



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 950 OF 2006**

**BETWEEN:**

**THOM CHISEKO .....PLAINTIFF**

**- AND -**

**GROUP 4 SECURICOR SECURITY  
SERVICES (MALAWI) LIMITED .....DEFENDANT**

**CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA**  
Mr Mwangomba, of Counsel, for the plaintiff  
Mr Majamanda, of Counsel, for the defendant  
Mr Allan Chuma – Official Court Interpreter

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

**Manyungwa, J**

By its Originating Summons, the plaintiff namely Mr Thom Chiseko brought these proceedings against Group 4 Securicor Security Services (Malawi) Limited, the defendant herein. The plaintiff seeks the following orders and declarations:

1. A declaration that having retired from the defendant's employment the plaintiff is entitled to payment of severance allowance under section 35 (1) of the Employment Act, 2000.

2. A declaration that the defendant's continued reluctance to pay the plaintiff severance pay after retirement is, therefore wrongful and contrary to law.
3. An order for costs of this action.

The summons are supported by an affidavit sworn by Mr Thom Chiseko who depones that he joined the defendant's company as a Financial Controller on 1<sup>st</sup> January, 1995 as is evident from exhibit C1, which is a copy of the letter of appointment. The said letter was in the following terms:

Securicor (Malawi) Limited  
P.O. Box 720  
Blantyre  
Malawi  
28<sup>th</sup> October, 1994

Mr Thom Chiseko  
Sable Farming Company Limited  
P.O. Box 5119  
Limbe

Dear Mr Chiseko

We would refer to the interviews you had with our Regional Finance Director, Mr Sergeant and the undersigned.

It is our pleasure that we advise that you have been successful and have been offered a position on the following terms:

1. A salary of MK9500.00 per month payable in arrears directly into your bank account.
2. You will be reviewed after a financial year – end which will be in September, 1995.

3. You will be able to enjoy the following benefits:
  - a. Contributory Pension Scheme. You will be required to contribute 5% of your basic monthly salary towards the scheme.
  - b. You will be provided with a house.
  - c. You will be provided with a company car.
  - d. You will on company medical scheme.
  - e. On completion of each working year, you will be entitled to 28 days leave.
  - f. The company will pay for security guard and a gardener.
  - g. The company will also pay for your electricity and water.
4. The contract of employment may be terminated by either party giving to the other three months notice or cash in lieu of such notice.

Kindly sign and return to us the enclosed copy of this letter to indicate that you are in agreement with the terms of employment. We look forward to an enjoyable mutually beneficial working relations with you. We also hope to hear from you as to when you will be able to start work at your earliest convenience.

Yours faithfully

Signed

C. G. Nseula

MANAGING DIRECTOR

The deponent further stated that he retired on 31<sup>st</sup> July 2003 upon attaining 55 years of age in terms of the company's terms and conditions of service. The deponent further stated that after his retirement, he continued working for the defendant company as a consultant. He deponed that the Consultancy Contract was mutually terminated on 13<sup>th</sup> August 2004 as is evidenced by 'exhibit C2' which is a letter of termination dated 09 – 08 – 2004. The said letter was as follows:

Securicor Malawi Limited  
P.O. Box 720  
Blantyre  
Malawi

Mr Chiseko

**TERMINATION OF EMPLOYMENT CONTRACT**

Please be advised that Securicor Management with your consent has approved termination of your consultancy contract with effect from end of business of 13<sup>th</sup> august, 2004. You will be entitled to the following annual benefits:

- Your salary due as at 13<sup>th</sup> August, 2004.
- Cash in lieu of eighteen (18) outstanding leave days.
- Less MK10, 000.00 outstanding Motor Vehicle Loan balance.
- Provision of Guarding, Alarm and Gardener up to 31<sup>st</sup> August, 2004.

All company properties under your care and your final report on your current work will be handed – over and discussed with the executive chairman.

By copy of this letter the Financial Controller is advised to prepare your final dues. On behalf of Securicor Malawi Management, please accept my words of thanks and appreciation for your contributions to the company during the entire period of your employment.

Wishing you all the best in your future plans.

Yours Sincerely

Signed

Nkungula A M

Head of Human Resource

Cc: The Executive Chairman  
Financial Controller  
PF

The deponent further stated that the defendant did not pay him severance allowance for the 9 years and 8 months that he had worked for them despite his two letters of demand as evidence by exhibits ‘C3’ and ‘C4’ which are dated 27<sup>th</sup> June, 2005 and 21<sup>st</sup> February 2006 respectively, both of which were addressed to the Head of Human Resource of the defendant company.

The deponent therefore prays that this court do grant him the reliefs sought in his Originating Summons.

The defendant opposes the summons and has thus filed an affidavit in opposition sworn by Mr Amin Nkungula, Human Resource Manager in the defendant's company. In the said affidavit in opposition he depones that on or about July, 2003 the plaintiff retired from the employment upon attaining 55 years of age in terms of the company's terms and conditions of service. It is further deponed that following the plaintiff's retirement the defendant paid the plaintiff a retirement package excluding severance allowance. The deponent therefore contends on behalf of the defendant that that is the reason why the severance allowance was not paid because the defendant believes that the plaintiff can not be entitled to severance allowance on retirement. In these premises the defendant therefore contends that the plaintiff is not entitled to severance allowance either under the contract or under the Employment Act, and prays that this summons be dismissed with costs.

### **ISSUES FOR DETERMINATION**

The main issue for the determination of this court is whether severance allowance is payable upon the retirement of the plaintiff and if so whether the defendant's refusal to pay the same is wrongful and contrary to the law.

