IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 409 OF 1988

BETWEEN:

A T STOLA.....PLAINTIFF

- and -

MALAWI BOOK SERVICE.....DEFENDANT

CORAM: MTEGHA, J.
Zimba, of Counsel, for the Plaintiff
Nyirenda, of Counsel, for the Defendant
Mthukane, Official Interpreter
Phiri, Senior Court Reporter

J U D G M E N T

The plaintiff in this action is claiming the sum of K4,982.01, being damages for wrongful dismissal and pension fund contribution. According to the statement of claim, the plaintiff is claiming loss of salary from 26th March 1987 to 25th April 1988 amounting to K3,294.24, and a sum amounting to K1,434.44 representing the employer's contribution to a pension fund scheme.

The defendant has denied liability. The defendant has, however, pleaded that the money due under the pension scheme has been paid in full.

On the other hand, the defendant has counter-claimed the sum of K13,680.00, representing the loss it suffered through the loss of exercise books as a result of the plaintiff's negligence.

It is common ground that the plaintiff was employed as a clerical officer by the defendant since November 1976. He was initially based at Blantyre Head Office and worked in various departments, including the main warehouse. He rose in his job and in 1986, he was based at the defendant's shop at Mzuzu as Shop Assistant. It is also common ground that when the defendant was despatching goods to its various shops in the country the procedure was that the goods would be despatched by the defendant's vehicle to the relevant shop. When despatching the goods, the driver of the vehicle that was carrying the goods would also carry two copies of Packing Slip and two copies of invoice. After verification, the recipient would sign the copies, returning the duplicate copies to the driver. After receipt of the goods, they were

entered in the goods received book and taken into the warehouse. When the goods were needed by the shop, the Manager would issue a requisition to the Warehouse Supervisor, who would issue him with the goods to sell in the shop. It is also common ground that on or about the 23rd of May 1986, a consignment of exercise books worth K13,680.00 was received at the Mzuzu shop. The person actually receiving these exercise books was the plaintiff, since he signed the packing slip and the Manager signed the invoice. The duplicates were returned.

It was the plaintiff's evidence that after he verified the goods and ascertained that they tallied, he signed the packing slip. The invoice was passed on to the Shop Manager, who verified the quantities and signed the invoice. It was his evidence that if the goods were destined for the warehouse, they were sent there; if they were destined for the bulk store, they were sent there, and if they were for the shop, they were displayed in the shop. In this particular case, the goods were displayed in the shop for sale. I will pause here and look at the evidence for the defence.

It was the evidence of both Mr Mvula and Mr Nyirenda, DW1 and DW2 respectively, that the goods were sent to Mzuzu by their van, accompanied by the packing slip. They expect that someone in Mzuzu would acknowledge receipt of the goods by signing the packing slip, a copy of which is returned to them, and whenever the packing slip has been signed, it means that the person signing has taken possession of the goods. Mr Mvula, who is Assistant Trade Manager based at the Head Office, further said that the goods were supposed to be entered on a card, called "Bin Card" and were also supposed to be entered in a "goods received" book and placed in the warehouse and issues out of the warehouse were supposed to be indicated on the card and goods received book. Both these witnesses said that the purpose of entering the goods into the relevant books was to trace the movement of the goods. They went on to say that in the instant case the exercise books were sent to Mzuzu shop and they received a copy of the packing slip indicating that Mzuzu had received the exercise books; but later on Mzuzu people said they did not receive them.

The evidence of PW2, Sam Robert Theulo Phiri, who in May 1986 was Assistant Branch Manager at Mzuzu, was that sometime in 1986 there was stock-taking at Mzuzu shop. They had a shortage of about K22,000.00 and in trying to find out how the shortage came about, the Manager, Mr Banda, went through the books and came across an invoice for exercise books. Banda said he did not receive these exercise books. However, it was his evidence that after signing the packing slip, an invoice bearing the value of the goods is given to the Manager, who is supposed to verify the quantity and price, and it was the Manager who entered the goods, which

meant that he must have seen the goods. Further, it was his evidence that the goods, when received from Blantyre, would go either to the warehouse or into the shop and not into the warehouse at all times.

