



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 3254 OF 2005**

BETWEEN:

MAYNARD SAWERENGELAPLAINTIFF

- AND -

PRIDE MALAWI LIMITEDDEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Meyer Chisanga, of Counsel, for the plaintiff

Mr Chimwemwe Kalua, of Counsel, for the defendant

Mr Mchacha – Official Interpreter

J U D G E M E N T

Manyungwa, J

INTRODUCTION:

The plaintiff, Mr Maynard Sawerengela, by his writ of summons issued on 4th November, 2005 claimed against the defendant, Pride Malawi Limited the sum of MK2, 368, 750.00, interest thereon and damages to be assessed, plus costs of the action. The plaintiff was at all times the defendant's General Manager until the 27th of July 2005 when he was requested to resign from employment by the defendant's Board Chairman. The defendant was at all times the plaintiff's employer, engaged in the promotion of rural initiatives and development enterprises by providing loans to small scale businesses.

PLEADINGS:

The plaintiff by his pleadings pleaded as follows:-

STATEMENT OF CLAIM

1. At all times the plaintiff was the defendants' General Manager until 27th July, 2005 when he was requested to resign from the employment by the defendant's Board Chairman.
2. On or about 1st August, 2003 the plaintiff tendered his resignation by giving three month's notice. The notice period run from 1st August to 31st October, 2005.
3. On or about 3rd August 2005 the Chairman of the Board of the defendant replied to the plaintiff's letter of resignation by stating that:-

“Your letter of 1st August, 2005 refers.

Your resignation from employment of Pride Malawi as General Manager is hereby accepted. You will however remain under suspension till your last working day.

Could you please call at the offices of Pride Malawi to discuss your terminal benefits position with the Acting General Manager and how you intend to extinguish your exposures to the company in the form of your own personal loan as well as exposures arising out of personal guarantees that you had made on behalf of some friends and relatives. This should also give you an opportunity to discuss the orderly handover of any company assets, which are currently in your possession.

...

4. On or about 4th August 2005 the defendant's Acting General Manager wrote to the plaintiff advising him that he was entitled to the sum of MK2,820,125.00 but the defendant would deduct the sum of MK2, 951,316.72 for loans that the defendants extended to its clients but guaranteed by the plaintiff.
5. As a result of the defendant's claim in paragraph 4 hereof, the defendant demanded the sum of MK1, 517,299.05 from the plaintiff.

6. On or about 5th August 2005, the plaintiff replied to the defendant's letter as follows:

“Your letter of 4th August, 2005 regarding the above refers. I have noted the contents of your letter and wish to make a few observations for you to consider and reflect on. First, the computation of the terminal benefits has omitted some benefits that are either in my employment contract or provided for in employment law. These are: severance allowance; electricity; water and telephone allowances; payments for night security guard, gardener, cook, fuel; club membership; medical cover and payment of 80% school fees. These benefits are covered in my employment contract and must be paid to me in full until the last day of my employment. Please recompute the terminal benefits to include the same. Secondly, I note that you are proposing to recover some individual loans that Pride Malawi extended to its clients. I do not understand the basis for this. Of the four loans itemised in your letter, I only guaranteed one loan extended to Grain Kansadwa. Even then, the loan and other three loans are secured. My recollection is that should a loan get bad security is called and realised. Should there be a shortfall after realisation of security, the borrower is asked to make good of the loan. I am not aware that this has been done in respect of the loan that I guaranteed and are surprised that I am being asked to pay for the other three loans that I did not guarantee but know are secured and Pride Malawi has means at its disposal of ensuring recovery. Thirdly, in my view my employment contract with Pride Malawi is different from loans contracts that the company entered with some of its clients and must be treated as such. Lastly, I do not know the justification of your wish to replace my company car before my employment with Pride Malawi lapses. Similarly, and though I would not belabour the point, I do not agree with the justification for withdrawing my driver before my employment contract expires. You may keep the driver. Please reflect on the issues above and revert to me.

...

