030492

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 85 OF 1985

BETWEEN:

A W MTAWALI..... PLAINTIFF

- and -

THE NEW BUILDING SOCIETY..... DEFENDANT

CORAM: MKANDAWIRE, J.

Nakanga, of Counsel, for the Plaintiff
Kaliwo, of Counsel, for the Defendant
Liyao (Mrs), Court Clerk
Maore, Court Reporter

J U D G M E N T

By his re-amended statement of claim the plaintiff, among other things, sues the defendant for wrongful dismissal. Paragraph 6 gives particulars of loss and damage that he allegedly suffered as a result of the alleged wrongful dismissal, as follows:

(1)	Loss of salary during suspension	-	K509.83
(2)	Loss of Pension (Society's)	-	K,6194.22
(3)	Proportionate bonus for 1983	-	K446.10
(4)	Transport from LL to Chilumba	-	K1,097.83
(5)	Loss of three months' salary	-	K2,294.25
(6)	Loss of 12 years' salary	-	K110,124.00
(7)	Leave pay for 15 days	-	K521.42
(8)	Personal Pension Contribution	-	3,097.11
	TOTAL		K124,284.76

The plaintiff also claims the sum of K5,000.00, being the value of a motor vehicle, Registration Number BE 232, which the defendant alegedly converted to its own use. Finally, the plaintiff has claimed the sum of K11,532.00, representing excess repayments on two houses which were mortgaged to the defendant.

The defendant admits that it employed the plaintiff as an Accountant. The defendant, however, denies that the plaintiff was wrongfully dismissed. It was pleaded that he was dismissed on account of his misconduct and he was duly paid notice pay. The defendant, therefore, denies that the plaintiff is entitled to any of the damages tabulated above. Turning to the motor vehicle, it was pleaded that the defendant was entitled to sell it, as the

plaintiff had bought it with a loan from the employer and at the time of his dismissal the said loan had not been fully repaid. Finally, the defendant denies that it was ever over-paid. It was pleaded that any excesses were applied to the plaintiff's outstanding loans.

It is not in dispute that the plaintiff was employed by the defendant. At the time of dismissal he had risen to the post of Accountant. It is also common case that the plaintiff's services were terminated on 21st September, 1983. It was the plaintiff's evidence that such termination constituted a breach of contract of emplyment, as he was not given any notice. According to him, he was entitled to three months' notice.

The plaintiff, who was PW1, and the only witness, told the Court that in August, 1983 he received a letter from the General Manager informing him that certain cheques deposited at Lilongwe Branch had been dishonoured. Before he got that letter, he knew nothing about the dishonoured cheques. It was only at a later stage that he saw them in the bank statement. When he saw those cheques in the bank statement, he contacted the Branch Controller, who said that the drawers of those dishonoured cheques had promised to bring cash. There were twelve such dishonoured cheques, but he only knew of three which the Branch Controller had released to him. At that time the Branch Controller was Mr Isaac Zinyemba. The plaintiff then wrote a letter to the drawer of the cheques, and this letter, which is Ex.P3, was signed by the General Manager. In all, he wrote three letters concerning the three cheques. He also wrote the Branch Controller instructing him to reverse the entries in the drawer's accounts. Later on, he learned that there were nine other dishonoured cheques, making a total of twelve. It was the plaintiff's evidence that since the drawers of those cheques dealt with the Branch, he could not know exactly what happenedd. All he did was to instruct the Controller of that Branch to reverse the entries. In so far as he was concerned, his job as an Accountant was done. The recovery of the money was up to the General Manager and the Financial Controller. Although he had done his part, he was accused of being negligent, in that he had done nothing to try and recover the money. Instead, he had left the task to the Branch Controller. It was also his evidence that the Financial Controller had also known of these cheques, for they were reflected on the trial balance. The plaintiff did not get a copy of the trial balances.

