

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 117 OF 1997

BETWEEN:

W. K. SAUKILA.....PLAINTIFF

and

THE NATIONAL INSURANCE CO. LTD.....DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr J. Chirwa, of Counsel for the Plaintiff

Mr P. Chirwa, of Counsel for the Defendant

Mrs Katunga, Official Interpreter/Recording Officer

Kapanda, J.

JUDGMENT

Introduction

On 26th June 1997 the Plaintiff commenced a legal action against the Defendant. In the legal suit commenced, by a writ of summons, the Plaintiff is praying for the following reliefs as shown in the Amended Statement of Claim:-

- (a) A declaration that the determination of the Plaintiff's employment was and is unfair and/or invalid;

- (b) A declaration that the Plaintiff's services were determined without having due regard to the provisions of Section 43 of the Republic of Malawi (Constitution);
- (c) A declaration that the Plaintiff is entitled to damages for loss of his legitimate income expectations up to the normal retirement age of 55 years;
- (d) Damages for breach of contract
- (e) Further, or other relief as the court deems expedient; and
- (f) Costs of this action

The Defendant has joined issues with the Plaintiff on the latter's law suit. This is clear from the pleadings that were exchanged between the Plaintiff and the Defendant. It is necessary that the relevant parts of the said pleadings be set out in this judgment.

Pleadings

The Plaintiff has made the following relevant allegations of fact in his amended statement of claim:-

AMENDED STATEMENT OF CLAIM

- “1. By an agreement made between the parties hereto it was agreed that the Defendant should employ the Plaintiff and the Plaintiff should serve the Defendant as Personnel Officer (Assistant Manager in charge of Personnel matters) with effect from the 27th day of April 1979;
2. By letter dated 6th January 1995 the Defendant appointed the Plaintiff as the Human Resources

Manager responsible to the General Manager of the Defendant for all Administration, Personnel and training matters of the Defendant's operations.

It was an express term of the said agreement that the services of the Plaintiff as a senior staff of the Defendant would be determined only with the approval of the Chairman of the Defendant;

3. The following terms were implied into the said agreement that is to say:-
 - (a) the Plaintiff would have the right to lawful and procedurally fair administrative action which is justifiable in relation to reasons given where his rights, freedoms, legitimate expectations or interests were affected or threatened; and
 - (b) the Plaintiff would be furnished with reasons in writing for administrative action where his rights, freedoms, legitimate expectations or interests were known.
4. The Defendant acted in repudiatory breach of the said express and implied terms in that the Defendant:-

PARTICULARS OF REPUDIATORY BREACH

- (a) by letter dated 5th July 1995 determined the Plaintiff's services without the approval of its Chairman by giving him 6 months' notice.

- (b) with the full knowledge of the Plaintiff's rights, legitimate expectations and interests proceeded to determine his services at the age of 53, that is to say 1 year 1 month 18 days before retirement, without giving him reasons in writing for such an act.
- (c) with the full knowledge of the Plaintiff's rights, legitimate expectations and interests proceeded to determine his services without regard to the procedure for the determination of services provided for in the Defendant's conditions of service.

Further, by acting in this way, the Defendant contravened the provisions of Section 43 of the Republic of Malawi (Constitution).

5. By reason of the wrongful repudiation by the Defendant of the said agreement, the Plaintiff has suffered loss and damage.

PARTICULARS

- (a) Loss of salary between 1st January 1996 to 18th February 1997 at K21,916.00 per month plus subsequent increments;
- (b) Loss of participation in the Defendant's Housing Scheme;
- (c) Loss of fuel allowances;
- (d) Loss of telephone allowances;

- (e) Loss of provision of security guard;
- (f) Loss of free medical services for self and 50% contribution for the other members of the family;
- (g) Loss of Bonus for the year ending December, 1996;
- (h) Loss of membership of the Blantyre Sports Club;
- (i) Loss of membership fees for the Institute of Personnel Management;
- (j) Loss of unlimited reasonable use of Company car up to the date of retirement;
- (k) Pay in lieu of leave days due for 1996; and
- (l) Pay in lieu of leave days for 1 month 18 days”.

