2 Apr 1992

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.1131 OF 1990

BETWEEN:

EMMANUEL MANDA SUING ON HIS BEHALF
AND ON BEHALF OF AND REPRESENTING
ALL MEMBERS OF LOVE AQUARIUS BAND ..... PLAINTIFFS

AND

CITY OF BLANTYRE ..... DEFENDANT

CORAM: UNYOLO, J.
Chikopa/Kapanda, Counsel for the Plaintiffs
Mbendera, Counsel for the Defendant
Gausi (Mrs), Court Reporter
Kaundama, Official Interpreter

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JUDGMENT

The plaintiffs claim damages from the Defendant for breach of contract.

The brief facts of the matter are these: the plaintiffs are members of a musical band known as Love Aquarius Band. The defendant on the other hand needs no introduction. In 1984 the defendant Council's management decided to offer hotel and catering services and took over the running of what used to be known as Hotel Chisakalime in Limbe. Prior to that time the Department of Hotels & Tourism ran the Hotel and the plaintiffs played there as a resident band. When the defendant took over the Hotel it also took over the band and a final agreement was concluded between the parties. The plaintiffs were however not able to produce the agreement they signed with the defendant in this respect. All the same they said that it was an agreement for one year but renewable and that the agreement was indeed renewed every year thereafter. The plaintiffs tendered in evidence Exhibit P1 which is the agreement the parties executed for the period 1st April, 1988 to 31st March, 1989. They said that the agreements for the years in between were oral. Perhaps I should mention that Exhibit P1 was actually signed only on 6th December, 1988 i.e. some nine months after the

agreement was renewed. The plaintiffs continued playing at the Hotel up to 31st March, 1989 and they carried on up to 4th October 1989 when they received a letter, Exhibit P2, addressed to them by the defendant's chief executive. The letter is dated 2nd October, 1989 and reads:

"Dear Gentlemen

TERMINATION OF CONTRACT

Since we did not revise your contract with City Council on its expiry and you are now playing without a valid one, I wish to advise you of a resolution of Policy and Resources Committee that your future contracts with effect from 1st October 1989 be between yourselves and the Hotel Chisakalime.

Therefore conditions of your contract will be negotiated by the Commercial Manager and Hotel Management as they may deem proper.

Yours faithfully,

Signed
R.C. MITCHINSON
TOWN CLERK/CHIEF EXECUTIVE"

The plaintiffs denied the contract was not renewed after 31st March, 1989 as contended by the Town Clerk in the letter just reproduced. According to them a new contract was duly agreed orally and all that remained to be done was to reduce the same to writing. The plaintiffs referred the Court to Exhibit P2, the contract for the year 1st April, 1988 to 31st March 1989, which was agreed in April but actually reduced to writing and executed only in December, as I have already indicated. They said that similarly they were content with the verbal agreement they reached with the defendant and believed that the written agreement would come later on.

I found the letter to be somewhat confusing. What however came out from the total evidence was that at the time the letter was written the defendant had put the Hotel up for sale. Indeed it appears that a buyer had already been found then and all that remained was the winding up. Be that as it may it was the plaintiffs' case that as advised in the said letter they went to see the defendant's commercial manager and discussed the matter with him. They said that in the end it was agreed the band should continue to play at the Hotel in the mean time and that the band did indeed play up to the month of

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February, 1990 when the new owners of the Hotel told them to leave the premises as they did not want a band. The plaintiffs complied and left.

The plaintiffs claim in this action firstly the sum of K9,000.00 being notice pay and secondly the sum of K6,000.00 for leave pay. The plaintiffs testified that the defendant was obliged on the termination of the agreement to give them three months notice in writing or pay them three months salary in lieu. The plaintiffs contended further that under the terms of the said agreement they were entitled to thirty days leave annually and they said they had not taken leave for two years at the time they were sent away from the Hotel. The plaintiffs referred to Exhibit P2, the agreement for the year 1988/89, in support of their case. They said that they were at the material time on a salary of K3,000.00 a month, hence the amounts they are claiming in the action. Further the plaintiffs said that they addressed a letter to the defendant claiming these monies and that the defendant's Town Clerk responded saying that they had no valid claim as the agreement between the parties had expired. The plaintiffs did not however give up. They went to see the Town Clerk and later petitioned the Mayor and had an audience with him. Subsequently, on 9th June 1990, the Town Clerk wrote a letter, Exhibit P5, to the plaintiffs advising that after considering the matter further the defendant had decided to make an ex gratia payment in the sum of K2,500.00 and the plaintiffs were asked whether they accepted the offer. See Exhibit P8. The plaintiffs wrote back accepting the offer and the K2,500.00 was paid to them on 12th July, 1990. The plaintiffs did take this sum into account and subtracted it from the gross sum claimed in their original statement of claim. They, however, left this sum out in their amended statement of claim; it being contended that the same had nothing to do with the monies due to them in terms of the contract.