This piece of evidence is, as I have pointed out earlier, corroborated by that of the plaintiff. He further went on to say that the fact that the exercise books were missing, was reported to Police, who arrested him and placed him on remand; and having stayed on remand for three months, he was taken to court on criminal charges, but at the end of the day, he was acquitted. When he was acquitted, he went back to ask for his job and pay. Meanwhile, on 26th March 1987, the plaintiff was interdicted in these terms:

"Dear Sir

INTERDICTION

On 20th May, 1986 Blantyre Warehouse sent 100 packets of 80 page and 100 packets of 40 page exercise books valued at K13,680-00 to Mzuzu Shop, receipt of which you acknowledged by signing packing slip No. 771.

During the mid-year stocktaking there was a shortage and it was discovered that the books were nowhere to be seen. You were asked to give an explanation, but up to now there has not been a valid explanation as to the whereabouts of the exercise books.

In view of this, you are being interdicted from duties without pay with effect from 26th March, 1987.

I further wish to advise that should you fail to trace the exercise books, Management will recommend to the Board that you be dismissed from Malawi Book Service.

Yours faithfully

M.P.H. Longwe
for: GENERAL MANAGER"

When he went back to ask for his pay and to be reinstated after his acquittal of criminal charges by the Court, his services were terminated by a letter dated 25th April 1988, in these terms:

"Dear Sir

TERMINATION OF SERVICES

At the last Board Meeting it was resolved that, although you were acquitted in a court of law on technicality, your services with Malawi Book Service be terminated with effect from 26th March, 1987 because of negligence and inefficiency.

The Assistant Accountant (I) will work out what is due to you from your pension contribution after taking into consideration what you owe the organisation.

Yours faithfully

M.P.H. Longwe
GENERAL MANAGER"

It should also be noted that when the plaintiff was interdicted he wrote to the General Manager of Malawi Book Service on 27th March 1987. In his letter he tried to explain what actually happened. Unfortunately, the letter is full of hearsay, so that I have paid very little attention to it. However, what comes out clearly is that the disappearance of the exercise books had puzzled all the staff at Mzuzu shop, and that they could not clearly pinpoint at anybody who could have caused the disappearance of the exercise books.

What comes out clearly from this evidence is that the exercise books worth K13,680.00 had disappeared. It is also quite clear that the plaintiff signed for the receipt of these exercise books. It is also clear that although all goods which were sent to the defendant's shops were to be consigned to the warehouse from where they could be drawn by a requisition, at Mzuzu shop there was a practice that the goods, when received, could be displayed in the shop straightaway when necessary.

The first point which Mr Nyirenda has taken up is that according to the defendant's witnesses, the plaintiff had no discretion to take the goods into the shop before they were recorded into the warehouse, since this was a direct breach of the standing instructions, and this omission led to the failure to trace the whereabouts of the exercise books, and, despite the fact that the plaintiff was given time to find them, he failed to do so. The defendant was then entitled to dismiss the plaintiff, or to suspend him. If I take the view that the plaintiff did not follow the instructions to be followed on receipt of goods, the defendant was entitled to dismiss him summarily. Again, even if the plaintiff displayed the goods in the shop, he failed to account for them. I think that from whatever angle one looks at the disappearance of the exercise books, the plaintiff was to blame and the defendant was entitled to dismiss him. The defendant could even have dismissed the Shop Manager, for he too was negligent. There was, therefore, no wrongful dismissal on the part of the defendant.

I will now have to consider whether the dismissal could be backdated from the date when the plaintiff was suspended. It is trite law that dismissal from employment cannot be backdated.

The plaintiff is claiming wages accrued during the period when he was under suspension. He was suspended on 26th March 1987 without pay, and he was dismissed on 25th April 1988. Mr Nyirenda, on behalf of the defendant, has submitted that during the period of suspension, the whole contract of employment is suspended; there is no obligation on the part of the employer to pay wages; similarly, there is no obligation on the part of the employee to render his services - he cited the case of **Celanese Bird -v- British Celanese Ltd (1945) K.B. 336**. In that case, **Scott, L.J.**, had this to say at page 341:

> "The clause operates in accordance with its terms; the whole contract is suspended, in the sense that the operation of the mutual obligations of both parties is suspended; the workman ceases to be under any present duty to work, and the employer ceases to be under any consequential duty to pay."

Mr Nyirenda has also relied on the case of **Greyson H Mkwapatira -v- Malawi Railways Ltd, MSCA Civil App. No. 5 of 1978** where **Skinner, C.J.**, as he was then, stated:

> "Where, in a contract of employment, there is a term, such as the present one, empowering the employer to suspend the employee from duty pending investigation of his conduct, the effect is that, when the employee is suspended from duty, the whole contract is suspended; the operation of the mutual obligations of the parties is suspended. The employee ceases to be under duty to pay his wages other than as specified in the terms...."

