



## **JUDICIARY**

### **IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY CIVIL CAUSE NUMBER 1884 OF 2007**

**BETWEEN:**

**JOE CHIWEMBU AND OTHERS .....PLAINTIFF**

**-AND -**

**DAIRIBOARD (MALAWI) LIMITED .....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA**

Absent, of Counsel for the plaintiff

Absent, of Counsel for the defendant

Manda – Official Interpreter

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## **J U D G M E N T**

**Twea, J**

The plaintiff took out an originating summons. He purported to represent others. It is not known how many or who the others are. He sought the court to answer three questions:

1. Whether under Sections 3 and 43 of the Employment Act the plaintiffs are defendants employees.
2. Whether the plaintiffs are entitled to the rights under Section 31 of the Constitution.
3. Whether or not right amounts of tax were deducted from the plaintiffs according to Taxation Act.

The summons was supported by an affidavit taken under the hand of the plaintiff. The defendant filed an affidavit in opposition.

I must mention at the outset that both affidavits appear to have been drawn casually. Both make averments but do not disclose nor exhibit any evidence at all in respect of the relationship between the parties.

What came out of the affidavits was that the defendant is a limited company which produces a variety of dairy products. These products are sold to customers directly, through established outlets or by bicycle vendors. The bicycle vendors are engaged by the defendant. They are supplied a variety of the products which are put in cooler boxes and sold out wherever the vendor travels.

The bicycle vendors would retire the proceeds of sale to the defendant. The defendant could, every month, pay the vendors a commission based on the sales volumes. Damaged products were deductible. Further, the defendant deducted tax on the commission.

It was averred by the plaintiff that he and some other vendors were dismissed without being heard. Further that the defendant made them do piece work of offloading vehicles and cleaning cold room without pay.

It was deposed by the defendant that the vendors were commission agents. Their engagement was verbal. They were free to leave at will. The defendant contended that the vendors were supplied transportation and insulated containers to preserve the products. The defendant deducted withholding tax, as is required and full disclosure was made to the vendors.

Further the defendant averred that a vendor could be terminated on known grounds of: excessive shortages, non – declaration of cash, unruly behaviour and overcharging customers. Such grounds would be made known to the vendor. Finally, it was contended that vendors would engage in piece work in order to clear the loading bay so that they get their supplies fast. They were too impatient to wait for the loaders to do the job.

I have already lamented the poor state of pleadings in this case. However, on the issue of tax deduction, it is clear from the affidavits and the skeletal arguments that there is no meeting of minds. In effect the plaintiff's view was that he should have been deducted "pay as you earn" tax. The

defendant on the other hand claimed that it withheld tax deductibles. The crux of the matter is whether the plaintiff was earning a salary or not and further whether dairy products were tax free at sale point or not. There was no evidence on these issues. I therefore find that the plaintiff did not establish that there was any wrongful deduction of tax. I accordingly dismiss this claim.

I have examined the other part of the claim. Notwithstanding the state of the pleadings I find that the relationship of the parties falls within the meaning of employee in Section 3(b) and Section 2(3) of the Employment Act and Labour Relations Act respectively. These read:

“employee” means

(b) a person who performs work or services for another person for remuneration or reward on such terms and conditions that he or she is in relation to that person in a position of dependence on, or under an obligation to perform for that person more closely resembling the relationship of employee than that of an independent contractor, and”.

The defendant averred that the plaintiff and the others were commission agents. It was contended that they were entitled to receive a Commission only and therefore they were kept at arms – length. This line of argument was not pursued in their skeletal argument. The presumption however, was that the plaintiff was an independent contractor. In my view this cannot be supported on the evidence of the defendant and at law.

The plaintiff was not delegated any authority than to sale the products and surrender the proceeds to the defendant. The plaintiff was given everything: transportation, products to sale, and had not authority to bind the defendant or to act independently. Further, sales were conducted under the name and on conditions given by the defendant. The defendant averred that the plaintiff would be dismissed if he overcharged customers. The relationship does not reflect business independence or delegation of authority, so as to imply a relationship of principal and agent. It reflects a dependency which implies a relationship of master and servant.

The defendant put emphasis on the fact that the plaintiff was free to come and go. It was argued that, thereby, he could not have been an employee.

To begin with the defendant is a Limited Company of considerable repute. It has used this system of sales for a long time. The onus to regulate the relationship with the vendors, in law, lies on the defendant and not the plaintiff. Clearly, the plaintiff, as long as he was not dismissed, was at liberty to come, get a bicycle and the products to sale. He would, at his own peril, lose the day's commission whenever he was absent. He would, at the end of the month be eligible to receive commission for the sales for that month notwithstanding his absence on some of the days. Clearly, under Section 3 of the Employment Act, the commission was his wage. In my view, the fact that it was called a "commission" does not affect the status of the relationship.

Secondly, it is clear that the relationship had no specific duration. It could be terminated by the plaintiff or the defendant at will, with or without reasons. This created employment at will. This doctrine is premised on the fact that, in the absence of any agreement to the contrary, either employer or employee may terminate the relationship at any time for any reason.<sup>1</sup> The ramification of this doctrine however, are now mitigated by the provisions of the Constitution and the Employment and Labour Relations Acts. The proviso to Section 28(4) of the Employment Act provides; that a contract for a specific task will be deemed to be a contract for unspecified period of time if an employee is regularly and repeatedly employed and paid wages on basis of the work completed within 24 hours, is an example of such relationships. Depending on the length of the relationship the plaintiff was entitle to legal protection under the Constitution and the Employment and Labour Relations Acts.

Lastly, Section 69 of the Employment Act places the onus to make employment relations comfortable to the Act on the employer. Where the employer fails to do so, he or she may not rely on the informality of the relationship. The employee is, under subsection (4), entitled to fair value of his services according to the law, to be determined by the labour officer.

It is my judgement therefore that the plaintiff and his fellow vendors were or are employees at will and entitled to the Constitutional and other legal protection.

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<sup>1</sup> Blacks Law Dictionary, six ed. P525

The summons succeed to this extent with costs to the plaintiff.

***Pronounced in Chambers*** this 20<sup>th</sup> day of October 2008 at Blantyre.

E. B. Twea  
**JUDGE**