I think that I should in fairness to learned counsel on both sides acknowledge at this juncture the ingenious and well-balanced argument they presented to the Court in this case.

Mr. Mbendera urged the Court to find that the plaintiffs' contract of employment with the defendant expired on 31st March 1989 and that the same was not renewed. Learned counsel submitted that the letter, Exhibit P2 which I have reproduced above, makes this clear. Mr. Mbendera appreciated that the plaintiffs continued to play at the Hotel after the 31st March but submitted that nevertheless this did not create a new term but only a "holding-over" just like a tenant would hold over after a tenancy had expired. Mr. Chikopa, on the other hand, urged the Court to find that the contract was renewed. He referred the Court to the evidence given by PW1 and PW2. It will be recalled that it was the evidence of the two witnesses that they agreed a new contract with the defendant after 31st March and that all that remained to be done was to reduce the

agreement to writing later on. I have given the matter anxious consideration. For my part there can be little doubt the 1988/89 contract reflected in Exhibit P2 expired by effluxion of time on 31st March, 1989. However I am inclined to believe the plaintiffs that the contract was renewed for the year 1989/90. I am moved by several considerations. First I find it difficult to accept that the defendant would have kept the plaintiffs playing at the Hotel for six long months after the 1988/89 contract had expired and continue to pay them all those months if the contract had not been renewed. I must also say that both PW1 and PW2 impressed me as truthful witnesses. They gave their evidence in a forthright manner. Further the plaintiffs' case was supported by what happened to the 1988/89 contract where, as I have earlier indicated, the contract there was concluded in April, 1988 but was reduced to writing and executed by the parties only in December. As was contended by the two witnesses the same happened in respect of the succeeding contract; the parties agreed to renew it and left the actual writing of the formal agreement to be done later on. Put briefly, I am satisfied that the contract was renewed; to run from 1st April, 1989 to 31st March, 1990, and I find accordingly.

It was the plaintiffs' case that the renewed contract was subject to the same terms as the preceding contract reflected in Exhibit P2. The plaintiffs contended that they were entitled, on termination of the contract, to 3 months notice or 3 months pay in lieu of such notice. The plaintiffs emerged unshaken on this point and I am satisfied that these terms did indeed apply to the renewed contract. Indeed there would, in my view, be nothing odd about such a term in a contract of this nature. It was then submitted on behalf of the defendant that the plaintiffs were given sufficient notice by the letter of 2nd October 1989, Exhibit P2, in that the plaintiffs continued to work up to January, 1990. With the greatest respect I am unable to share in this view. To my mind, Exhibit P2 did not seek to give the plaintiffs notice of termination of the new contract or, indeed, of the preceding contract which, as I have said, expired on its own by effluxion of time. Rather the letter was only a declaration that in the view of the defendant there was no contract subsisting between the parties after 31st March, 1989 and the letter then went on to advise the plaintiffs to negotiate one with the Hotel Management, whatever that meant, really. In short, I am unable to assent to the argument on this point.

Next Mr. Mbendera submitted that even if the defendant was in breach the plaintiffs did not all the same suffer any loss in that they continued to be employed at the Hotel and at the same salary. The plaintiffs' evidence, as I understood it, was that upon receipt of Exhibit P2 they thought they had no alternative but to see the defendant's Commercial Manager as advised in the said letter. The plaintiffs said that they were again simply told to continue playing at the Hotel and that the

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formal details of the agreement would be dealt with later. It was their evidence that they continued playing at the Hotel up to February, 1990 when, without any prior notice, the new owners of the Hotel told them to leave. As I understand the facts the defendant was a party to this new arrangement. Be this as it may, I have already found that a new contract was agreed between the plaintiffs and the defendant for the period 1st April, 1989 to 31st March, 1990 and the central issue is that the plaintiffs were entitled to be given 3 months notice if the defendant wanted to terminate the said contract or pay them 3 months pay in lieu of such notice. Indeed this particular issue does not appear to have been raised by the defendant in its defence. What I have said here is therefore simply academic, I think.