It was on 30th August, 1983 that he had been served with a letter suspending him from employment. The suspension was without pay, and the letter, which is Ex.P4, charged him with serious misconduct, in that he had permitted a cashier, who was a junior member of staff, to handle the attempted recovery of the monies amounting to over K35,000.00. It was his evidence that the suspension

was unlawful, because the Staff Rules, Ex.P5, had no provision for suspension. Then followed the letter of dismissal dated 21st September, 1983 - Ex.P6.

Having been dissatisfied with the manner in which the matter was handled, he appealed to the Chairman of the defendant Society. The Chairman directed that a commission of enquiry be appointed. When the matter was investigated and reported to the Board of Directors, at its Meeting of 20 December, 1983, the Board confirmed the dismissal, but resolved that he be paid certain monies. The relevant paragraph of the Minutes reads as follows:

> "It was resolved that in view of Mr Mtawali's length of service with the Society, three months' pay in lieu of notice, accumulated leave pay and employee's Pension Fund Contributions would be paid to Mr Mtawali less the balance of loan accounts due to the Society from him."

It was the plaintiff's evidence that even in the light of this resolution he got nothing. In February, 1984 he got a letter from Old Mutual that his withdrawal benefits amounting to K3,097.11 had been sent to the defendant Society, but, to his surprise, he had received nothing.

It was also the plaintiff's evidence that the practice at the New Building Society was to pay a bonus to every employee at the end of each year. If an employee had not worked for the full year, he would get bonus proportionate to the period he had served. In his case, he had worked from January to August, 1983 and although bonuses were paid in 1983, he was paid nothing.

When he was dismissed, he was not given any transport to take him home. It was with difficulties that he found transport to take him. He had to engage Gatto International Marine Limited and he had to pay the sum of K1,097.83. The plaintiff further testified that the retirement age at the New Building Society was 60 years. At the time he was dismissed he had 12 years more to reach that age. Had he not been dismissed, he should have continued earning a salary until retirement. The dismissal, therefore, occasioned loss of salary and, according to his calculations, during the next 12 years he should have received the sum of K110,124.00. This is the amount of money he has lost.

The plaintiff had two houses, one in Blantyre and the other in Lilongwe. They were both mortgaged to his employer. The arrangement was that for both houses rent be paid direct to the New Building Society and that if there was any excess, that excess be paid to the plaintif. For the house in Blantyre the rent was K450.00 per month and repayment was K395.00 per month, giving an excess of K67.000 per month. That state of affairs went on for 6 years and so

the plaintiff is claiming excess for that period, amounting to K4,824.00. Thereafter, rent went up to K600.00 per month and repayments also went up to K516.00 per month. This covered a period of 8 months and he is claiming K672.00. The total excess on the Blantyre house comes to K5,496.00. Turning to the house in Lilongwe, the rent was K600.00 per month and repayment was K513.00 per month, resulting in an excess of K87.00 per month. That was for a period of 3 years and so the excess came to K3,132.00. Thereafter, the rent was raised to K750.00 a month, while the repayment remained at K513.00 a month, giving, according to his evidence, a monthly excess of K232.00. There is an arithmetical error here, for the excess should be K237.00.00. According to his calculation, the total for 8 months was K1,856.00. For the next 6 months, repayments were raised to K572.00, while rentals remained at K750.00. That gave a monthly excess of K178.00, giving a total of K1,068.00 for the period. In all, the plaintiff claims a total of K11,532.00. It was his evidence that the agreement was that any excess was to be paid to him, but contrary to that agreement, he received nothing until in 1988, when he started to receive excesses. This, he said was due to extreme pressure. His efforts to get the outstanding arrears of K11,532.00 failed.

In March, 1983 the plaintiff was granted a loan of K5,000 to enable him buy a car. The price of the car was in fact in excess of K6,000.00 and so he raised the difference. The Car Loan Agreement was tendered as Ex.P16. When he was dismissed, the car was seized by the defendant. As a matter of fact, he at first refused to surrender the car because there was no clause in the agreement to authorise the defendant to sell the car. He only surrendered the car when the Assistant General Manager threatened to sell his mortgaged properties. He was then forced to write a letter authorising the defendant to sell the car. In protest to the whole thing, he retained the car keys and he produced them as Ex.P17.