7. On 31st August, 2005 the plaintiff met with the defendant's Acting General Manager and discussed the plaintiff's terminal benefits. What was agreed at the said meeting was reduced to writing in a letter of 31st August, 2005 from the plaintiff to the defendant as follows:-

“Please refer the Chairman’s letter Ref. GBP/mat of 3rd August, 2005 whereby my resignation from employment of Pride Malawi as General Manager was accepted. You will further recall that I was required to call at the office of pride Malawi to discuss my terminal benefits position with the Acting General Manager of pride Malawi Limited and how I intend to extinguish the exposures to the company in the form of personal loans as well as exposures arising out of personal guarantees that I made on behalf of some alleged friends and relatives. I wish to sincerely thank you for your openness and cooperation during our meeting of 30th August, 2005. Resulting from this meeting, the agreed terminal benefits were calculated as follows:-

| <u>Non Taxable Benefits</u> | <u>Period</u> | <u>Rate</u> | <u>Total</u> |
|-----------------------------|---------------|-------------|-------------------|
| Fuel | 3 months | 48,000.00 | 144,000.00 |
| Electricity | 3 months | 7,500.00 | 22,500.00 |
| Water | 3 months | 7,500.00 | 22,500.00 |
| Cellphone | 3 months | 12,000.00 | 36,000.00 |
| Security Guard | 3 months | 8,000.00 | 24,000.00 |
| Security Alarm | 3 months | 10,610.00 | 31,830.00 |
| Gardener | 3 months | 3,000.00 | 9,000.00 |
| Cook | 3 months | 5,500.00 | 24,000.00 |
| School fees | 1 term | 352,616.00 | 352,616.00 |
| Masm | 3 months | 8,000.00 | 24,000.00 |
| SUB-TOTAL | | | 682,946.00 |

| <u>Non Taxable Benefits</u> | <u>Period</u> | <u>Rate</u> | <u>Total</u> |
|-----------------------------|---------------|-------------|---------------------|
| Gratuity | 10 moths | 110,687.50 | 1,106.875.00 |
| Leave Grant | 20 days | 19,250.00 | 385,000.00 |
| 3months salary | 3 months | 442,750.00 | 1,328,250.00 |
| Severance Pay | 4 weeks | 442,740.00 | <u>442,750.00</u> |
| SUB-TOTAL TAXABLE | | | 3,262,875.00 |

| | |
|--------------------------------------|---------------------|
| Total Gross Terminal Benefits | 3,945,821.00 |
| Income Tax on Leave days & Gratuity | 670,093.75 |
| Income Tax on 3 months salary | 443,812.50 |
| SUB – TOTAL TAXES PAYABLE | 1,113,906.25 |
| STAFF LOANS BALANCE | 463,163.58 |
| NET PAYABLE TERMIALN BENEFITS | 2,368,750.00 |

I noted that you are proposing to recover some individual loans that Pride Malawi extended to its clients. I do not understand the basis for this. Of the four loans itemised in your proposal I only guaranteed one loan extended to Mr Grain Kaswada (Operations Manager for Makandi Tea Estate). Even then, the loan and other three loans are secured. My recollection is that when a loan gets bad, security is called for and realised. Should there be a shortfall after realisation of security, the borrower is asked to make good the shortfall and should the borrower fail the guarantor is asked to make good of the loan. I am not aware that this has been done in respect of the loan that I guaranteed and are surprised that I am asked to pay for the other three loans that I did not guarantee but know are secured and Pride Malawi Limited has means at its disposal ensuring their recovery.

In my view, my employment contract with Pride Malawi is different from loan contracts the company entered with some of its clients and I believe must be treated as such. Lastly, I do not know the justification for your wish to replace my company car before my employment with Pride Malawi lapses.

Similarly and though I would not belabour the point, I do not agree with the justification for withdrawing my driver before my employment contract expires. You may keep the driver.

Please reflect the issues raised above and revert to me.

...

8. On or about 5th September, 2005 the defendant wrote back to the plaintiff completely reneging from the agreement of 31st August, 2005. The defendant wrote:

“We write to acknowledge receipt of your letter dated 31st August, 2005 in which you are contending the calculations of your terminal benefits. We have consulted on your claims and would like to get the necessary information from you.”

1. **Payments of Non – taxable Benefits.**

We have failed to get hold of the contract you have been referring to. We therefore can not determine the type of benefits and the amounts entitled. In the absence of any contract signed between yourself and the Board of directors subsequently to the offer letter, dated 10th June, 2007 and signed by yourself in acceptance on 13th June, 2003 prevails. Based on this letter, the following is determined; The Company pays you its pension contribution 7% on the total basic salary earned during the ten months. You did not contribute any as required. Only non – taxable benefits provided are cellphone units and the MASM premiums.