The Defendant, on the one hand, has admitted some allegations of facts made in the Plaintiff’s amended statement of claim and on the other it has denied some allegations of fact made by the Plaintiff in his said amended statement of claim. The Defendant has further made its own allegations of fact. The pertinent parts of the Defendant’s Amended Defence are as follows:-

AMENDED DEFENCE

- “2. The defendant admits that the Plaintiff was appointed to the position of Human Resources Manager but denies that it was an express term of any or any agreement that the services of the

Plaintiff were to be terminated with the approval of the Chairman of the Defendant or at all.

3. The Defendant did not employ the Plaintiff upon the alleged express terms referred to in paragraph of the statement of claim. The contract of employment between the Plaintiff was governed by conditions of service and the material clauses in the said conditions of service as follows:-

- 3.1 Clause 1 (d)

In cases of termination and resignation of permanent staff other than for reasons or redundancy the appropriate period of notice required to be given by the company or employee will be as follows:-

- (i) for senior staff - Three calendar months

- 3.2 Clause 12

A pension Scheme subject to its Rules exists for permanent employees. The scheme is contributory, retirement age is 55 years.

- 3.3 Clause 18 (1)

The Company may without necessarily assigning any reason, terminate the service of an employee by giving him proper notice in writing of salary in lieu thereof. For senior staff the notice shall be three months and in case of junior staff it shall be one month.

- 3.4 The Defendant will at the trial rely on the conditions of service for their full terms, purport and effect.

4. On the 5th July 1995 the Defendant gave to the Plaintiff notice of its intention to put to an end to the said Contract of Service.
 - 4.1 The said notice of 5th July 1995 from the Defendant was for more than the required period of 3 months.
 - 4.2 On 19th July 1995 and in his letter of the same date the Plaintiff accepted the notice of the contract of employment and opted for a paid up pension in accordance with the Rules of the Pension Scheme.
 - 4.3 The Plaintiff was paid all his terminal and pension benefits in accordance with the Conditions of Service and the Pension Scheme Rules.
5. The Defendant denies that any or any terms were implied in the Contract of Employment between the Plaintiff and itself as alleged in paragraph 3 of the statement of claim or at all and further denies each and every particular of paragraph 3 of the statement of claim.
6. The Defendant denies the contents of paragraph 5 of the statement of claim. The Defendant will contend that:-
 - 6.2 The Defendant is not a public body and it is therefore denied that Section 43 of the Constitution of Malawi are applicable in the circumstances.
7. The Defendant denies that the termination of the contract of employment was wrongful as alleged in paragraph 5 of the statement of claim or at all.
8. The alleged loss and damages are denied.

9. Save as herein expressly admitted the Defendant denies each and every allegation contained in the statement of claim as if the same were herein set forth and traversed seriatim.”

In the light of the Defendant’s statement of amended defence the parties joined issues on the action and it then became necessary for the parties to offer evidence in support of the allegations of fact each one of them made. I will now proceed to review, in a narrative form, the evidence that was adduced by both parties.

Evidence

It is on record that the Plaintiff testified on his own behalf whilst on the other hand the Defendant called its Managing Director to testify on its behalf. I will start with the testimony of the Plaintiff.

The Plaintiff, W.K. Saukila, has told this court that he was born on 18th February 1942 and worked for the Defendant company from late April 1979 until his employment with the Defendant company was terminated on 31st December 1995. It is his further testimony that at the time his services were terminated he was 53 years 10 months 13 days old and that according to the conditions of service applying to his contract of employment he was to retire at the normal retirement age of 55 years. Thus it has further been put in his evidence that he was to serve 1 year 1 month and 18 days before the said normal retirement age of 55 years.

