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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.598 OF 1987



BETWEEN:

J. MSATEKESEKA .....

1ST PLAINTIFF

AND

G. MANGOCHI .....

2ND PLAINTIFF

AND

ENCOR PRODUCTS LIMITED .....

DEFENDANTS

CORAM: BANDA, J.

Kaliwo, Counsel for the Plaintiffs  
Chirwa, Counsel for the Defendants  
Liyao (Mrs), Official Interpreter  
Maore, Court Reporter

JUDGMENT

The plaintiffs are suing the defendants for damages. They allege that the defendants unlawfully determined their employment which lost them a pension which they would have earned had their employment continued until normal retirement age. The plaintiffs are also claiming damages for alleged negligence and or breach of statutory duty.

The first plaintiff was employed by the defendants as a Raw Materials and Stores Supervisor. He started work on 1st March, 1973 and had worked for 14 years when he was retired on 31st March, 1987. He stated that he was told on 28th January, 1987 that he would go on retirement on 31st March, 1987. The second plaintiff worked for the defendants as a Tool Setting and Supervisor. He, too, had worked for the defendants for 14 years when he was retired on 31st March, 1987. He stated that he was told in December, 1986 by a Mr. Wandale who was the Personnel Officer that he was going to retire on 31st March, 1987. Both plaintiffs were members of the defendants Pension Scheme which is managed by Old Mutual. The Pension Scheme provides three types of retirements, namely early retirement, normal retirement and late retirement. The early retirement takes place when a member has worked continuously for 5 years and has reached the age of 45 years. The normal retirement occurs when a member has reached the age of 55 years and the late retirement happens when a member has reached the age of



70 years. Both plaintiffs went on early retirement but they contend that it was wrong for the defendants to retire them early. And that is the crux of of this case.

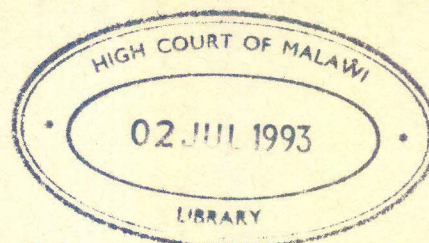
It was the evidence of the plaintiffs that the only thing which was explained to them when they joined the Pension Scheme was that they would retire when they reached the age of 55 years. They have denied ever being told that it was also possible to retire after they had worked for 5 years or after they had reached the age of 45 years.

Mr. Kaliwo for the plaintiffs has submitted that this case involves important issues of law involving the rights of an employee in a pension scheme. Mr. Kaliwo submitted that the main issue in this case was whether the plaintiffs' retirement was proper and secondly whether in the circumstances of this case the defendants were negligent as particularised in the statement of claim. It was Mr. Kaliwo's contention that as a matter of law a person who is deprived of his pension is entitled to claim his pension and the authorities Mr. Kaliwo cited for that proposition are the cases of Lajabu v UTM Civil Cause No.381 of 1985 and Liponda v UTM Civil Cause No.413 of 1983 both unreported. Mr. Kaliwo submitted that in both those cases it was ordered that the company should pay pension to the plaintiffs. It was further submitted by Mr. Kaliwo that it is a principle of law that if a person, because of the act of a tortfeasor, is compelled to get a lower pension than he is entitled to that person can claim damages as he would have been entitled to at normal retirement age and that the tortfeasor must pay those damages. And this is the principal claim by the plaintiffs that they are entitled to claim the difference between the amount they received at early retirement and the amount they would have received had they continued to work until they had reached normal retirement age.

Mr. Chirwa, on the other hand, has submitted that the defendants properly retired the plaintiffs and that their retirement was in accordance with the Pension Scheme rules. He contended that under the rules there is a provision which stipulates that when a member has served the company for 5 years and has reached the age of 45 years such a member qualifies for early retirement.

There can be no doubt that the main issue in this case is the construction of the relevant rules and in particular rules on page 4 of Exhibit 1. It is important to note that it is expressly provided that retirement other than the normal retirement is always subject to the employer's consent. In other words, it seems to me that no member can go on early retirement unless the employer has given his consent. It is the consent of the employer which, in my view, is the crucial factor. It is true that clause 2 paragraph b is clear in its terms. That clause must not be read in isolation but must be read together with the specific provision which states that





a member can only proceed on early retirement with the employer's consent.

