IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2018 OF 2000

Between

M.S. MWADZANGATI.....PLAINTIFF

and

DAVID WOOD t/a WOOD CONSULT.....DEFENDANT

CORAM: **HON JUSTICE A.C. CHIPETA**
Katsala/Salima, of Counsel for the Plaintiff
Makhalira, of Counsel for the Defendant
Moyo (Mrs), Official Interpreter

JUDGMENT

As amended at hearing stage the plaintiff's claim against the defendant in this matter is for the sum of K384,071.43. This claim comprises of various losses the plaintiff attributes to the conduct of the defendant. These include a claim for K225,000.00 in lieu of 18 months' salary, K8,000.00 for mobilization allowances, K3, 600.00 for housing allowance, K14;400.00 for leave grant, K117,000.00 in lieu of living allowance, and K16,071.93 as value of 27 days of leave lost. In addition the plaintiff seeks to recover interest on the sum claimed at bank lending rate with effect from 1st June, 2000, K57,610.71 as solicitors collection costs, damages for breach of agreement and costs of the action.

In his Statement of Claim the plaintiff has alleged that by an agreement in writing dated 9th May, 2000 the defendant agreed to employ him as a Civil and Structural Engineering Technician for a period of 18 months from 1st June, 2000. The benefits that were to go with this employment have been averred to be K12,500.00 salary per month and tax free allowances to cover mobilization at K8,000.00 housing at K200.00 per month, leave grant at K800.00 per month, and living expenses at K6,500.00 per month. The plaintiff has also averred that he was entitled to 18 days of leave per annum.

By paragraph 3 of his amended Statement of Claim the plaintiff has complained that on or about 1st June, 2000, wrongfully and in repudiatory breach of the employment agreement above described, the defendant terminated the said employment and dismissed the plaintiff therefrom. By reason of this the plaintiff claims that he has suffered loss and damage and hence the present action.

In his defence, the defendant has totally denied liability in this matter. Whilst admitting that he and the plaintiff indeed entered into the employment agreement referred to in the plaintiff's claim and on benefits correctly and elaborately pointed out therein, the defendant has by paragraph 3 of his defence fully denied terminating the plaintiff's employment in a wrongful manner and in breach of the material agreement.

On the contrary the defendant contends that he was entitled to terminate this agreement as he did.

In actual fact the defendant is virtually saying that the plaintiff has himself to blame for the termination of this agreement. He contends at paragraph 5 of the defence that the plaintiff was guilty of anticipatory breach of the employment agreement herein in that on 9th June, 2000 while already tied to work for the defendant he allegedly attended an interview for the post of CAD Technician with M/S MOD Chartered Architects who happen to be the representatives in Malawi of the consultants of the Project he was engaged to work on.

Thus in his turn the defendant complains that rather it is he who has suffered loss and damage in this case and that this is all due to the plaintiff's conduct. The defence the defendant has filed accordingly culminates into his counterclaiming, inter alia, for loss of the plaintiff's services pegged at K20,000.00, costs incurred in looking for a replacement of the plaintiff on the job, put at K10,000.00, and an unliquidated claim for loss of reputation and goodwill in the defendant's business, apart from seeking costs of the counterclaim. In his Reply and Defence to Counterclaim the plaintiff has traversed the entire counterclaim and joined issue with the defendant on all his denials in the defence.

The facts of the case are relatively straight forward and hardly, if at all, in dispute. Ex P1 is a letter dated 9th May, 2000 from the defendant to the plaintiff, offering him employment at the Thyolo District Hospital project. Exhibit P2 is the Memorandum of Understanding that accompanied the letter of offer. It contains all the terms and conditions of service, including the salary and allowances claimed in this action, for the post of Civil and Structural Engineering Technician so offered to the plaintiff. This Memorandum of Understanding was duly signed by both the defendant and the plaintiff respectively on 9th and 10th May, 2000. It indicates 1st June, 2000 as the agreed date for the commencement of the employment in question and a duration of 18 months expiring on 30th November, 2001 as the period of work. It is conceded by both parties that this contract of employment had no termination clause in it.

Evidence has disclosed that the plaintiff by oral arrangement managed to shift the date of commencement of employment herein from 1st June, 2000 as initially agreed to 12th June, 2000. At the time the plaintiff so secured this job he was working for S.C.S. Associates as a Draughtsman and upon giving notice of resignation from that employment, it appears that his boss, Mr Soubashsobnack, could not readily release him at the end of May, 2000. It is on this basis that he approached Mr Wood, the defendant, who agreed to the plaintiff starting to report for work as from 12th June, 2000 instead.