With regard to the question of pay in lieu of leave I wish to say that the plaintiffs were firm they were entitled to one month leave every year. They also emerged unshaken that they did not take their leave in 1988/89 and also in 1989/1990. The claim for two months pay, in these circumstances, would appear to me sound. According to Exhibit P2 such leave was to be taken in January but I think that this was simply an administrative arrangement.

The matter does not, however, end there. Mr. Mbendera has raised two other issues. Learned counsel referred the Court to the K2,500.00 which I have said the defendant paid to the plaintiffs in July, 1990. Counsel contended that it was agreed between the parties the said sum was paid in full and final satisfaction and discharge of any claim the plaintiffs might have had against the defendant. Referring to evidence what happened on this point was this. On 21st June, 1990 the plaintiffs wrote to the Mayor of the defendant Council complaining about the manner in which the Town Clerk was handling their issue. The letter, Exhibit P5, reads -

"YOUR WORSHIP THE MAYOR,

We write to you prefering to the discussion we had with the Town Clerk today on the 21st of June 1990 concerning about our money which the Council owes us.

Your Worship, the Town Clerk offered to give us K2,500 (Two Thousand and five hundred Kwacha) which he didn't explain why he offered us that money for. As far as we're concerned the Council is supposed to pay us K12,000.00 (Twelve thousand Kwacha) for three months notice and one month leave grant. Therefore, we appeal to you, Your Worship, to help us on this matter and at the same time we're asking for your help to make the Town Clerk and the Council understand the whole

situation. This matter has been going on for a very long time and as far as we know we should've been claiming a 9 month-pay plus damages since the Council has never written us any letter of dismisal up to now which means we're still working for them.

Please, Your Worship, would you kindly consider us as soon as possible.

Yours faithfully,
LOVE AQUARIUS"

The response to the letter came through a letter from the Town Clerk. The letter bears the date of 9th June, 1990 but it is clear this was a slip; the correct date was 9th July, 1990. It is, I think, pertinent to reproduce the letter. It reads -

"Dear Sirs

BAND CONTRACT

Your letter of 21 June 1990 was considered by the Council's Policy and Resources Committee on 30 June.

The contract of employment expired on 6 December 1989 and was not renewed. There is no notice clause, and, as you were previously advised any further contract should have been with the Hotel Chisakalime, in which event this would have transferred to the new owners. In the event, no such contract was entered into.

The Committee therefore considered that its obligation to the band expired on 6 December 1989 and that no claim could be entertained.

However, it approved the offer previously made to you of an ex gratia payment of K2500. This payment must be accepted within 14 days of the date of this letter, following which it will lapse and will not be renewed.

Yours faithfully

Signed
R. C. MITCHINSON
TOWN CLERK AND CHIEF EXECUTIVE"

The plaintiffs responded on 10th July, 1990 in a very short letter accepting the offer. The letter reads:

"Dear Sir

Answering to your letter which you wrote us on the 9th of July 1990 we have thought of accepting the offer.

Yours faithfully,
LOVE AQUARIUS BAND
E. MANDA"

According to the plaintiffs the Town Clerk had earlier told them, when they went to see him, that the K2,500.00 was a token of the defendant Council's appreciation for the services the band rendered from 1984. They said that they accepted the payment in that light. There was tendered in evidence a payment voucher, Exhibit P7, which was raised in respect of the K2,500.00. The narrative column of the said payment voucher states that the payment was a, I quote: "final payment on the termination of contract". It is however the uncontroverted evidence of the plaintiffs that the said payment voucher was not passed to them on the day they got the K2,500.00 from the accounts department nor did they know anything about it. It is also to be noted that the payment voucher was not signed by the plaintiffs or any of them. On these facts I am unable to hold this payment voucher against the plaintiffs.

What we are therefore left with is Exhibit P8 i.e. the letter in which the defendant offered to pay the plaintiffs the sum of K2,500.00. It is significant to note that the money was offered as an ex gratia payment. But of course the letter must be read with the plaintiffs' letter dated 21st June 1990 which, as I have already observed, was a letter the plaintiffs wrote to the Mayor. I have said in that letter the plaintiffs complained that they did not understand why the Town Clerk was insisting on the payment of K2,500.00 only instead of the full sum they were claiming under the contract. The issue raised here is difficult and obscure and I must confess it has given me most anxious moments in the course of which my opinion wavered. However on very anxious consideration of the matter I have come to be of the opinion that if a party intends to offer a payment in full and final satisfaction and discharge of liability such party must state so clearly and unequivocally. The defendant in the present case should have gone further to state clearly that the offer meant to represent a full and final satisfaction of the monies claimed by the plaintiffs in this matter. As I have earlier pointed out, such does not seem to be the position here. The plaintiffs said that they did not understand what the Town Clerk was talking about in relation to the K2,500.00. At one point they understood him as saying the

money would be paid as a token of appreciation for the out standing services they rendered during the 6 years or so they played at the Hotel. All in all it appears that there was no consensus ad idem between the parties on this point.