It is the further evidence of the Plaintiff that in terms of the conditions of service there was need to seek the approval of the Chairman of the Board of Directors of the Defendant company before his services could be terminated. The Plaintiff has further told this court that this was the case because he was a senior member of staff at the time his services were terminated. It is the Plaintiff’s further testimony that in the letter of termination of service there is no indication that such approval was obtained before his services were terminated. In point of fact it has been testified by the Plaintiff that from his recollection the said approval of the Chairman was not sought. The Plaintiff has further testified that the conditions of service

have no provision that the giving of notice, without the approval of the Chairman, would be sufficient to terminate his employment contract with the Defendant company.

The Plaintiff has continued, in his testimony, to state that at the time his employment contract was terminated he was not given reasons for the termination of his services with the Defendant company. It is his further testimony that the termination came as a sense of shock to him because he was to retire at the age of 55 years. The Plaintiff has further told this court that as a result of this premature retirement he has suffered loss in terms of benefits *viz* salary up to the time of the normal retirement age from January 1996 to February 18, 1997; loss of use of the company car; loss of provision of a security guard; loss of bonus scheme; membership to Blantyre Sports Club; loss of participation in MASM membership; loss of provision of fuel at K3000.00 per month; subsidised telephone; loss of earned leave in 1996 and part of 1997; and loss of participation in a housing scheme that was being operated by the Defendant company.

It has been conceded by the Plaintiff, during cross-examination that the notice period that he was given before his services were terminated was generous in that instead of same being three(3) months he was given six(6) months notice and that during that period he enjoyed the benefits that went with his position in the Defendant company.

The foregoing is, in a nutshell, the testimony of the Plaintiff in support of the allegations of fact he has made in his amended statement of claim. As noted earlier the Defendant called one witness to testify on its behalf.

The Defendant called Mr Felix Raphael Mlusu, hereinafter referred to as "DW1", to give evidence on its behalf. It is the sworn testimony of DW1 that he is the Managing Director of the Defendant company and that at the material, when this matter arose, he was the General Manager of the Defendant company. He has further told this court that as General Manager he was allowed to attend board meetings of the Defendant company.

It is his further evidence that on 22nd June 1995 he had the opportunity of attending one of the board meetings where the members of the Board of

Directors of the Defendant company reviewed, *inter alia*, performance of the members of staff. It has further been testified by DW1 that the then Chairman of the said Board of Directors did not attend this particular meeting for one reason or another and that in his place the members of the board elected an Acting Chairman. He further told this court that in the absence of the Chairman it was the normal practice, of the Board of Directors, to elect an Acting Chairman.

DW1 has further testified that one of the resolutions of the meeting was in respect of non-performing members of staff and that the board resolved that those members of staff who were not performing were to be retired. It is DW1's further testimony that he was the one who was to implement the decision of the board in this regard and that among those that were affected by the resolution of the Board of Directors was the Plaintiff. DW1 has further testified that he informed the Plaintiff about this and a letter terminating the Plaintiff's employment with the Defendant company was given to the Plaintiff.

It has further being testified by DW1 that the Plaintiff was given all his terminal benefits in line with the conditions of service and that over and above the said terminal benefits the Defendant company offered for sale to the Plaintiff the company furniture and the car that the latter was using. It is also DW1's evidence that the Defendant was so generous with the Plaintiff in so far the provision of terminal benefits was concerned.

The above is, in a summary, the evidence that was adduced by the Defendant in defence of the Plaintiff's action. Let me now isolate the issues for determination in this matter.

Issues For Determination

In my view, looking at the pleadings and the evidence in this matter, the facts in issue that require this court's determination are as follows:-

- (a) Whether or not the provisions of Section 43 of the Constitution of the Republic of Malawi applied to

the Plaintiff's employment with the Defendant company;

- (b) Whether or not the termination of the Plaintiff's employment was unfair and/or invalid. Alternatively, whether or not the Defendant was entitled to terminate the Plaintiff's employment by giving notice or salary in lieu thereof;
- (c) Whether or not the Plaintiff is entitled to damages for loss of legitimate income expectations up to the normal retirement age of 55 years; and
- (d) Whether or not the Plaintiff is entitled to any damages or at all, for breach of contract.