### **THE LAW**

The law relating to Severance Allowance is provided for in Section 35 of the Employment Act<sup>1</sup>. The said section is in the following terms:

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<sup>1</sup> Employment Act 2000

S35(1) “On termination of contract by mutual agreement with the employer or unilaterally by the employer an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the first schedule.

(2) The Minister may, in consultation with organisations of employees, by notice published in the Gazette, amend the First Schedule.

(3) The employment of an employee shall not be terminated for reasons connected to his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer can not reasonably be expected to provide this opportunity.

(4) For the purposes of subsection(1), termination includes termination by reason of the insolvency or death of the employer but does not include –

a) termination of a contract of employment for a specified period of time where termination occurs at the expiration of the specified period.

b) a contract of employment for a specified task where the termination occurs at the completion of the task.

(5) The payment of severance allowance under subsection (1) shall not affect the employee’s entitlement, if any, to payment in lieu of notice under Section 30 or to a compensatory or special award under Section 63.

(6) Subsection (1) shall not apply where the employee

- a) is serving a probationary period as provided for in Section 26.
  - b) is fairly dismissed for a reason related to his conduct.
  - c) unreasonably refused to accept the employer at the same place of work under no less favourable terms than he was employed immediately prior to the termination.
  - d) is employed by a partnership and his employment ceases on the dissolution of the partnership and he enters into employment with one or more of the partners immediately after such dissolution or unreasonably refuses to accept an offer of employment by any such partner under no less favourable terms than he was employed immediately prior to the dissolution.
  - e) is employed by a personal employer who dies, and the employee enters into the employment of the personal representative, widow, widower or any heir of the deceased employer immediately after such death or he unreasonably refuses to accept an offer of employment by such person on no less favourable terms than he was employed immediately prior to the death.
- (7) Where the contract of employment is terminated by reason of the death of the employee, the severance allowance shall be paid to the surviving spouse of the deceased employee or in the absence of such a spouse, to such other dependent relative as the labour officer may decide.



- (8) A complaint that a severance allowance has not been paid may be presented to a District Labour Officer within three months of its being due and if the District Labour Officer fails to settle the matter within one month of its presentation, it may be referred to the court, in accordance with Section 64 (2) or 64(3), which if the complaint has been proved shall order payment of the amount due.”

The question is, would severance allowance upon a proper construction of Section 35 be payable in the circumstances. In the case of Blantyre Sports Club V R. K. Banda and E. Mkangala<sup>1</sup> my learned brother Chimasula – Phiri J on the rules of construction stated:

“The rules of construction of statutes is clearly stated in the case of Banda V Malawi Law Society<sup>2</sup>. Recently this has been cited with approval in the Constitutional case of Eric Sabwera and Peoples Progressive Movement (PPM) V Attorney General<sup>3</sup> (unreported) where it was stated as follows:-

‘The governing principle in the construction of a statute is accurately stated in Maxwell on Interpretation of Statutes 11<sup>th</sup> Edition at 1 – 2(1962)

‘A statute is the will of the legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded ‘according to the intent of them that made it ‘Sussex

<sup>1</sup> Blantyre Sports Club V R. K. Banda, E. Mkangala Civil Cause No. 61 of 2003

<sup>2</sup> Banda V Malawi Law Society 12 MLR 29

<sup>3</sup> Eric Sabwera and People’s Progressive Movement (PPM) V Attorney General Constitutional Case No. 1 of 2004

*Pearage* (1884, 11 CI & E 143). If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature. *Income Tax Commissioners V Pemsel* (1891) AC 534'.The case of *Income Tax Commissioners V Pemesl* is a well known authority for all those who aspire to an understanding of the interpretation of statutes. In other words, the first rule that a court has to consider when confronted with construing a statute is to give the statute the natural meaning of the words used. That is the court's paramount duty. Maxwell continues (op. cit at 4).

When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absotula Sentential expositore non indiget*...The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from notions which may be entertained by the court as to what is just and expedient. (See *New Playmonth Borough Council V Taranaki Electric Power Bd* (1933) AC 680. The words can not be constructed, contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the

meaning conveyed may be, it must receive its full effect. (See *Ornamental Woodwork Co. V Brown* (863), 2 H & C 63) When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.”

The learned Chimasula – Phiri J, in the Blantyre Sports Club case went on to state that if retirement was one aspect to which Section 35(1) was not applicable, then this should have been expressly provided for. This what the learned judge stated:

“Section 35(1) has clearly and without any ambiguity provided for payment of severance allowance on termination of contract in two situations. First by mutual agreement with the employer or secondly, unilaterally by the employer...*For avoidance of doubt it should have been expressly provided that Section 35(1) shall not apply where the employee reaches retirement age or retires.* I believe that the exclusion of the aspect was intentionally done by Parliament to enable a long serving obedient employee to pocket severance allowance whether with pension or not. [my emphasis]

I am in full agreement with the observation of the learned judge. In these circumstances and by reason of the foregoing, I declare that the plaintiff having retired from the defendants employment, the plaintiff is entitled to payment of severance allowance under Section 35(1) of the Employment Act 2000, and that the defendant’s continued refusal to pay the same after

the plaintiff's retirement is therefore wrongful and contrary to law.

As regards costs, these normally follow the event, as such I award costs of these proceedings to the plaintiff.

*Pronounced in Chambers* at Principal Registry, Blantyre, this 31<sup>st</sup> day of January, 2008.

Joselph S Manyungwa

**JUDGE**