



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 941 OF 1992

BETWEEN:

A MTIMKHULU.....PLAINTIFF

- and -

NORSE INTERNATIONAL LTD.....DEFENDANT

CORAM:

MTEGHA, J

Mhango, Counsel for the plaintiff

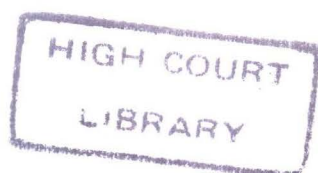
Nkhowani, Counsel for the defendant

Mrs Tembo (Mrs), Official Interpreter

Magwira (Miss), Recording Officer

J U D G M E N T

The plaintiff is suing the defendant to recover damages for breach of
a contract of employment in the form of terminal benefits.



The plaintiff was employed by the defendant as Personnel Officer in 1978. His salary was rising as the years went by. On 17th August 1990, he wrote to the defendant saying he wanted to retire. He said, in that letter:

“On 22nd September 1990 I would have completed 12 years faithful service with Norse International Limited, Malawi. I therefore give notice to honourably retire on grounds of old age and to make way for an energetic young man to take over which will indeed be an asset...”

According to his evidence, after he wrote the letter, that is when he was in Mzuzu, Mr. Franzel, the Managing Director, called him to Blantyre to discuss his retirement. It was agreed that he should continue his work for another year to clear some files, especially those files that were with Savjani and Company and that at the same time he should discuss his terminal benefits with Savjani and Company. He discussed this issue with

Mr. Mbendera, of Savjani and Company. At that time the defendant had no conditions of service in place. After discussing with Mr Mbendera, Mr. Mbendera gave him a note on which he wrote that he could get either severance pay or an annuity. He took that note and handed it to Mr. Franzel who said that he should leave it with him. The plaintiff continued with his work until 20th December 1991. This was his last day of work, and he went to take leave of Mr. Franzel. He was paid K3,000.00 and his salary for December. The K3,000.00 was specified as the year-end bonus. As regards his terminal benefits, he was advised to see the Ministry of Labour, and indeed, acting on this advice, he went to see them. They wrote a letter to Mr. Franzel dated 9th January 1992 (Exh.4), in which they partly stated:

“It is within his rights and upon acceptance that the Company could have considered paying him such annuity regarded as Gratuity, Ex-Gratia or the usual severance pay since your Terms and Conditions of Service, if any at all, do not stipulate

any financial contributory awards for your senior staff members....”

Mr. Franzel did not reply to this letter and two reminders, dated 6th February and 4th March 1992 were sent to Mr Franzel, who replied on 6th March 1992. He stated in that letter:

“Would you kindly advise by return, what you would consider, under the circumstances, to be a fair and reasonable ex-gratia payment.”

In reply to this letter, the Regional Labour Officer advised that a fair and reasonable ex-gratia payment would be two weeks pay for each completed year. Acting , supposedly, on this letter, Mr. Franzel computed the figures to be K3,721.82 and out of this sum he deducted the sum of K3,000.00 which the plaintiff had been paid as bonus, and a cheque of

K491.20 was paid to the plaintiff after tax. Naturally, the plaintiff was not happy and he went back to the Labour Office. The Labour Office wrote to the defendant on 26th March 1992. The Regional Labour Officer stated as follows:

“What I had requested you to do as a guideline has been misinterpreted. As you may be aware Mr A. M. Mtimukhulu was earning a salary of K750.00 per month plus K300.00 allowances making a total wage of K1,050.00 inclusive and your computations are not compatible with what you should have used as a formulae in your computations.

Severance pay is normally done as follows:-

$$1st\ 5years = K1050 \times \frac{3}{100} \times \frac{12}{1} \times \frac{5}{1} = K1,890.00$$

$$100 \quad 1 \quad 1$$

6

$$4 \text{ years} = K1050 \times \frac{5}{100} \times \frac{12}{1} \times \frac{4}{1} = K2,520.00$$

$$\frac{100}{1} \times \frac{1}{1}$$

$$4 \text{ years} = K1050 \times \frac{6}{100} \times \frac{12}{1} \times \frac{4}{1} = K3,024.00$$

$$\frac{100}{1} \times \frac{1}{1}$$

$$\text{Total} = K7,464.00$$

$$\text{Leave pay} = K \underline{407.97}$$

$$\text{Total} = K7,871.97$$

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The amount in question should be paid in a lump sum and does not attract any deductions whatsoever....”

When the plaintiff took this letter to the defendant, Mr. Franzel who appeared to have been fed up, told him to go anywhere he wanted. The plaintiff went away and decided to see his lawyers. The plaintiff's lawyers looked at the issue and wrote to the defendant that since the conditions of service were not in place, and since the defendant had agreed to treat the severance pay as the basis of settlement, the recomputed figures should be as follows:

“(A) On the First 5 years

$$\underline{\text{K12600}} \times 3 \text{ i.e. } \text{K378.00} \times 5 = \text{K1890.00}$$

(B) On the next 5 years

$$\frac{\text{K12600} \times 5 \text{ i.e. K630.00} \times 5}{100} = \text{K3150.00}$$

100

(C) On the last 4 years

$$\frac{\text{K12600} \times 4 \text{ i.e. K756.00} \times 4}{100} = \text{K3024.00}$$

100

$$\text{TOTAL} = \text{K8064.00''}$$

When the defendant got this letter, Mr. Franzel wrote back on 30th March 1992, stating that the plaintiff had resigned from his employment on his own volition and that he was not entitled to payment of any sort, except his monthly salary and leave pay and that any other payment was

entirely left to the discretion of the management. It was the plaintiff's evidence that he never resigned from his job, but that he lawfully retired, and he wrote a letter to that effect.