I wish to observe that although I have isolated the issues for determination in this action I will not specifically refer to them when I am making my findings on them. Further, my decision on these issues will be based on the evidence on record. I wish to note that both Counsel made written submissions which I found to be comprehensive and illuminating.

I will now proceed to make my findings on the said issues for determination in this matter. As noted above I shall not refer to each one of the issues specifically but it is trusted that at the end of this judgment they shall have been determined.

Law and Findings

It is a settled principle of law, and I have reminded myself of same, that in civil actions the standard of proof is on a balance of probabilities. Further, I am mindful of the well known principle of law that he who alleges must prove what he is alleging. These principles of law will therefore be borne in mind when I am deciding on the issues that I have enumerated above.

It has been submitted on behalf of the Plaintiff that according to the applicable conditions of service the termination of the Plaintiff's employment ought to have been done after obtaining the approval, in writing, of the

Defendant's Chairman. The Plaintiff has further contended that the Chairman of the Defendant company did not approve the termination of his employment with the Defendant company. Learned Counsel for the Plaintiff further submits that the conditions of service do not provide for the approval of such termination by an Acting Chairman. It has further been argued on behalf of the Plaintiff that as a matter of fact the Defendant company has not produced a copy of either the resolution of the board or the approval that was allegedly made by the Acting Chairman. It is also the Plaintiff's contention that the Defendant should be estopped from contending that there was an approval of the Acting Chairman because that was not pleaded in its statement of defence.

The Defendant on the other hand has argued that the Plaintiff's contention in this respect is without merit because in the absence of the Chairman there was an Acting Chairman who presided over the meetings of the Board of Directors. It has further been submitted by the Defendant that, in fact, at the material meeting that resolved to terminate the Plaintiff's employment with the Defendant the board appointed an Acting Chairman.

It is my finding that the conditions of service indeed provided that before the Plaintiff's employment could be terminated there was need to obtain the approval of the Chairman. Further, it is my judgment that in as much as the conditions of service do not specifically provide that such approval could be made by an Acting Chairman that of itself did not mean that the board, through an Acting Chairman, could not give such approval. I am of this view because to hold otherwise would have produced an absurd result. Why I am saying so? If I were to agree with learned Counsel for the Plaintiff it would mean that in the event that the Defendant wants to terminate the services of an employee it would not do so even where the Chairman was for one reason or another partially incapacitated or could not avail himself at a meeting for a long period of time. What Counsel for the Plaintiff is saying is tantamount to suggesting that in a case where an employee is found to be in serious breach of the conditions of service he would still be retained as an employee on the ground that the Chairman is partially incapacitated and can not therefore call a meeting to discharge such an employee. That would not make any business sense at all. I further find that the Defendant did not wholly depart from its statement of amended defence when it offered

evidence to the effect that the termination of the Plaintiff's employment was actually done with the approval of the Acting Chairman. The case of **Zgambo -vs- Kasungu Flue Cured Tobacco Authority** 12 MLR 311 is instructive on this point. The evidence offered by the Defendant is not, on the whole, inconsistent with the pleadings. In my view, the evidence is merely a variation, modification or development of the averments in the statement of Amended Defence and the Defendant can not be estopped from adducing this evidence to the effect that the Defendant's Acting Chairman gave the approval regarding the discharging of the Plaintiff from employment. In the premises it is my finding that there is sufficient evidence on record to prove that the Plaintiff's employment was terminated after same was approved by the Acting Chairman of the Defendant Company. The termination of the Plaintiff's employment with the Defendant can not said to have been invalid on the ground of want of approval of the Chairman of the Board of Directors of the Defendant company. A meeting of the Board of Directors of the Defendant company, chaired by the Acting Chairman, decided to terminate the services of the Plaintiff.