Mr Chalimba, DW1, is in the defendant's employ as Chief Internal Auditor. At the time of the plaintiff's dismissal he was the Financial Controller. He told the Court that as an accountant, the plaintiff's duties included implementing accounting and reporting systems. He was responsible for supervising staff engaged in producing reports. It was also his responsibility to handle dishonoured cheques and following up all such cheques. It was the plaintiff's duty to report to Management.

Mr Chalimba further testified that in early February, 1983 certain cheques were dishonoured. But he did not know that cheques had been dishonoured until August, 1983, when he was informed by the Investment Controller. He said that, ordinarily, Management should have known of these cheques immediately they were dishonoured and it was the plaintiff's responsibility to make such a report. The

witness then tried to contact the three persons into whose accounts the cheques were deposited. He was able to get hold of a Mr Yusuf Kara, but was unable to get the other two. These dishonoured cheques resulted in three accounts being overdrawn to the extent of K35,100.00. This meant that the New Building Society had lost K35,100.00. The accounts in question were Nos. 70-64253; 70-64271 and 50-62080, belonging to Messrs Yusuf Kara, Omar Kara and Hussain Kara respectively. And the accounts were overdrawn to the extent of K9,630.28; K17,287.47 and K8,073.08 respectively. The dishonoured cheques were reflected in the bank statements and, according to the normal procedure, Mr Chalimba should have known of these cheques in February, 1983, but as it happened, he only knew of them in August, 1983.

The Chief Internal Auditor went on to say in his evidence that when the plaintiff was dismissed, he was paid K2,294.25, being three months' salary in lieu of notice; K521.40 as 15 days' leave pay and K3,097.11 Pension Scheme refund. The plaintiff, however, did not actually receive these monies, as they were credited to his loans with the New Building Society. It is the net that went to his loans as some of the money went to the Income Tax Department following that department's tax assessment. The plaintiff was also paid his salary during the period of suspension. He had been duly informed that monies payable to him were credited to his loan account. Turning to the claim for bonus, Mr Chalimba said that this claim cannot be justified, as the payment of bonus was not a condition of service. Bonus was only paid at of the discretion of the Board of Directors. At the time of the plaintiff's dismissal, bonus had not been declared. Turning to the Society's Contribution towards the plaintiff's Pension Scheme, Mr Chalimba testified that the plaintiff was not entitled, as he had withdrawn from the scheme. There is no provision in the Pension Scheme Rules to pay Society's contribution to an empoloyee who withdrew from the Scheme. He referred to Rules 3.2 of the Pension Scheme Rules - Ex.P14. The plaintiff, having been paid his own contribution, that marked the end of the matter. It was also Mr Chalimba's evidence that the plaintiff's claim for transport costs from Lilongwe to his home cannot be sustained because the staff rules do not provide for that.

It is true that the Society sold the plaintiff's car which he bought with a loan from the Society. The car, however, was sold with the written authority of the plaintiff. In this regard, the witness referred to Ex.D11, which is a letter from the plaintiff authorising sale of the vehicle. Before sale, some expenses were incurred and these amounted to K157.90. The car was sold at K3,600.00, although it had been valued at K1,700.00 by Mobile Motors Limited. The car was, therefore, sold at the best possible price.

Turning to the claim for K11,532.00, representing excess rentals, Mr Chalimba told the Court that the Society was not holding any money. Any excesses were applied to clear the plaintiff's indebtedness. Besides his indebtedness, the mortgage accounts fell into arrears from time to time and any excess was used to clear such arrears.

