

20 NOV 1991

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.286 OF 1987

BETWEEN:

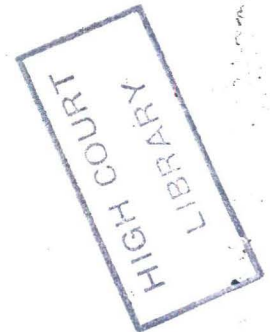
L.K. BANDA..... PLAINTIFF

- and -

CILCON LIMITED..... DEFENDANT

Coram: BANDA, J.

Chirwa, Counsel for the Plaintiff
Msaka, Counsel for the Defendant
Kalimbuka Gama, Court Clerk
Longwe, Court Reporter



J U D G M E N T

The plaintiff is suing the defendant for wrongful dismissal and false imprisonment. There is also a claim for overtime and leave pay.

It is alleged that by an agreement made in 1974 the defendant agreed to employ the plaintiff who agreed to serve as the defendant's accounts clerk at a salary of not less than K185.00 per month. It is further alleged that it was an express term of the said agreement that the employment of the plaintiff would continue until terminated by a 3-months notice. It is also alternatively alleged that it was an implied term of the said agreement that the plaintiff's employment would be determinable only by a reasonable notice and it is contended that a reasonable notice is 3 months.

It would appear that as a result of the agreement the plaintiff started to work for the defendants sometime in February 1974 until 20th January, 1984, when it is alleged the defendants unlawfully and in breach of the terms of employment dismissed the plaintiff with immediate effect and that the defendants refused to allow the plaintiff to remain in their employment. It is alleged that by this alleged breach of agreement the plaintiff had been deprived of his salary and that he had suffered consequent loss and damage.

It would appear that for sometime the defendant company Head Office was in Blantyre and operated from premises which were adjacent to the premises used by M/s. S.R. Nicholas Construction Company hereinafter called Nicholas Co. But at some point in 1978 the Head Office of the defendant company moved to Lilongwe leaving only the accounts section in Blantyre. It would appear that the accounts section of the defendant company operated in the same building that was occupied by Nicholas Company.

It is not disputed on the evidence before me that Cilcon and Nicholas companies are two separate companies and in law are separate legal personalities. There was a suggestion and it was not disputed that Cilcon is a subsidiary company of Nicholas and that the Financial Controller for the two companies was a Mr. Stewart. Be that as it may, the position in law is that Cilcon and Nicholas are two separate companies.

The evidence before this Court is that on 20th January, 1984 the plaintiff was called into the office of Mr. Stewart where he was told that there was a theft in Nicholas office involving K5,000.00. He was asked if he knew anything about that and that his reply was that he did not know anything about the alleged theft. It was his evidence that at about 8.00 a.m. on the same day he was taken out of Mr. Stewart's office and was locked up in another office near a switchboard. His evidence was that it was Mr. Stewart who locked him up. The plaintiff further stated that as he was being taken to be locked up Mr. Stewart told him that the matter would be reported to the Police Division at Chichiri, and that at about 10.00 a.m. on the same day he was taken out from the office in which he was locked and was handed over to a Mr. Thunga who took him to the Police. The plaintiff remained in custody from 20th January 1984 to 23rd September 1984. IN 1986 he was prosecuted and was convicted for the alleged theft before the Chief Resident Magistrate's Court and he was sentenced to a term of imprisonment of 8 years. His conviction was, however, quashed on appeal to the High Court.

The evidence which was the basis of the criminal prosecution against the plaintiff shows that the theft related to the purchase of timber by Nicholas Company and the exhibits which were produced at the criminal trial show that all the documents involved related to Nicholas Company. None of it concerned Cilcon.

It was the plaintiff's evidence that occasionally Mr. Stewart would ask him to work on Nicholas papers and that exhibit D2 were some of the papers on which the plaintiff worked. There can be no doubt therefore that the alleged theft involved Nicholas Co. and, in my judgment, it must be asumed that in whatever Stewart or any other employee did in connection with the alleged theft was on behalf of Nicholas

Company. It is true that Stewart was the Financial Controller for both companies but in so far as the alleged theft by the plaintiff was concerned there can be no doubt that whatever he did was done in his capacity as Financial Controller or employee of Nicholas Co. It must be remembered, as I have already said earlier in this judgment, that a substantial part of the defendants' operations had moved to Lilongwe and that only the accounts section remained in Blantyre. Mr. Thunga, the man who physically took the plaintiff to the Police, was employed, at that time, by Nicholas Co. There is evidence and it is not disputed that the vehicle which conveyed the plaintiff to Police belonged to Nicholas Co. although earlier on it had belonged to Cilcon.