It is the Plaintiff's further contention that he was treated unfairly by not being allowed to retire at the normal retirement age. Indeed, it is the Plaintiff's argument that he was treated unfairly by not being allowed to retire as was the case with another employee of the Defendant. The question that comes to my mind is this: was the termination of the Plaintiff's employment unfair thereby entitling him to obtain damages for loss of legitimate income expectations up to the normal retirement age of 55 years? Put in another way was the Plaintiff's employment only to be terminated when he had reached the age of 55 years?

The Defendant has argued that an employer has the right to terminate an employees contract of employment by giving appropriate notice notwithstanding the fact that an employee has not reached the prescribed retirement age as provided for in the conditions of service. Thus it is further submitted on behalf of the Defendant that the Plaintiff was employed on specific terms and his services were terminated following the said terms.

I totally agree with Counsel for the Defendant. It is trite law that an employer has a right to terminate an employment contract without necessarily

waiting for an employee to reach the prescribed retirement age. All that the employer has to do is to give an appropriate notice in compliance with the terms and conditions of service. Instructive case authorities on this point are that of **Harry Chanamuna -vs- Oilcom** C.C. No.2001 of 1996 (unreported) and **Malawi Railways Limited -vs- P.T.K. Nyasulu** MSCA C.A. No. 13 of 1992. In **P.T.K. Nyasulu's** case Kalaile J.A., when delivering the judgment of the Malawi Supreme Court of Appeal, had this to say at page 15 which is very enlightening:-

“---The question is one of construction of each particular contract and, while a contract of permanent and pensionable employment which contains provisions for termination which can be construed as exhaustive can not lawfully be determined otherwise than in accordance with those provisions, and power to determine it on reasonable notice will not be implied, it requires the clearest language to show that a contract of personal service is intended to be a contract for life, or, a contract which is to endure until the employee has qualified for full pension. Furthermore, any such construction will be precluded where the contract gives the parties reciprocal rights of terminating the employment on notice so that the employer can not have supposed that he would have employment for life---”

In the instant case the Plaintiff's employment was governed by a specific contract which provided for termination of employment by either party. The Defendant more than complied with the terms of the contract of employment with regard to notice on termination. I find that there was nothing unfair with the termination of the Plaintiff's employment where the Defendant was more generous in that on terminating the Plaintiff's employment instead of giving the Plaintiff three (3) months notice, as provided for in the conditions of service, the Defendant gave the former six (6) months notice. Further, I find as a fact that there was no breach of the terms of the contract of employment between the Plaintiff and the Defendant when the latter terminated the former's contract of employment.

In both his amended statement of claim, and the evidence adduced in support of both of his allegations of fact, the Plaintiff is alleging that his

services were terminated without the approval of the Chairman and that his said services were terminated without giving him reasons in writing. It is further conceded by the Plaintiff that what the Defendant company did amounts to a breach of Section 43 of the Constitution of the Republic of Malawi. The Plaintiff has further argued that the provisions of the said Section 43 of the Constitution does not apply only to persons employed in the public service. The Plaintiff contends that this clause applies to every person and that it in fact applied to the Plaintiff as a citizen of Malawi who was entitled to a lawful and procedurally fair administrative action.

It has been contended on behalf of the Defendant that Section 43 of the Constitution is not applicable to the instant case because there was no exercise of public power, in the sense of an administrative action, when the Defendant decided to terminate the Plaintiff's employment. It is further submitted by Counsel for the Defendant that the rights mentioned in the said Section 43 of the Constitution can only arise where there is an administrative action taken by a public body. Learned Counsel for the Defendant has further argued that Section 43 of the Constitution does not apply to a pure master and servant relationship because in such situations the rules of natural justice embodied in the said section are not applicable. It is forcefully submitted that the relationship between a master and a servant is governed by the ordinary rules of a private contract and a party to such a contract may sue for breach of contract if his rights are threatened or affected. Counsel for the Defendant thus cited a long list of authorities in support of his arguments. I find that the submissions of learned Counsel for the Defendant represent the position at law and I completely agree with him in that respect. Indeed there are local case authorities that have defined the applicability of the said Section 43 of the Constitution. The said case authorities are those of **Felix Mtwana Mchawi -vs- Minister of Education, Science and Technology** Miscellaneous Civil Cause No 82 of 1997 and **Dr. B.S Chawani -vs- The Attorney General** MSCA C.A. No. 18 of 2000.