The evidence of Mr J Khonyongwa, DW2, was quite brief. In 1983 he was a director of the New Building Society. It was his evidence that he was a member of the sub-committee appointed by the Board of Directors to look into the plaintiff's appeal concerning his dismissal. The sub-commitee consisted of two members, Mr Raisbeck and the witness. After making their findings, the sub-committee reported to the Board by their letter dated 30th November, 1983 - Exhibit D14. The sub-committee was satisfied that the plaintiff was aware of the dishonoured cheques and so recommended to the Board that the dismissal should remain in force. The Chairman, however, asked for a fuller report and that was submitted in a letter dated 29th December, 1983 - Exhibit D15.

It is clear that when the plaintiff was dismissed on 21st September, 1983, by letter of that date - Exhibit No. P6, he had not been served with any notice, nor had he been paid any salary in lieu of notice. In considering whether the plaintiff was wrongfully dismissed or not, I shall restrict myself to the events as they stood at the time of dismissal and that was on 21st September, 1983. I shall for the time being ignore the Board of Directors decision, for that came several months later. It is Rule 8 of the Staff Rules - Ex.P5, that deals with the question of termination of appointment. This rule provides as follows:

> "TERMINATION OF APPOINTMENT
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> The appointment held by any employee, unless varied by the letter of appointment, may be terminated by either party at any time by one calendar month's notice, effective from the first day of the month, given in writing and without cause assigned. Notice of termiantion by the Society shall in all cases be issued by the General Manager or by an officer designated by him.
>
> Should any employee be found guilty of conduct which, in the opinion of the General Manager, is prejudicial to the interest and the reputation of the Society, or becomes insolvent or financially embarrassed, or be guilty of dishonesty or dishonourable conduct, or fail to make the requisite disclosure under Staff Rule 31, the Society reserves the right to dismiss the employee concerned without notice or payment in lieu of notice."

Paragraph one provides that there shall be one calendar month's notice and since the plaintiff was dismissed without notice, it is apparent that he was dismissed under paragraph two, for the letter of suspension - Ex.P4 - charged him with "the most serious misconduct". The second paragraph gave the General Manager a discretion to dismiss with or without notice and without pay in lieu of notice. Of course, he was to exercise that discretion according to the circumstances of the case. Such provisions of discretion, however, are sometime liable to abuse. I shall, therefore, have to determine whether there were sufficient facts to justify the General Manager's decision to dismiss without notice and without payment in lieu of notice.

The first thing I have to determine is whether the plaintiff knew of the dishonoured cheques and whether, having known, he failed to inform Management. If my finding is in the affirmative, the second point, I must determine is whether such would constitute serious misconduct so as to justify summary dismissal. The plaintiff's evidence on the matter was that in August, 1983 he received a letter from the General Manager advising that certain cheques deposited at Lilongwe Branch had been dishonoured. He said he never knew of those cheques. He only saw them in the bank statement at a later date. When he saw them in the bank statement, he contacted the Branch Controller, who informed him that the Karas had promised to bring cash. At that time he only knew of three cheques and he had written about these, but later he discovered that there were twelve in all. He then instructed the Branch Controller to reverse the entries and as far as he was concerned, he had done his job as an accountant. It was not his duty to try and make recovery of the lost money and he did not know if the Karas had brought the money. Since the Karas were dealing with the Lilongwe Branch, he did not know what was happening. He told the Court that recovery of the lost money was up to the General Manager and the Financial Controller. On the other hand, Mr Chalimba testified that the plaintiff deliberately withheld information from Management.