Per evidence, it is what transpired between the shifting of this original commencement date for the contract and the arrival of the new date of 12th June, 2000 that has brought about this case. Owing to what the defendant ended up discovering about the conduct of the plaintiff in this period of time he developed some doubts about him and he ended up changing his mind about going ahead with the contract of employment that was just about to take effect. Ex P3 is a letter dated 11th June, 2000 in which the defendant basically expressed his dismay at discovering that the plaintiff had in the meantime attended interviews for a different job with MOD Chartered Architects, who were representatives of the Consultants of the project he was to be employed on, and that his poor performance thereat had dented his image in the eyes of those representatives of the Consultants. The letter proceeded, inter alia, to terminate the plaintiff's employment and to enclose a cheque of K12,500.00 being one month's salary in lieu of notice.

The plaintiff totally denies the allegation that he attended interviews as has been alleged by the defendant. He however admits attending what he would rather call "informal interviews" or "informal discussions" in relation to a certain opening for a job as CAD Technician in MOD Chartered Architects. He also concedes that at those "informal" discussions his skills as a draughtsman were put to test in that he was asked to produce a drawing on a computer.

Be this as it may, the bottomline of the plaintiff's argument is that his dealings with MOD Chartered Architects in this regard should be treated as purely his own business. Although he never meant to alert Mr Wood about these dealings, and I get the impression that in fact he hoped that Mr Wood would not get wind of them, following this accidental discovery of his dealings, the plaintiff expects that Mr Wood should without question just accept the explanation he gave him and then completely desist from reacting to this event. In short his argument is that his conduct should not be construed as amounting to anticipatory breach of contract as contended by the defendant and that he should therefore not suffer any adverse consequences for it.

As is quite clear both from the pleadings and from the evidence reviewed so far the parties herein are pointing fingers at each other and each of them is actively shifting blame on to the other for the breakdown of the contract of employment they executed herein.

I here need to observe that under Malawian law fixed term contracts of employment are no strange phenomenon. Section 25 of the Employment Act, 2000, while recognizing several species of employment contracts, clearly refers to one such type of contract as being "for a specified period of time." Indeed even under legislation preceding this Act the position of the law was not different.

As happens to be the case this Court (Hon. Skinner, C.J. then sitting) did confirm in Contrin vs Dos Santos [1973-74]7 MLR 111 that fixed term employment contracts are legal and that there are in fact two variations of them i.e. those with and those without clauses governing termination of employment. In the present case therefore the execution of an employment contract of a fixed duration of 18 months between the plaintiff and the defendant, as occurred, without inclusion of any termination clause in the said agreement, was quite a legitimate exercise. It is accordingly my view that on execution of this contract, subject to the fact that it was due to commence on a future date which was later postponed to a further off date, a binding contract of employment was duly effected between the parties concerned.

It is however significant, I think, as to some extent well recognized in the pleadings, and I do need to highlight it here, that the present case is somewhat different from most other cases I have come across in the course of preparing this judgment. Unlike the case authorities cited or available for consideration on the subject of breach of employment contracts, the contract executed herein never reached commencement or operation stage. Thus complaints of "termination of employment" or "dismissal from employment", as in part argued appear to me somewhat off tune, if not altogether off-tangent.

In the Dos Santos case I have just referred to above, for instance, there was not just a contract of employment in place between the parties, in fact the quarrel between them only erupted after actual commencement of employment and after time had thus begun to run. The question for consideration when the matter was taken to Court was whether the plaintiff having already embarked on his five years fixed term employment contract, the defendant could, before lapse of the agreed period, dismiss him from his job, bearing in mind that there was no termination clause.

Likewise in Munde vs Electricity Supply Commission of Malawi Civil Cause No. 555 of 1995 (Principal Registry - unreported), cited by the plaintiff, it will be seen that Mr Munde's suit arose after his contract of employment had come into effect and after he had already worked for four months. His tenure of employment had been fixed at 24 months and there were still 20 more months to go when the employer purported to terminate the employment. There being no termination clause in that contract the Court properly refused to imply a power on the employer's part to terminate that employment.

The position obtaining in this case, it will be noted, is markedly different from that to be found in the above two cases. As already disclosed, the plaintiff in this case never actually embarked on the employment he had agreed on with the defendant. Exhibits "P1" and "P2", the documents constituting the contract, having pointed at 1st June, 2000 as the date the contract would come into operation, and the said date having at the instance of the plaintiff himself been orally shifted further to 12th June, 2000, it will be seen that exhibit "P3", the letter that ended the anticipated fixed employment relationship, came into being a day before this new commencement date. In this event I therefore have some discomfort about calling what transpired here a "termination" of employment or a "dismissal" therefrom as partly pleaded, since no employment had as yet commenced in this case.