It is also to be noted that courts have shown a measure of reluctance to uphold alleged settlements or discharges where no legal advice was sought in accepting the same. See (a) Lovell v. Williams (1938) 62 R.L.I. Rep. 249 (cited in Binghams Motor Claims, 8th Edition, p.690; (b) McCluskey v Catholic Life General 1 AC (NI) Rep. (1930), p.59 and (c) Biggin & Co. Ltd. vs Permanite Ltd (1951) 2 All E.R. 191. In this latter case Lord Justice Somervell at p.196 observed -

> "The law, in my opinion, encourages reasonable settlements, particularly where, as here strict proof would be a very expensive matter. The question, in my opinion, is: what evidence is necessary to establish reasonableness? I think it is relevant to prove that the settlement was made under legal advice."

(1938) 83 Sol. Jo. 72 CA

Lord Justice Singleton said at page 199:

> "It is a matter of consideration that the settlement was arrived at under advise, the more so as the party settling may be quite uncertain whether he can recover anything against someone".

In the case at hand there is no evidence to suggest that the discharge or compromise relied on by the defendant was upon legal advice. All in all I am loath to accept the submission that the K2,500.00 payment amounted to a settlement or compromise. Indeed it is significant that inspite of the payment the plaintiffs immediately went to law.

Finally it was urged that the plaintiffs' claim was statute barred by virtue of section 161 of the Local Government (Urban Areas) Act in that the matters complained of by the plaintiffs did not arise within one year of the date the action was commenced. This was another Gordian knot in this case. Section 161 provides that court actions against a Local Authority (like the defendant here) must be brought within one year of the time when the causes of such action arose. It is common case the action in the present cause commenced in this Court on 26th November, 1990. The central question for the determination of the Court is therefore when did the plaintiffs cause of action arise. The words 'cause of action' have been held to mean "every fact which it would be necessary for the

plaintiff to prove, if traversed, to support his right to the judgment of the court, per Lord Esher M.R. in Read v. Brown (1888) 22 QBD 128, 131. A more recent case is Letang v. Cooper (1965) 1 QB 222 where Diplock L.J. at 242 defined the words as meaning "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". In the present case what we would be looking at are the facts pertaining to the breach of the contract between the plaintiffs and the defendant. Under paragraph 6 of the plaintiffs' amended statement of claim it is suggested the breach occurred on 2nd October, 1989. It will be recalled this was the date the defendant wrote the letter Exhibit P2 stating that no contract subsisted between the parties at that juncture and went on to advise the plaintiffs to negotiate one with the Hotel management. But as I have earlier pointed out the defendant's position is a mix-up on this point. In Exhibit P8, the letter dated 9th June, 1990 which I have reproduced above, the defendant stated the contract expired on 6th December, 1989 and that its obligation to the plaintiffs expired on that date. Clearly this statement contradicted the defendant's own position reflected in Exhibit P2. Anyway, if the contract expired on 6th December, 1989 and the defendant failed to give the plaintiffs the requisite notice or pay in lieu then the cause of action arose on that date. However as I have earlier found the contract practically continued up to about January/ February 1990 when the plaintiffs were told to leave the Hotel. On these facts the contention that the action was not commenced within one year from the time when the cause of action arose must fail. In my view the plaintiffs have proved their case and I find the defendant liable.

I now turn to the question of damages. I am satisfied on the evidence that the plaintiffs' claim is made out. They were entitled to K9,000.00 representing 3 months pay in lieu of notice and a further K6,000.00 representing pay in lieu of leave for 2 years. The total comes to K15,000.00 but I think that the K2,500.00 already paid by the defendant must be taken into account. There was also a claim of interest but this was not substantiated. I therefore enter judgment for the plaintiffs for the sum of K12,500.00 less whatever tax is payable.

Costs of the proceedings to the plaintiffs.

PRONOUNCED in open Court this 2nd day of April, 1992 at Blantyre.

L.E. Unyolo
JUDGE