is not liable to pay the salary, it follows that the defendant cannot counter claim for the dependants' allowance, house rent, water rates, electricity rates and medical expenses amounting to K4,098.06

I will now turn to the counter claim the particulars thereof are as follows:

Balance due on Car Loan	K7,784.46
Interest	358.38
19 days short notice to terminate service agreement	449.67
Value of defendants' furniture bought by plaintiff from defendant	461.66
TOTAL	K9,054.17
Less Pension Contributions	K2,309.51
BALANCE	K6,744.66

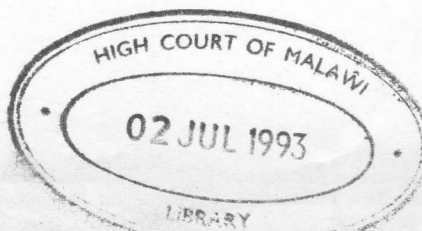


It was the defendants' evidence that when the plaintiff was leaving the defendants' employment he was supposed to pay this amount of money to the defendant. However, the plaintiff contended that the pension contributions, after deducting the amount in lieu of notice and value of furniture represented more than six months instalments on the motor vehicle and therefore he had not defaulted in his instalments to warrant immediate payment of the balance on the car loan. He further went on to say that when Mr. Chadzala wrote him to indicate the mode of payment, he did indicate that he was going to pay by monthly instalments of K140.00, that is why he instructed the New Building Society to pay, and they did pay on 8th June, 1987 and on 26th June, 1987. To his surprise, the cheques were returned vide Exhibit D3 and D4. It was Mr. Nakanga's submission that under Clause 4 of the agreement, the defendant was only entitled to possession of the vehicle if the events specified in Clause 3(a) have happened, and not to request the plaintiff to pay straightaway the whole balance.

I think it is unfortunate that the learned counsel did not read carefully Clauses 3(a)(1)-(4) and 3(b). It is clear that if the events specified in Clause 3(a) and (b) happened then Clause 3(b) provides that:

"then and in each and every such case the whole of the balance of the advance then outstanding shall become due and payable forthwith by the purchaser or his executors or administrators as the case may be."

It appears to me that the defendant, if the agreement is read in total from Clause 3 to Clause 4, had an option of either demanding payment forthwith or repossessing the vehicle, and the plaintiff had to comply with the choice which the defendant made.





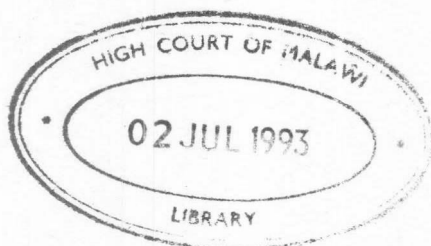
It has been further submitted that in terms of Exhibit P14, a memorandum dated 2nd February, 1987, the Personnel Manager, Mr. Chadzala had written to say that he would communicate with the defendant to enable the defendant to indicate how he would pay the balance, and in response the plaintiff indicated verbally how he would pay, i.e. K140.00 per month. It was the evidence of the defendant that it never accepted the proposal and no arrangements were made. I am inclined to believe this piece of evidence. If the parties had agreed on the mode of repayment, why did the defendant return the cheques to the New Building Society? Furthermore, in Exhibit P15 the defendant clearly stated that it was:

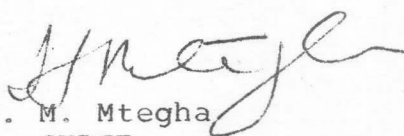
"with regret that you did not see the Personnel Manager before you left for Lilongwe to finalise the issues which were not concluded upon your resignation."

The second paragraph of Exhibit P15 also confirms my views.

Even if the defendant agreed to the plaintiff's proposal Clause 5 of the agreement protects it. It says that any time or other indulgence from time to time granted to the plaintiff shall not prejudice or affect the defendants' strict rights under the agreement. The defendant can, therefore, demand immediate payment. I, therefore, find that the defendant has proved the counter claim. I enter judgment for the defendant in the sum of K6,744.66. The defendant to have costs.

PRONOUNCED in open Court this 17th day of May, 1989,
at Blantyre.




H. M. Mtegha
JUDGE