While it might well appear as if I am engaging in semantics, I have genuinely wondered whether it is at all possible to terminate employment that has not even commenced or to dismiss, wrongfully or otherwise, someone who has not yet started working. Although I cannot claim to have a better descriptive term for what transpired between the parties, I all the same have problems contemplating or comprehending a termination of or a dismissal from employment when the party complaining did not even have the opportunity to start reporting for work, even once for that matter, out of the agreed period of employment for time to begin to run.

While on this point I have found Buckley, L.J.'s observations in the case of Gunton vs Richimond-upon-Thames London Borough Council (1980)JCR 775 rather pertinent to my concern. With reference to a like situation the Honourable Judge said:-

> *"Cases of wrongful dismissal in breach of contract of personal service have certain special features. In the first place, as the term 'wrongful dismissal' implies, they always occur after the employment has begun and so involve an immediate breach by the master of his obligation to continue to employ the servant."*

It follows, I believe, that there could not in this case have been any "termination of employment" or "a dismissal from employment" as the pleadings and arguments have in certain respects suggested. The actual employment not having been embarked upon the terms and conditions of service embodied in the Memorandum of Understanding (Ex P2) had not yet come into operation and could not have been resorted to by either of the parties.

It strikes me therefore, in the light of this observation that the efforts by the plaintiff to rely on the absence of a clause in Ex P2 for the termination of the employment intended in that contract are futile and misguided. I tend to think that even if the contract in question had contained such a termination clause, since we are dealing with events that occurred prior to the commencement of employment that clause would not have played any role in the resolution of the present dispute. The contract not yet having become operational as at 11th June, 2000 when the defendant issued the letter Ex P3 the clause on termination, had it existed, would, like the rest of the contract, also not have been operational. The contract of employment not thus

having started operating, in terminating this agreement, the defendant was in no position to employ any of its terms, express or implied, as they were not yet functional.

The plaintiff, in my assessment, has been loose and careless in his employment of language, both in the pleadings and in his arguments. Unfortunately this mishap has proved rather contagious in that the defendant has also yielded to like looseness in expression. As earlier noted, due to this laxity of language, termination of employment agreement has virtually been equated to termination of employment. An examination of the pleadings and of exhibit P3 will clearly confirm the confusion engaged in by the parties in respect of this terminology. Indeed as I have earlier held it is a practical impossibility, before employment has actually commenced, to effect a termination of the same or to effect a dismissal of a person therefrom. Pleadings and arguments to this effect, therefore, are empty and void and of no consequence in this case.

It will, however, be recalled that I have earlier found that by 10th May, 2000 the plaintiff and the defendant had entered into a valid contract of employment, which was to finally take effect on 12th June, 2000. This contract, as also already observed, never came in force because on 11th June, 2000, via Ex P3, the defendant terminated the agreement relating to it. Notwithstanding the loose language the defendant used in that letter its net effect was to end or to terminate the employment agreement entered into just the day before the plaintiff could report for work and bring the intended employment into being.

I note that it is this development that has aggrieved the plaintiff up to a point of commencing this action and in part he has indeed so pleaded. He believes that the defendant was wrong in so preventing him from embarking on the agreed employment. It is just that while making this point in his pleadings and in his evidence the plaintiff has clouded or compounded the complaint by at the same time misnaming it a termination of or a dismissal from employment. The sole and simple question the plaintiff is really posing therefore, and I so understand him to say, is whether the defendant herein was not wrong in so killing his hopes of employment, as created by the contract they had executed, virtually at the last minute.

I have no doubt that valid as the employment agreement between the parties herein was, if the defendant's termination of the same be found to have had no legal justification, the plaintiff's case, as above understood, would have to succeed. The question therefore is whether or not the defendant was legally entitled to terminate this agreement as he did. As already indicated the answer to this cannot lie in the express or implied provisions of the Memorandum of Understanding as it was then not yet in force. The answer in my considered view lies in what rights, if any, parties have to pull out of valid contracts in the period between agreement and implementation.

Going by the evidence, the parties had fully and finally agreed on a fixed contract of employment to commence on 1st June, 2000. When that day came near the plaintiff was candid enough to approach the defendant and to agree with him on postponement of the date of commencement of employment to twelve days further away. Meantime as the new date was approaching the plaintiff, for reasons best known to himself, and believing himself to be very clever in his dealings, decided to fool all people who were so concerned about helping him.