The same principle was upheld in the case of **P F Gwembere -v- Malawi Railways Ltd., MSCA Civil App. No. 7 of 1979**. I agree that this is the position of the law; but it applies only where there is provision for suspension in the contract of employment. In the cases of **Mkwapatira** and **Gwembere**, which are cited above, there were specific provisions in the contracts of employment, namely, Clause 6 of the Disciplinary Code, which read as follows:

> "Where an employee is suspected of having committed an offence which seriously affects the safety or security of trains, the working of the Railways or property or cash may be suspended from duty on half pay...."

Similarly, in the case of **Bird -v- British Celanese Ltd**, the Court was interpreting a provision of the contract of employment which stated that for various transgressions including refusal to obey an order, the employer was entitled 'temporarily to suspend the workman from his employment'.

The question which I have to determine here, therefore, is whether, in the present case, there was a provision in the contract of employment which entitled the defendant to suspend the plaintiff without pay, or even the provision for mere suspension. Mr Nyirenda has submitted that the plaintiff had conceded that he could be suspended. I do not, with respect, agree with this submission. I can see nothing of the sort, both in the pleadings and in the evidence that was adduced before me. The proper thing, if Mr Nyirenda was relying on this, would have been that a copy of the conditions of service should have been tendered in Court, or at least some evidence should have been adduced. The position is this, that, where there is a contract of employment, and there is no provision in that contract for the suspension of an employee on commission of various transgressions, an employer is not entitled to suspend; he is, of course, entitled to dismiss an employee. He is, however, obliged to pay his employee up to the date of dismissal. For these reasons, I reject Mr Nyirenda's argument and instead I award the plaintiff the sum of K3,294.24 as loss of salary from 26th March 1987 to 25th April 1988.

The plaintiff has also claimed the sum of K1,434.44, being loss of employer's Pension Fund contribution. I decline to award this sum, for the reason that there is no basis for the award. The pleadings have not disclosed any obligation or agreement that the defendant was supposed to contribute to the pension fund, or indeed, to pay the contributions to the plaintiff in a case where he is dismissed.

I also decline the award of K253.33 as pay in lieu of notice. It is quite clear that the defendant was entitled to summarily dismiss the plaintiff in the present circumstances.

However, this is not the end of the matter. The defendant has counter-claimed the sum of K13,680.00 as loss suffered by the defendant due to the negligence of the plaintiff. Mr Nyirenda has submitted that the plaintiff was negligent, in that he signed for the delivery of exercise books without ensuring that the exercise books had been physically delivered into the defendant's shop; that he failed to ensure the receipt of the exercise books was properly entered in the defendant's books and stock cards, and that he failed to ensure that the stocks issued to the shop were properly recorded on the stock cards. It was Mr Nyirenda's submission that according to the evidence, all goods, whether they were in small or large quantities, were to be consigned to the warehouse, and whether the plaintiff had discretion or not, that did not relieve him of his obligation to account for the goods and it was imperative for the plaintiff to maintain the records in order to enable Management to trace the goods. He was, therefore, negligent

and the defendant is entitled to counter-claim in negligence. He cited to me the case of **Lister -v- Romford Ice and Cold Storage Co. Ltd. (1957) AC.555**. I will revert to this case at a later stage. I would, however, consider the question of negligence.

It is not disputed that the plaintiff was a Shop Assistant. It is also not in dispute that at times he assisted in receiving the goods from Head Office and signing for the receipt thereof. He was supposed to enter them in the goods received book; but he did not; he was supposed to take the goods to the warehouse from where they would be issued into the shop. In the instant case he did not do this, but instead he took the goods to the shop without proper documentation. Whether the goods were sold or not, it appears to me, as I have held earlier on, that the plaintiff was negligent and the defendant was entitled to dismiss him because of this omission. The counter-claim is based upon this negligence.

