IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 662 OF 1985

BETWEEN:

KENNETH HAHN ..... PLAINTIFF

- AND -

SPEARHEAD HOLDINGS LIMITED ..... 1ST DEFENDANT
A. O. GAFFORIO ..... 2ND DEFENDANT
R. H. MARTIN ..... 3RD DEFENDANT

Coram : UNYOLO, J.

Kaliwo of Counsel for the Plaintiff
Mandala/Sidiq of Counsel for the Defendant
Kadyakale, Official Interpreter
Gausi (Mrs). Court Reporter

JUDGMENT

The plaintiff in this action claims damages under various heads from the Defendants jointly and/or severally for breach of a contract of employment.

The following facts are not in dispute. By an agreement made on 1st August, 1983, the plaintiff was employed on a three-year contract by Spearhead Enterprises Limited (In Receivership) as an estate manager. This company was in June, 1984, taken over by the First Defendant Company; Spearhead Holdings Limited. The plaintiff, however, carried on working in the same position and he was at all material times based at Ng'ombe Estate in Mchinji District. The Second Defendant was the General Manager based at the Company's head office in Blantyre and the Third Defendant was the Company's Administrator having earlier served as the Receiver/Manager of the former company above-mentioned.

It was in the evidence that the plaintiff having on 21st August, 1983, carried out a surprise check of stocks at the farm he discovered that a number of hoes were missing. The storekeeper failed to explain the discrepancy. Consequently the plaintiff decided to report the matter to the police and he asked the storekeeper in question to accompany him to the police station. He drove, with the storekeeper sitting in the back of the van. On arrival the storekeeper was

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however nowhere to be seen. He must have jumped off the motor vehicle on the way. To date his whereabouts are not known. Anyway, when the plaintiff returned to the farm he carried on with the check and at the end of the day it was discovered that some 362 bags of maize were also missing. Then on 11th January, 1984, the plaintiff wrote to the Second Defendant advising him formally of these discrepancies and of the measures he had decided to introduce to prevent further losses. The plaintiff thought that the matter would end there. That was not to be. The Second and Third Defendants took the view that the loss of the maize was to some extent due to negligence on the part of the plaintiff and the two Defendants decided to recover the loss herein from the plaintiff's bonus for that season. This, they proceeded to do and the plaintiff's bonus account was debited with a sum of K4705.28 representing the value of the missing 362 bags The plaintiff was, however, not consulted in all this and it was only after he queried the figures appearing in the bonus account in question that the Second Defendant intimated to him that the company had held him responsible for the loss of the maize. With all the courage he could master, the plaintiff vehemently protested his innocence in the matter and implored the company to reverse its decision herein. The Second Defendant was however adamant in the view that the loss of maize smacked of negligence on the plaintiff's part and that having considered the matter carefully the company had two alternatives, either to recover the money from the plaintiff or give him the sack. Subsequently, on 19th December, 1984, the Third Defendant also wrote to the plaintiff expressing his total agreement with the action taken by the Second Defendant on behalf of the company in recovering the K4705.28 from the plaintiff's bonus. Then on 17th April, 1985, the Second Defendant addressed another letter to the plaintiff, giving the plaintiff three months notice of termination of his employment with the company. The three months expired on 31st July, 1985 and the plaintiff was paid his salary up to that date plus some monies in respect of servants' allowance, leave pay and gratuity. I will say more about these points later in the judgment. Being not satisfied with the way he was treated, the plaintiff finally instructed his legal practitioners to commence the present action. Such are the undisputed facts in this case.

As indicated earlier at the very outset it was the prior company, Spearhead Enterprises Limited (In Receivership) which employed the plaintiff as a farm manager under a contract for 3 years from 1st August, 1983. I have also indicated that the said company was in June the following year taken over by the First Defendant Company. Counsel for the Defendants submitted that upon the transfer of a business from one company to another the effect at law is that all employees are

at that stage considered dismissed. Learned Counsel contended that on the facts of the present case the plaintiff could not rely on the contract of employment he made with the prior company as he must be deemed to have been dismissed at the time the First Decendant Company took over. With respect, this argument is merely academic otherwise the evidence clearly shows that the First Defendant Company absorbed the employees of the prior company including the plaintiff. Indeed, as already indicated the plaintiff simply carried on in the same capacity as farm manager until a year later in 1985 when he was discharged and as I will show in a few moments the Defendants own case is that the company terminated the plaintiff's employment in pursuance of Clause 19(a) of the very agreement he made with the prior company. The Defendants went to blow both hot and cold here. I cannot allow this, and I therefore reject the argument on this aspect.