To the employer he was leaving at SCS Associates, Mr Soubashsobnack, he was not honest enough to say that he was leaving employment because he had secured a better job with Mr Wood. Due to the lie he told about possibility of going into business in order to raise fees for a course at the Malawi Polytechnic, the plaintiff caused Mr

Saubashsobnack to panic for him and to try and arrange with Mr Peter Creazer, DWII, of MOD Chartered Architects, for possibility of a job in that firm.

As if this was not enough the plaintiff proceeded hereafter to fool Mr Creazer by presenting himself for possibility of a job with his firm when he well knew that within the next few days he would be disappearing to Thyolo under the employ of Mr Wood. Indeed at the same time the plaintiff also fooled Mr Wood by completely keeping him ignorant about the drama he was staging in Blantyre before he could report for work in Thyolo.

I think it was completely unnecessary for the plaintiff to tease all these kind people, who were all trying to help him, in the fashion he did in this case. It certainly does not come to me with any sense of shock or surprise that when Mr Wood, the defendant, discovered what the Plaintiff, his prospective employee, had been up to, he felt completely disappointed with him. To my mind after this discovery the defendant had all reason to feel so let down as to end up wholly mistrusting the plaintiff. It was only natural and proper in the circumstances that he rethink the question whether to really go ahead and employ the plaintiff as per the contract that was due to commence. I take the view that the plaintiff has no one to blame except himself for creating this mistrust in the mind of Mr Wood and for consequently losing the opportunity he had already secured to start working for him the next day.

As I have said before, this case is about termination of *employment agreement* as opposed to termination of actual employment or dismissal from employment. I have also said the true question for consideration is not whether or not the terms of the said contract provided for such a termination, because they could not so provide, as they were yet to become effective on commencement of employment. The question I must therefore consider in order to determine the case is about the rights of the parties, if any, to retreat from a binding agreement before its implementation starts.

This is where the defendant's defence of anticipatory breach of agreement comes in. If it be the case that there was no anticipatory breach on the part of the plaintiff to entitle the defendant to pull out of the employment agreement the case for the plaintiff will have been made out. If however it be shown that the plaintiff was guilty of such anticipatory breach then the defendant's withdrawal from this agreement will be treated as a justified act.

The law relating to anticipatory breach has been well captured in various case authorities and legal texts including Cheshire and Fifoot on the Law of Contract and Robert Upex in the Law of Termination of Employment (5th ed). The impression I gain is that it is enough to establish repudiatory conduct on the part of a party to a valid contract if, viewed objectively, his conduct shows an intention no longer to be bound by the said contract. The party in question does not in fact have to intend his conduct to be repudiatory nor does he have to reasonably believe that it would be accepted as such. See: Brown vs J.D.B. Engineering Ltd (1993)1 IRLR 568.

The all important question I need to ask to resolve the matter herein, in my view, is whether given that a valid contract of employment was executed between the parties, the defendant was obliged, regardless of what he had discovered about the plaintiff's level of trustworthiness, to go ahead and still employ him, as has been argued by the plaintiff. The way I see it the behaviour the plaintiff engaged in, which was quite dishonest and which he was incidentally hoping against hope that Mr Wood would never come to discover, was quite reprehensible. It was such conduct as was capable of destroying or seriously damaging the relationship of trust and confidence the two were supposed to enjoy had their employment relationship come to fruition.

I tend to think that by cheating his way into the possibility of securing another job with MOD Architects at the back of a man from whom he had secured postponement of start of employment in Thyolo, the plaintiff could certainly not expect to remain a trusted person in event of his clandestine deeds coming to light. I accordingly find myself in full agreement with the defence in the case and accordingly hold that in so conducting himself, even if he did not intend to engage in repudiatory conduct, from an objective assessment, the plaintiff was guilty of anticipatory breach of the contract he had with Mr Wood. I am definitely of the mind, therefore, that the plaintiff dug his own grave as far as his loss of this job was concerned and that the defendant was therefore quite justified in taking the step to terminate the agreement. I dare add that as such the defendant had no obligation to pay the plaintiff anything on effecting this termination and that the K12, 500.00 he paid to the plaintiff turns out to have been purely a gratuitous payment although he named it as being pay in lieu of notice. In the premises I dismiss the plaintiff's action herein with costs.

Turning to the counterclaim, I hasten to say that I did not encounter any persuasive evidence to sustain it. The defendant hardly justified what he was claiming from the plaintiff. I accordingly do not have before me sufficient back up evidence to merit any awards to the defendant from the plaintiff in respect of loss of the plaintiff's services, costs incurred in looking for a substitute for the plaintiff, and loss of reputation and goodwill in the defendant's business. I equally therefore dismiss the defendant's counterclaim herein with costs.

Pronounced in open Court this 30th day of December, 2003 at Blantyre.

A.C. Chipeta
JUDGE