It seems to me that on the evidence before me, and it is overwhelming evidence, there can be no doubt that Mr. Stewart and Mr. Thunga in reporting the plaintiff to the Police were doing so on behalf of Nicholas Co. because the theft involved property belonging to Nicholas Co. In those circumstances, therefore, it is clear in my judgment that the proper party who should have been sued should have been Nicholas Co. in so far as the false imprisonment claim is concerned. I must admit that I thought at one stage, in view of the overwhelming evidence pointing to the fact that Nicholas Company was the complainant in the theft case, that counsel for the plaintiff would consider amending the parties to the action. I thought that at that point it had become so obvious that a wrong party had been sued but that was never to be. I am satisfied therefore that in so far as the claim for false imprisonment is concerned, I find that a wrong party was sued and the plaintiff must therefore fail in his claim for false imprisonment. However, as far as the claim for wrongful dismissal is concerned I believe the correct party to be sued was Cilcon.

As I have already found earlier in this judgment Nicholas and Cilcon are two distinct legal personalities in the eyes of the law. The only basis alleged for dismissing the plaintiff was that he had absconded himself from his duty. But the evidence clearly shows that Mr. Stewart knew why the plaintiff had not reported for duties. His absence from duty was not deliberate or voluntary and indeed when the plaintiff was able to go to his work he did so on the first available opportunity but he was not allowed to resume his duties. What just cause did Cilcon have in dismissing the plaintiff from work? The case of National Coal Board v. Galley (1958) 1 All E.R. p.90 was cited to me by Mr. Msaka. In my judgment that case can be distinguished from the instant case. In Galley's case there was, by the defendant, a deliberate refusal to work in clear contravention of an agreement which bound him. As I said the plaintiff did not deliberately refuse to work. Indeed he had shown his willingness to work when he was able to do so.

I am satisfied therefore that there was no just cause for the defendant company to dismiss the plaintiff when none of their properties were involved in the alleged theft which has turned out was never proved.

In the plaintiff's pleadings it is alleged that the employment agreement had an express provision for 3 months' notice. No evidence was adduced to prove that such agreement provided for 3 months' notice. In the alternative it was alleged that there was an implied term that reasonable notice would be 3 months. The evidence before this court is that the plaintiff received the salary monthly and in the absence of an express stipulation as to a period of notice Section 10 of the Employment Act provides that reasonable notice in such circumstances would be one month's notice and I so find.

I would now like to consider the claim for overtime and leave pay. There have been some contradictions between what is alleged in the pleadings and the evidence adduced. For instance, if the allegation in the pleadings is correct that the plaintiff started work on a salary of K185.00 a month, it would appear that that salary has not changed since 1974 because the evidence was that at the time the plaintiff was being dismissed his salary was in fact K185.00 per month. No evidence, in my judgment, was adduced to prove how the sums of K155.00 for overtime pay and K693.75 for leave pay were calculated and to be fair to counsel for the plaintiff he conceded that there was no evidence to prove those two claims and, accordingly, I find that they have not been substantiated.

Accordingly, there will be judgment for the plaintiff in the sum of K185.00 being salary for one month's notice and costs of these proceedings.

Pronounced in open Court this 23rd day of October, 1991 at Blantyre.



R.A. Banda
BANDA

(IN CHAMBERS AT 2.00 P.M.)

COURT to COUNSEL: Gentlemen, when I delivered judgment this morning I omitted to award general damages for the plaintiff on the claim for unlawful dismissal. I only granted him a sum of K185.00 as notice pay. He was in custody from 20th January 1984 to September, 18th. The plaintiff was out of employment for 8 months. In the circumstances I will grant him general damages in the sum of K1500 and K185 notice pay for one month.