The other issue in controversy is whether the contract was properly terminated. As already indicated the Defendants' case is that the plaintiff's employment was terminated in accordance with Clause 19(a) of the Agreement signed by the plaintiff and the First Defendant company's predecessor. That clause provides that either of the parties to the agreement could terminate the agreement at any time before the expiry of the three year term, or giving the other party three calendar months notice in writing. The plaintiff's case is that the agreement, being basically one for a fixed term of three years, was not terminable before the said term was up. Learned Counsel also submitted that the action taken by the First Defendant could not be justified considering that only a few months previously, it unilaterally deducted the K4705.28 from the plaintiff's bonus, thereby giving the plaintiff few hopes that he would continue in his employment only to turn around and give him the sack soon thereafter. Learned Counsel argued that all in all, that amounted to wrongful dismissal. With respect, in the face of the very clear and unambiguous words of Clause 19(a) already-mentioned the plaintiff's arguments on this aspect are untenable. Admittedly, the contract here was one for a fixed term but the agreement went on to expressly stipulate that the same could be terminated before the expiry of the end of the period and since the requisite term of notice was given, the defendants in my judgment cannot be faulted.

I must now turn to the various heads of damages claimed by the plaintiff. First the plaintiff claims the sum of K11,370.00 being salary lost as a result of the premature termination of the contract. It will be noted from what I have said above that the contract had one more year to go to the end of plaintiff's term. The plaintiff therefore claims the salary he would have got during that period. Admittedly the plaintiff got

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his salary for the period of notice. In the circumstances the claim on this part has no legs to stand on as no salary was payable thereafter, the contract, as I contend, having been properly determined. I accordingly dismiss the claim on this aspect.

Next the plaintiff claims the sum of K11,250 for loss of gratuity arguing that he would have earned this amount if he had continued to work for the First Defendant during the one-year period to the end of the term of the contract. With respect, for the reasons I gave just given in relation to the plaintiff's claim for loss of salary, the claim under this head must also fail. Put simply, the plaintiff cannot claim for gratuity for the year he did not work as there would be no basis for such a claim. The same is also true of the other claim made by the plaintiff for the sum of K5,000 in respect of loss of crop bonus for the same period after his services were terminated. Indeed during cross examination the plaintiff correctly conceded that it was not right to claim any monies after his contract was terminated.

Further, the plaintiff claims the sum of K502.50 being under-paid bonus for the year 1983/84. The evidence adduced in support was very scanty and in the end it was conceded that the plaintiff had failed to prove his claim on this aspect and it is dismissed.

Finally, I turn to the plaintiff's claim of K4705.28 being the money the First Defendant deducted from the plaintiff's bonus in order to recover the loss on the 362 bags of maize earlier mentioned. The Defendants case is that but for negligence on the plaintiff's part the said 362 bags of maize would not have missed. The Defendants say that the plaintiff was negligent in this context in that:-

(a) he failed to properly check the stocks of maize;

(b) he failed to properly supervise the stores clerks so as to prevent the loss of the maize;

(c) he failed to devise a proper or any control system; and

(d) he failed to ensure a proper rationing of the maize to the labourers on the farm

The Defendants say that it was an implied term of the plaintiff's contract of employment that in the event of any loss of the company's money or property being occasioned to the company due to negligence on the part of the plaintiff, such loss would be recovered from the

plaintiff's dues and that it was in pursuance of such implied term that the First Decendant company decided the K4705.28 herein from the plaintiff's bonus. Pausing here, it is to be noted that the plaintiff does not deny it was part of his duty to execute the finances he is alleged to have failed to carry out herein. He says, however, that he took all the necessary precautions in the matter in that the maize was kept in a shed and kept under lokk and key. He denies that he failed to keep proper records. He says that these were actually in place and that he did check them as often as he could. The plaintiff pointed out that he was very busy particularly at the material time as that was the PLanting season and he had three farms to manage. He argued that what he did was enough and he cannot therefore be held to have been negligent considering all these facts.