The position of the law regarding an employee's liability to his employer for negligence is this: If an employee is employed by the employer on the understanding that the employee is skilled to perform particular duties, there is an implied term in the contract of employment that the employee will perform the duties with reasonable care. If it transpires that the employee has committed this breach of his implied duty of care, the employer is entitled to recover in respect of that damage if the employer suffers damage. This was, in effect, the ratio **decidendi** in the case of **Lister -v- Romford Ice and Cold Storage Co. Ltd.** cited to me by Mr Nyirenda. The headnote to that case states:

> "A lorry driver, employed by a company, took his father with him as a mate. In backing the lorry he injured his father, who in an action against the company, recovered damages in respect of the driver's negligent act. The company brought an action against the driver claiming, as joint tortfeasor, it was entitled (1) to contributions from him under the provisions of section 6 of the Law Reform (Married Women on Tortfeasors) Act, 1935 and (2) to damages for breach of an implied term in his contract of service that he would use reasonable skill and care in driving....Held, that the driver was under a contractual obligation of care to his employers in the performance of his duty as a driver...the company was entitled to recover from the driver damages for breach of that contractual obligation...."

Viscount Simonds had this to say in this case:

> "It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The position of law stated by **Willes, J. in Herner -v- Cornelius (1853 5 C.B. (NS) 236, 246)** has never been questioned: 'When a skilled labourer', he said, 'artizan or artist is employed, there is on his part an implied warranty that he is reasonably competent to the task he undertakes - **Spoundes peritiam artis.** Thus if an apothecary, a watchmaker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts....An express promise or express representation in the particular case is not necessary'. I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry, which, driven without care, may become an engine of destruction and involve his master in very grave liability...."

Again, it is well-settled that an employer will not be entitled to any indemnity or damages from the employee if at the time when the employee's alleged breach of his duty of care took place when the employee was being employed on duties other than those in which he professed to be skilled at the time of his engagement; or if the negligence of the employer or of some other and senior employee of his has contributed to the damage. This was the position in the case of **Harvey -v- R G O'Deel Ltd (1958) 2 Q.B. 78.**

In that case the facts were that the plaintiff and one, Galway, were employed and engaged on some repair works at Hurley on behalf of the defendants. Galway, who was a storekeeper, owned a motor-cycle combination and on many occasions he used this motor-cycle for the defendants' business, paying his own petrol, but when he used it for the defendants' business he received a travel allowance; he was also paid, just like other workmen when travelling out; they were paid for travelling time and also time for meals if they were out for the whole day. When Galway was instructed to go to Hurley he was told to take the plaintiff, and after working on the repair works it became necessary for them to go into Maidenhead to get some more tools and materials and to have a meal. They went into Maidenhead, and on their way back, Galway's motor-cycle was in collision with a motor car. Galway died, but the plaintiff was injured. The accident was due in part to Galway's negligence. The plaintiff sued the defendants for damages. It was argued, on behalf of the defendants, **inter alia**, that Galway had impliedly, by making his motor-cycle combination available for his employers' business, agreed to indemnify them if he committed an act of negligence. **McNair, J.** had this to say at p.106:

> "Galway was engaged and employed by the first defendants as a storekeeper; as a concession to the first defendants he from time to time used his motor-cycle on their business and was so using it at the time of accident. I find it difficult to see on what grounds of justice and reason I should hold that by making his motor-cycle combination available for his employers' business on a particular occasion he should be held in law to have impliedly agreed to indemnify them if he committed a casual act of negligence."

In the instant case, can it be said that there was an implied term of contract that the plaintiff would indemnify the defendant or make good of any loss caused by shortage due to his negligence? I do not think so. The plaintiff was employed as a Shop Assistant, but from time to time he was detailed to do the work of a receiving clerk or warehouse supervisor. Such implied term could not have arisen.

I have earlier on held that the plaintiff was negligent in not complying with the normal procedure to be followed on receipt of goods. But there is also evidence that the Shop or Branch Manager was also negligent. He did not check to verify if the goods had been received or put into the warehouse, so that the loss, if any, was also contributed to by the defendant's senior employees. In **Jones -v- Manchester Corporation and Others (1952) 2 All ER 125**, it was held that an employer is not entitled to an indemnity from an employee if he has himself contributed to the damage done by the employee or bears some responsibility for it or if the negligence of some senior employee has contributed to the damage.

In the present case, the loss of the exercise books, on the evidence, cannot be attributed to the plaintiff's negligence only. Neither did the plaintiff profess to be a skilled employee so that this Court can imply a duty of care.

For these reasons, the counter-claim must fail. I dismiss it.

In the circumstances, I enter judgment for the plaintiff in the sum of K3,294.24 and costs for this action.

PRONOUNCED in open Court this 11th day of March 1993, at Bantyre.

H M Mtegha
JUDGE