It is not disputed that the plaintiffs were told 3 months, or slightly less than 3 months, before they were retired that they would retire. Both plaintiffs stated in their own evidence that they were happy to go on retirement because when one retires one receives something. There is no evidence to show that the plaintiffs resisted or that they were unhappy to proceed on retirement. It is clear from Exhibits D2(a) and D2(b) that whoever signed those forms must have been aware that the retirement for which the application was being made was early retirement. The plaintiffs have denied signing Exhibit D2(a) and Exhibit D2(b) and both have contended that the signatures which appear on those Exhibits although they appear similar to their signatures were not theirs. They stated that they had never seen those Exhibits before and the only time they saw them was the time when they were produced in Court. Similarly, the plaintiffs have denied signing Exhibits D3 and D4. It is the contention of the plaintiffs that since they were not told that it was possible to retire early they said that when they were told that they would retire on 31st March, 1987 they believed it was their normal retirement. It is difficult, in my judgment, to understand the basis of that belief when they must have known that they were not yet 55 years of age which is the normal retirement age. Mr. Kaliwo has however conceded that those Exhibits as well as Exhibits D4 and D3 were signed by the plaintiffs. I am not sure whether Mr. Kaliwo was entitled to make that concession on behalf of the plaintiffs when they themselves have categorically denied any knowledge of the Exhibits. They also denied having gone to the Commissioner for Oaths to swear their Affidavits of birth. There can be no doubt in my judgment, in view of the evidence of Mr. Saiwa, that those Exhibits were signed by the plaintiffs and I so find. Their denial to have signed those Exhibits in the face of clear evidence that they did seriously cast doubt on the credibility of their evidence.

I have carefully reviewed the evidence in this case and I am satisfied that when the Pension Scheme was being explained to the plaintiffs the full provisions of the retirement were explained to them. I do not believe the plaintiffs when they stated that the only thing which was explained to them about the pension rules was that they would only retire when they reached the age of 55 years. The retirement before normal date, the retirement on normal date and the retirement after normal date are all contained in the same clause but different paragraphs. I cannot believe that a Personnel Officer would only explain to the plaintiffs one sub-clause of that main





clause This again only goes to expose the plaintiffs as people who are ready to distort the truth. It was clear to me and I suspect it must have been clear to the plaintiffs that what they were saying could not reasonably be true.

It is clear on the evidence that what the plaintiffs were not happy about was the amount which they received when they were retired at an early date. They had hoped and had expected that they would get a lump sum which would normally be referred to as a gratuity and that thereafter they would be receiving periodical sums of money. This was, of course, not possible under the rules as was explained by Mr. Mussa Hussen Hamuza.

The defendants' case was that it became necessary to lay off some members of staff because of the financial difficulties the company was facing and that certain steps were decided upon which it was believed would alleviate the problem and would enable the company to continue its operations. The evidence was that the defendants business became slack and had suffered a loss. One of the steps taken to enable the company to continue its operations was to lay off certain members of staff. It was also the evidence of the defendants that apart from the plaintiffs there were other members of staff who were also retired early and there were others who were simply declared redundant.

The point which Mr. Kaliwo has raised that it is a matter of law that where a person has been deprived of his pension is entitled to claim his pension needs careful examination. In my considered view a permanent and pensionable employment does not mean life employment and I am reinforced in that opinion by the case of MacClelland v. Northern Ireland General Health Services Board (1957) 2 AER 129. In that case Lord Goddard exploded that myth in the following terms:

"That an advert offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment, that is that the person employed would be on the general staff with an expectation that, apart from misconduct or inability to perform the duties of his office, the employment would continue for an indefinite period. But apart from a special condition, in my opinion, a general employment is always liable to be determined by reasonable notice. Nor do I think that, because a person is offered pensionable employment, the employer thereby necessarily engages to retain the employee in his service long enough to enable him to earn a pension."










All in all, therefore, I am satisfied that the whole claim of the plaintiffs against the defendants has not been proved on a balance of probabilities and it must fail with costs to the defendants.

PRONOUNCED in open Court this 31st December, 1990, at Blantyre.

  
R.A. BANDA  
JUDGE