These cheques were dishonoured in February, 1983 and yet, according to the plaintiff's evidence, he first learned of them in August, 1983, when he got a letter from the General Manager. I find this to be an amazing situation. In the ordinary course of events, the General Manager should have learned of the dishonoured cheque from the plaintiff and not the other way round. The trial balances and bank statements were produced monthly and the plaintiff conceded that these were produced monthly. The plaintiff, as accountant, saw these returns and he must have known that there were some dishonoured cheques. The plaintiff said the trial balances were not given to him. I do not agree. He was the accountant and an accountant who does not see the trial balances cannot, in my view, properly call himself an accountant. If the plaintiff did not see

the trial balances, then he was not just doing his job. On the evidence before me, I find that the plaintiff knew of the dishonoured cheques and that he did not inform Management. The cheques were dishonoured in February, 1983, and yet Management was not aware until August, 1983. For a period of five months Management was in the dark. I am also satisfied that it was the plaintiff's duty as an accountant to follow up dishonoured cheques. It would appear that apart from writing three letters on three of the dishonoured cheques, the plaintiff did nothing. It was the plaintiff's own evidence that the Branch Controller told him that the Karas would bring cash. It was also the plaintiff's own evidence that he did not know what was happening at the Branch and he did not know if the Karas had brought cash. This clearly shows that the plaintiff left it to the Branch Controller to make recoveries. All the plaintiff did was to instruct the Branch Controller that the entries relating to the dishonoured cheques be reversed. I am satisfied, on the evidence before me, that, apart from the three letters he wrote, the plaintiff made no attempt to recover the money lost on the twelve dishonoured cheques.

In the course of cross-examining Mr Chalimba, the plaintiff did suggest that the New Building Society contributed to the Kara accounts being over-drawn, in that withdrawals were made against cheques that were not cleared. Mr Chalimba conceded that it was not proper to allow withdrawals against uncleared cheques. What used to happen is this: Mr Yusuf Kara would draw cheques on either the National Bank of Malawi or Commercial Bank of Malawi, payable to the New Building Society or O Kara or H Kara. These cheques would be deposited into the accounts of Y Kara, O Kara and H Kara at the New Building Society. Before these cheques were cleared, withdrawals were allowed at the New Building Society. The New Building Society allowed the withdrawals by issuing cheques to these account holders. Mr Chalimba conceded that in the normal course of events before issuing the cheques, the New Building Society would first have satisfied itself that there was sufficient money in the Kara accounts. Most of the New Building Society cheques were signed by Mr Chalimba and the plaintiff. A few were signed by Mr Likaku, the then Assistant General Manager. Each cheque carried two signatures. The plaintiff's contention was that he could not be held responsible for whatever followed, because it was the defendant itself allowing withdrawals against accounts that had no money. This argument is attractive, but I do not agree. The plaintiff was the accountant and it was squarely his duty to do the ground work to see that there was sufficient money in the accounts. This he did not do. The cheques on which the plaintiff himself appended his signature amounted to K18,520.00. When subsequently the cheques drawn by Y Kara were dishonoured, the plaintiff did not report to Management and he took no steps to recover the money lost on the over-drawn accounts amounting to K35,100.00.

On these facts, I think that the defendant, through its General Manager, was entitled to dismiss the plaintiff summarily. It is my view that failure to report the dishonoured cheques, which ammounted to over K35,100.00, and then failure to try and make recovery of the lost monies, did amount to a serious act of misconduct. In the circumstances of this case, the defendant was entitled to lose trust in the plaintiff. Besides, rule 18, which gave the General Manager discretion to dismiss summarily, there is an abundance of case authority to the effect that an employer is entitlted to dismiss where an employee does anything which is incompatible with the due or faithful discharge of his duty to the employer. I can only cite the cases of George Nyirenda -v- Lujeri Tea Estates Ltd, Civil Cause No. 507 of 1981 (unreported), and Wasili -v- Clan Transport Ltd, Civil cause No. 506 of 1981 (unreported). The plaintiff's claim for wrongful dismissal, therefore, fails.

In the result, I dismiss all the various heads of damages that followed the claim for wrongful dismissal as detailed in paragraph 6 of the statement of claim. Perhaps let me say this. Even if I had found that the plaintiff was wrongfully dismissed, I was not going to award him salary during the period of suspension; three months' salary in lieu of notice; and personal pension contribution, because these were already paid to him as a result of a direction from the Board of Directors. However, the plaintiff did not actually receive the money, as it was credited to his loans with his employer. I was not going to award him 12 years' salary, because his damages would be limited to one months' salary, in terms of the conditions of service.

