



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE No.1141 OF 2006

BETWEEN

DINGISWAYO JERE PLAINTIFF

-AND-

LARK COTON MALAWI DEFENDANT

CORAM : T.R. Ligowe : Assistant Registrar

Mwabungulu : Counsel for the Plaintiff

RULING

This is the defendant's application to set aside a default judgment under Order 13 of the Rules of the Supreme Court on the basis of irregularity and that the defendant has a defence on the merits. It is supported by an affidavit and a supplementary affidavit sworn by counsel deposing, among other things, that the defendant was not served with the writ in this matter. That this is an employment matter and should have first been brought before the Industrial Relations Court. That the defendant has a defence on the merits in that the plaintiff together with his colleague misappropriated company funds in the sum of K768 050 in 2004. That when the plaintiff was called to disciplinary meeting on several occasions he never appeared but just disappeared. This very act portrayed to the company that he was no longer interested to work for the defendant. Further, the plaintiff can not be entitled to a salary for

which he did not work, for a salary is earned. Counsel deposes in the supplementary affidavit that the default judgment does not specifically state on what ground it was entered. It combines failure to give notice of intention to defend and to serve defence in the alternative. That the defendant is not liable for false imprisonment as it merely reported to police of the missing company funds and the Police acted independently.

There is an affidavit in opposition sworn by Paul Jonas Maulidi, counsel for the plaintiff. It deposes that the writ was duly served on the defendant by post without being returned through dead letter service undelivered to the addressee.

Counsel further deposes that the defendant's affidavit in support does not disclose any defence on the merits in that:

- a) The defendant has not specifically responded to the issues raised in the statement of claim
- b) The defendant does not deny that the plaintiff was employed by the defendant as stated in paragraph 2 of the statement of claim.
- c) The defendant does not deny that it suspended the plaintiff from employment pending the outcome of the defendant's investigations into the allegation of misappropriation of K724 000 which the plaintiff alleges to be false
- d) The defendant does not deny that the defendant arrested the plaintiff and handed him over to Ngabu Police station and as alleged by the plaintiff in paragraph 4 of the statement of claim
- e) The defendant does not deny that the plaintiff informed the defendant of the acquittal and that he requested that he be reinstated in his employment as alleged by the plaintiff in paragraph 5 of the statement of claim.

- f) That the defendant has not responded to the issues raised in the statement of claim so as to show defence on merit.

Before I proceed let me comment on the use of the affidavit in opposition. In ***F. Chirwa t/a Tikhale Building Contractors v. M.D. Initiative*** Civil Cause No. 625 of 2004 (Lilongwe Registry) (unreported), I held recently that to consider an affidavit in opposition in answer to an affidavit of merits in support of an application to set aside a default judgment, is tantamount to trying the matter on affidavit evidence. And so, it need not be considered. There are exceptions, and this affidavit is one. This affidavit does not raise merits to counter the defendant's affidavit in support and to consider it would not in any way be like one is trying the matter on affidavit evidence.

The plaintiff claims salary and damages for unlawful termination of employment. He avers he was employed by the defendant and was receiving a salary of K15 000 per month. In or about 2004 he was suspended pending the outcome of the defendant's investigations in the allegation of misappropriation of K724 000 which allegations were false. The defendant arrested him and handed him over to Ngabu Police station where he spent four days in custody. He was prosecuted at Ngabu Magistrate's Court and was acquitted on 23rd March 2005. He informed the defendant about the acquittal and requested to be reinstated but the defendant refused or neglect to respond. He avers he has suffered loss and damages for false imprisonment and loss of employment benefits.

There are three issues.

1. Whether the judgment is irregular in that the defendant was not dully served with the writ of summons;

2. Whether the judgment irregular, this matter having been commenced in the High Court instead of the Industrial Relations Court; and
3. Whether the affidavit in support discloses a defence on the merits.

The answer to the first question is in the negative. The defendant was duly served with the writ of summons, and it was duly proved before judgment was entered.

The answer to the second question is in the affirmative. Under section 110(2) of the Constitution of the Republic original jurisdiction over “labour disputes and such other issues relating to employment” lies in the Industrial Relations Court. It was held by Chipeta J. in ***Hyghten Ledmani Mungoni v. The Registered Trustees of Development of Malawi Traders Trust (DEMATT)*** Civil Cause No. 686 of 2001 (High Court, Principal Registry) (unreported) that much as the High Court enjoys unlimited original Jurisdiction per section 108(1) of the Constitution, procedurally it should not assume original jurisdiction where that is exercisable by any of its subordinate courts. He dismissed the plaintiff’s claim in that case which was for severance pay for termination of employment, a finding that the said termination was wrongful and unlawful and a determination for compensation.

There is a claim for damages for false imprisonment in the plaintiff’s claim herein which may appear alien to “labour disputes and such other issues relating to employment”, but in ***Dick Chikwekwe v. Banja La Mtsogolo*** Civil Cause No. 3348 of 2004 (High Court, Principal Registry) (unreported) the plaintiff claimed damages for libel among other employment issues. Manyungwa J transferred the matter to the Industrial Relations Court for the same reason that the Industrial

Relations Court was specifically created to deal with labour related matters and they should first be dealt with that court before this court. It would appear the Judge considered the claim for libel related to employment in that case. Similarly in this case, the claim for false imprisonment is arising from issues to do with employment. That is why I find it irregular that this action was first commenced before this court.

Having found the proceedings irregular, I would not labour myself to consider the third question. The default judgment is hereby set aside. The parties should apply to transfer the matter to the Industrial Relations court within 14 days from the date hereof.

The plaintiff is condemned in costs.

Made in chambers thisday of March 2007.

T.R. Ligowe

ASSISTANT REGISTRAR