In the **Felix Mtwana Mchawi** Kunitsonyo, J., as he then was, made the following observation regarding the said Section 43 of the Constitution:-

“---My attention has been drawn to Section 43 of the Constitution. That section is meant to protect the citizens of this

country from abuse of executive power. In my view it re-states that common law position on the principles of natural justice --” (emphasis added)

The above quoted observation was echoed in the said case of **Dr. B.S. Chawani** cited above. His Lordship Justice Tambala, J.A., on delivering the judgment of the Malawi Supreme Court of Appeal, had this to say at pages 6-7:-

“---We are unable to accept that the purpose or function of Section 43 of the Constitution is to protect an individual’s legitimate expectations. If the section was intended to afford such protection, then clearly, such intention was not stated in the section. Section 43 simply gives a person (i) a right to lawful and fair administrative action and (ii) a right to be given reasons including written reasons which must support an administrative action. It is true that the two rights arise where a person has some right, freedom or interest or legitimate expectation which is likely to be affected by the administrative action, but it seems that is (it) is not the purpose of Section 43 to protect such right, freedom, interest or legitimate expectation. If the section affords such protection, then it does so only indirectly or incidentally. In our view, Section 43 of the Constitution is simply an entrenchment of the principle of natural justice which requires that no person shall be condemned without being heard. The section has of course, stretched the principle a bit to include the requirement to give reasons which must support an administrative action---”

I wholly agree with the dictums of both Kunitsonyo, J. (As he then was) and Tambala, JA. It is clear, in my judgment, that after reading the decisions in these two cases that Section 43 applies to situations where there is an abuse of executive power exercised by the executive arm of government and no more. Further, it is my understanding that the said Section 43 of the Constitution is intended to provide protection to persons from potential arbitrary executive action.

In the present case I doubt very much that there was any executive power, as the term is understood in legal parlance, being exercised by the Defendant at the time it decided to terminate the services of the Plaintiff. I find as a fact that on the decided authorities the acts of the Defendant did not constitute an administrative action as envisaged by Section 43 of the Constitution. This matter before me is a case dealing with a contract of employment between private persons in which there is no element of public employment or service. The rules of natural justice entrenched in Section 43 of the Constitution do not apply to such types of contract of employment where an aggrieved party may sue for breach of contract if his rights are threatened or affected. An instructive case authority on this point is **Harry Chanamuma -vs- Oilcom (Mw) Ltd** Civil Cause No. 2001/96 [unreported] where Kalaila, J. (As he then was) cited with approval the statement of Sir George Donaldson M.R. in the case of **R -vs- East Berkshire Health Authority, Exparte Walsh** (1984) 3 All ER 425 at page 429 to the effect that in a pure case of master and servant the master can terminate the contract of employment at any time and for any reason or for none; and further that such cases do not depend at all on whether the employer has heard the employee in his own defence.

Conclusion

Having made the above findings of fact on the question of liability I am of the opinion that it is not necessary for this court to make any determinations on the issue in respect of damages and/or the quantum of damages. For the reasons I have given above the Plaintiff's action and all the claims are dismissed in their entirety.

Costs

The question of costs has exercised my mind very much. This court has a complete discretion to order an unsuccessful party to pay the costs of an action. The Plaintiff has failed to establish his case against the Defendant.

It is therefore only proper that I exercise my discretion in favour of the Defendant and award the costs of this action to the Defendant. The costs awarded to the Defendant are to be taxed by the Registrar if not agreed.

Pronounced in open Court this 20th day of March 2001 at the Principal Registry, Blantyre.


F.E. Kapanda
JUDGE