It is common case that on 16th March, 1983 the plaintiff obtained a loan in the sum of K5,000.00 to enable him purchase a motor vehicle, Registration Number BE 232. The car loan agreement was tendered as Ex.P16. At the time of his dismissal he had not finished repaying the loan. The defendant then seized the car and sold it at K3,600.00. A sum of K157.90 was spent on minor repairs and advertisement. The net proceeds were credited to the plaintiff's indebtedness with the defendant. It is contended by the plaintiff that the defendant's seizure and sale of the car were unlawful, for the car loan agreement did not empower the defendant to do so. It was the plaintiff's evidence that he was forced into writing a letter - Ex.D11 - authorising the defendant to sell the car. He said he wrote the letter in the Assistant General Manager's office under threats that if he did not give the authority to sell, the defendant would sell the plaintiff's houses which were under mortgage to it. He told the Court that because he wanted to keep his houses, he had no choice but to write the letter, but he refused to surrender the car keys which he tendered in evidence. Mr Chalimba's evidence on the matter was that the plaintiff wrote the letter voluntarily. In cross-examination, he conceded that it was very necessary to have

the letter of authority from the plaintiff, for without such a letter the defendant could not pass ownership to the purchaser.

On the evidence before me, I am satisifed that the plaintiff did not write the letter of authority voluntarily. If he did, he would not have retained the car keys. The evidence shows that the defendant was out to have the letter at all costs. My finding is that the letter was written under threats. The car was, therefore, seized and sold against the plaintiff's will. But the real question is, was the defendant's action contrary to the car loan agreement? I think so. The car loan agreement, as it stands, did not give the defendant the right to seize and sell the car. The plaintiff had absolute ownership of the car and the defendant had not reserved to itself any proprietary right in the car, as can be seen from this relevant part of the agreement:

> ".....Should I leave the employ of the New Building Society before repayment of the loan, I asuthorise the balance outstanding be deducted from all or any monies due to me....."

This passage did not authorise the defendant to seize and sell the car. The plaintiff was to keep the car which was his property and the balance was to be deducted from all or any monies due to him. True, the plaintiff was indebted to the defendant, but he had two houses mortgaged to the defendant, whose rent went direct to the defendant. And as will be clear later in this judgment, the defendant could very well have recovered, the balance on the car loan from rentals just as other loans were recovered. The manner in which the car was seized seems to suggest that it was intended to punish the plaintiff. The defendant's action constituted conversion. It matters not that the net proceeds were credited to the plaintiff's indebtedness. At paragraph 1080, page 673 of Clerk & Lindsell on Torts, Fourteenth Edition, there is this quotation:

> "If a man takes my horse and redelivers it to me nevertheless I may have an action against him, for this is a conversion, and the redelivery is no bar to the action but shall be merely a mitigation of damages."

It is unfortunate that I was not able to trace the source of this quotation, but it is my view that it represents the law.

Having held the defendant liable in conversion, I now come to the itchy question of damages. The plaintiff has pleaded that he suffered loss to the extent of K5,000.00, representing the value of the car. There is no claim for loss of use. The normal measure of damages for conversion is the market value of the goods converted. The

car was sold at K3,600.00. I do not agree with the plaintiff that the vehicle was sold at an under-value. That car was a Toyota and it was valued at K1,700.00 by Mobile Motors Limited, who are the franchise holders of Toyota motor vehicles. The defendant was able to sell it at more than double that valuation. It cannot, therefore, be said that it was sold at an under-value. Ordinarily, the plaintiff would be entitled to the K3,600.00, less K157.90. But as has already been said, the plaintiff had this amount credited to his loans. The plaintiff was claiming the value of the car knowing fully well that the proceeds of sale had been credited to his loans. In the result, I think that nominal damages would be justified simply to underscore the fact that the defendant committed a legal wrong. "A conversion cannot be purged and if a defendant is guilty of conversion, he must pay some damages" per Branwell, LJ in Hiort -v- London and North Western Railway Co. (1879) 4 Ex.D.188. In the circumstances, I award the plaintiff 10t.