Mr. Franzel gave evidence on behalf of the defendant. He said that the plaintiff worked for the company as Personnel Officer from 1978 and on 17th August 1990, the plaintiff wrote a letter requesting to resign from the Company. He accepted the resignation and requested the plaintiff to stay on until December 1991. The plaintiff agreed and in December 1991 he left and he was paid his monthly salary, leave pay and a bonus of K3,000.00. As far as the defendant is concerned, the plaintiff does not deserve any more payment.

At the end of the case for the defence, both counsel informed the Court that they would prefer to submit written submissions by 15th July

1998, but as I am writing this judgment, I have not received written submissions from the plaintiff's counsel.

At this juncture, it is important, in my view, to state what facts of the case have come out from the evidence that are not in serious dispute. There is no doubt that the plaintiff was employed from 1978 to 1991. He, therefore, had worked for the defendant for a period of 13 years. When he was paid his terminal benefits at the end of his employment, he noticed that his terminal benefits were much less than what he had expected; as a result, he went to complain to the Managing Director, who, as the evidence shows, sent him to Savjani and Company, where Mr. Mbendera advised that in the absence of written conditions of service, severance pay was the proper one. The defendant refused to comply with that advice and told the plaintiff to go anywhere he wanted; that is why the plaintiff went to the Ministry of Labour, who also advised that in the circumstances severance pay was the best and they gave the defendant the formulae to be applied.

When the Ministry of Labour wrote to the defendant giving them the formulae to be used in calculating the benefits, the defendant recalculated the benefits and a further cheque of K491.20 was made in his favour in addition to what he had received earlier. Up to this point, there is no dispute, and I take it that the defendant had accepted the advice and formulae which was given to them by the Ministry of Labour. But in calculating the figures the defendant used a different formulae and not that which was advised by the Ministry of Labour. If the defendant had applied the formulae which was advised by the Ministry of Labour, the matter would have ended there and the remaining dispute would have been the determination as to whether the K3,000.00 was paid gratuitously at the discretion of the defendant or it was the end-of-the year bonus.

The other point which I find as a fact is that the K3,000.00 which was included in both calculations, which was termed as gratuitous payment by the defendant, and was paid to the plaintiff as part of his terminal benefits

at this juncture, was the end-of-the year bonus. It had nothing to do with the plaintiff's terminal benefits. This amount was paid to the plaintiff as bonus. The evidence before me clearly shows that at the end of each year members of staff were paid a **bonus**. The amount varied according to how the company performed that particular year. It also depended upon the grade and performance of the employees. I will not, therefore, consider this amount as part of the terminal benefits which the plaintiff received.

The other point which I further find as a fact is that the plaintiff had requested to retire from the defendant's employment and after some discussions with Mr. Franzel, it was agreed that the plaintiff should retire at the end of 1991, instead of September 1990, that is why he was in the defendant's service for thirteen years, and not fourteen years, as per statement of claim. It is not correct, therefore, as Mr. Franzel would like the Court to believe, that the plaintiff resigned on his own volition. Mr.

Franzel was, when he wrote that the plaintiff had resigned on his own volition, deliberately trying to mislead the plaintiff's lawyers.

The position, therefore, is that the plaintiff had worked for the plaintiff for thirteen years; he retired and got his end-of-the year bonus of K3,000.00. The only issue to be determined is whether he is entitled to the other monies which he has claimed.

It has been submitted by the defendant's counsel that the contract of employment had come to an end by the 19th of December 1992 and when the defendant paid the plaintiff the sum of K3,000.00, leave pay and his monthly salary, the defendant had discharged its contractual obligations. The case of G A Ngosi and Others v. Malawi Railways Ltd., Civil Cause No. 1838 of 1995 was cited to me. I concede that the basic principle in contract is that parties to a contract take on rights and obligations as defined in the contract to the extent necessarily intended by them. Anything outside

the contract would not and cannot constitute any rights and obligations thereunder. As I have already pointed out, the position in the present matter, as far as the K3,000.00 is concerned, is that it is not part of the terminal benefits.

It has been contended by learned counsel for the defendant that by the 19th December 1991 there was no relationship of master and servant because the contract for employment had expired and therefore there was no time when the defendant could have promised the plaintiff any more money in his terminal benefit on a non-existent contract. He went on to submit that there was no offer and acceptance; there was no consideration, and no intention to create legal relations. I do not think that there is a problem here. The dispute arose as to the performance of the contract, and not as to the formation of the contract. It was only when the plaintiff was paid his terminal benefits that the dispute arose. It is quite clear from the evidence that the defendant agreed to pay the plaintiff as advised by the

Labour Office, well before the 19th of December 1991; that is why the terminal benefits were recalculated, but wrongly, in my view, deliberately wrongly calculated by not following the guidelines from the Ministry of Labour. In my view, the legal problems raised by learned counsel do not avail him.

· Having considered the totality of the evidence before me, this is a proper case where the plaintiff must succeed. I enter judgment for the plaintiff in the following amounts: K3,000.00 end-of-the year bonus; one month's salary, holiday grant, plus terminal benefits using the formulae from the Ministry of Labour. This amount, if not agreed upon, should be determined by me in Chambers. I award the costs to the plaintiff.

PRONOUNCED in open Court this *6th* *November* day of ~~October~~, 1998, at

Blantyre.


H M Mtegha

JUDGE