Significantly, it is to be noted that when the season began in August, 1983, the plaintiff admittedly had 1365 bags of maize. The evidence then shows that when the plaintiff carried out the check in about December the same year 362 bags were missing. This was about five months later. This was a substantial quantity. If, which is most likely, the bags did not disappear just in one lot, this represents an average loss of some 72 bags per month and considering the total facts I get the distinct impression that the plaintiff did not properly and sufficiently check the stocks of maize and/or the records thereof. For example, the plaintiff said in cross-examination that the last check before December was in September. This meant that he did not carry out any check in October, November and the greater part of December. Indeed the plaintiff said the same thing in his report in June, 1984, informing the Second Defendant formally of the loss of maize. I agree the plaintiff may have been busy at the time but in my view it was extremely necessary that he checks the stocks and records or at least have someone to carry out such checks on his behalf so as to prevent what happened in this case. Indeed the "corrective" measures the plaintiff introduced in January after the loss was discovered are quite commendable and should have been put in place earlier. In a word I am inclined to agree with the Defendants that the plaintiff was negligent.

The next question is whether the First Defendant was entitled to deduct the value of the lost maize from the plaintiff's bonus as was done. As I have indicated earlier the Defendants case is that it was an implied term of the contract of employment herein that in the event of any loss of property or money being occasioned to the company due to negligence on the part of the plaintiff such loss would be recovered from the plaintiff's dues. As a general matter, it is to be noted as was observed in Re Comptoir Commercial Anversois & Power, Son & Co. (1920) 1 KB 868 the implication of a

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term is a matter of law for the court, and whether or not a term is to be implied usually depends upon the intention of the parties as gathered from the language of the agreement and the surrounding circumstances. The court will therefore be prepared to imply a term if this arises from the words of the contract itself and the circumstances under which it is entered into. An inference that the parties must have intended the term sought. Also, as was observed in the Moorcock (1889) 14 PD 64, a term will be implied if it is necessary, in the business sense, to give efficacy to the contract. Further a term will be implied if such term was so obviously a stipulation in the agreement that it was naive to express it specifically by words. Gardner v Moore (1969) 1 dB 55. There are several other situations where a term could properly be implied in a contract. And on the negative side, a term will not be implied merely because the court thinks it would have been reasonable to have inserted it in the contract. See Rergate v Union Manufacturing Co Ltd (1918) 1 KB 592. Considering the facts of the present case, and in particular the agreement signed by the parties, I am unable to find any basis upon which the stipulations sought can be implied into the agreement in this case. I doubt very much this was what both parties intended at the time the agreement was reached nor do I think that the situation here falls within the principle enunciated in the Moorcock case, above-mentioned. The Defendants argument here is therefore unattainable and I reject it.

It was next contended that the plaintiff cannot now be held to complain on this aspect since he eventually agreed to the company retaining the money. Considering the total facts I would agree with the plaintiff that he did not really have a free hand or choice in the matter. All in all I am of the view and find that the company was not entitled to unilaterally deduct the K4705.28 and the plaintiff's claim on this point must therefore succeed. Indeed it is to be noted that the company did not put in a counter-claim on this action.

There is one other matter which I must deal with before I conclude. It relates to the Second and Third Defendants. The Second Defendant had not come to court at the hearing of this case. Counsel for the Defendants however made a submission of no case to answer in regard to this Defendant. Here I can say at once that in my judgment both the Second and Third Defendants did whatever they did in this matter purely in their capacity as employee and agent respectively of the First Defendant Company. In my judgment there is no basis by which they could be sued in relation to the issues raised in this case. The plaintiff's claim against these two Defendants must therefore fail and are dismissed in their entirety.

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In the final analysis I enter judgment for the plaintiff for the sum of K4705.28 only.

The question of costs has exercised my mind. As a general principle costs are discretionary but normally they follow the event. Considering the total facts of this case I order that each party have costs on the claims such party has succeeded.

PRONOUNCED in open Court this 10th day of July, 1990, at Blantyre.

L. E. Unyolo
JUDGE