Finally, the plaintiff is claiming the sum of K11,532.00, being excess rentals the defendant received on his two properties. As has already been shown above, the plaintiff gave a detailed breakdown as to how he arrived at this figure. I need not repeat what has already been narrated above. Suffice to say that the defendant did not seriously dispute the detailed breakdown as given by the plaintiff. In its defence, at paragraph 22, the defendant merely denied that it does not owe this amount or at all. In his evidence, Mr Chalimba admitted that on both properties more rent was paid than repayments. It was agreed between the parties that rent be paid direct to the defendant and any monies over and above monthly repayments as fixed by the defendant was to be paid to the plaintiff. The plaintiff's case was that such excesses were not paid to him. Mr Chalimba's explanation was that the excess were used on the mortgages. When cross-examined, he admitted that all rentals had been paid. I think that Mr Chalimba's explanation that excesses went to cover the arrears was wholy unsatisfactory. Rentals were paid quarterly so that there were bound to be arrears for the first two months of each quarter. But at the end of the quarter rent would be paid for the full three months and then there would be excesses in any given quarter after clearing arrears for two months. In whatever manner the rentals were paid, there was bound to be an accumulation of excesses, since all the rentals had been paid. On this issue Mr Chalimba was torn to pieces and when pressed he conceded that he could not analyse how excesses were used. When Mr Nakanga took the witness through the figures, he agreed that there were rental excesses over K10,000.00, but could not explain how this money was applied. All he said was that the plaintiff had no excess account. For a long time, the plaintiff had been pressing to have excess rentals paid to him, but to no avail. At his request, in April, 1987, the defendant paid K900.00 to the City of Blantyre as arrears of city rates. The plaintiff undertook to pay K900.00 quarterly until all

the city rates arrears were paid, but there is no evidence that such quarterly payments were made.

After carefuly considering all the evidence on the matter, I find that the plaintiff's case for excess rentals has been made out. Out of the K11,532.00 claimed will be deducted K1,939.76, representing K900.00 city rates and K1,039.76 balance on personal loans which were paid out of excess rentals. I, therefore, enter judgement for the plaintiff in the sum of K9,592.24.

I now come to costs. The defendant will have costs on the claim for wrongful dismissal which it successfully defended. The plaintiff will have costs on the claim for excess rentals on which he has succeeded. The question of costs on the claim for conversion of motor car has really exercised my mind. Normally, costs follow the event, but the award of costs is in the discretion of the Judge, as Viscount Cave, LC. said in Donald Campbell -v- Pollak, (1927) AC. 732:

> "this discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case."

In the instant case, the plaintiff has been awarded 10t nominal damages. The question that I must determine is: in the due exercise of my discretion, should I award him costs or deprive him of those costs? The question of costs where the plaintiff has been awarded nominal charges was ably surveyed by Devlin, J.in Anglo-Cyprian Agencies -v- Paphos (1951) 1 All ER. 873, at page 874, in the following words, which I find to be highly instructive:

> "No doubt the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a 'successful' plaintiff. In certain cases he may be, e.g., where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case."

When the facts of the present case are examined, I find that the plaintiff was not seeking to determine or protect a legal right, but he was claiming the value of the car, knowing fully well that he had the full benefit of the value of that car, in that the proceeds of sale were credited to his loans. I find such litigation to be unnecessary and it is my view that to award the plaintiff costs would only serve to encourage unnecessary litigation. I, therefore, order the plaintiff to pay the costs of this claim.

PRONOUNCED in open Court this 3rd day of April, 1992, at Blantyre.

M P Mkandawire
JUDGE