2. **Severance Pay**

Our personnel policy indeed provides for severance pay with the calculation done made by you. However, the circumstances of your departure do not warrant payment of a severance pay. Your resignation was a result of a disciplinary hearing and not retrenchment.

3. **Individual Loans**

In your memo dated 9th May, 2005 you declared interest in the following customers and you pledged to take them on personally and ensure that the moneys are recovered. The investigations by the independent consultant confirmed that you indeed had personal interests in these accounts. We are in agreement with you that it remains your responsibility to ensure that these accounts are recovered in

full by 31st December, 2005. It is only after these loans are recovered in full by the said date that your terminal benefits will be paid.

| | |
|------------------|------------------------|
| Grainfield Mlolo | MK321,414.72 |
| Kansandwa | |
| Barbra Chikhosi | MK245,000.00 |
| Agness Bulla | MK 30,902.00 |
| Francis Kapesi | MK1,329,008.00 |
| Laston Bandawe | MK 434,590.00 |
| Rhoda Lizibowa | MK1,213,026.64 |
| Owen Chikopa | MK2,407,012.00 |
| Edgar Nanthambwe | MK256,708.80 |
| Hendrix Napolo | MK855,424.00 |
| Ruth Namaona | MK1,026,458.00 |
| L. Nawena | MK506.713.00 |
| Marc Maleta | MK360,020.00 |
| Emmanuel Mulumbe | MK1,304,706.00 |
| Harry Mononga | MK877,013.20 |
| TOTAL | MK11,452,180.00 |

4. The calculations are therefore as follows:-

| | |
|-----------------|----------------|
| 3 months salary | MK1,328,250.00 |
| Leave days (20) | MK385,000.00 |

| | |
|--|-----------------------|
| days) | |
| Company Pension Contribution | MK308,925.00 |
| Sub – Total Taxable Emoluments | MK2,023,175.00 |
| Less: Income Tax on leave days | MK236,198.75 |
| Add: Pension contributions Income Tax on 3months salary | MK443,812.50 |
| SUB – TOTAL PAYABLE | MK680,011.25 |
| Less: Staff loans | MK463,163.58 |
| Add: Air time & MASM | MK60,000.00 |
| Amount Payable to you | MK940,000.17 |

We trust this clarifies the position and the same can be settled upon fulfilment of all conditions and look forward at your urgent attention on the said condition.

...

9. The defendant has maintained its statement of not paying the plaintiff and has wrongfully not paid the plaintiff even his salary from the months of August to the end of October 2005.
 10. Further, the defendant has wrongfully failed and or neglected to pay the plaintiff his terminal benefits.
- And the plaintiff claims:-

1) The sum of MK2, 368,750.00 made up as follows:-

| | | |
|-----|--|-----------------------|
| i | MK1,328,250.00 being three months salary | |
| ii | MK385.000 leave days | |
| iii | MK1,106,875.00 gratuity | |
| iv | MK442,750.60 severance pay | |
| | Total Gross Terminal benefits | MK3,945,821.00 |
| | Less income tax on leave and gratuity | 670,093.73 |
| | Less tax on 3 months salary | 443,812.50 |

| | |
|--------------------------------|-----------------------|
| Sub-total taxes payable | MK1,113,906.25 |
| Staff loans balance | 463,163.58 |

- 2) Interest at 1% above the ruling banking lending rate on the amounts claimed from the due dates up to the date of payment.
- 3) General damages to be assessed
- 4) Costs of this action.

The defendant by its amended defence pleaded as follows:-

AMENDED DEFENCE AND COUNTER – CLAIM

1. The defendant admits that the plaintiff was its General Manager but denies that it requested the plaintiff to resign from employment and puts the plaintiff to strict proof.
2. The defendant states that after hearing the plaintiff on a report of his misconduct it was resolved by its Board of Directors to have the plaintiff summarily dismissed but the plaintiff pleaded with the said Board of Directors that to save his face he be allowed to voluntarily resign from employment.
3. It was further agreed that the plaintiff's resignation would be without notice obligation on his part and with immediate effect.
4. The plaintiff duly resigned from employment and by letter dated 1st August, 2005 gave 3 month's notice purportedly in accordance with his employment contract which allegedly came into force on 1st January, 2005.
5. In actual sense there was or is no contract that came into force on 1st January, 2005 and the plaintiff therefore erroneously believed that he was entitled to 3months notice yet the defendant informed the plaintiff to resign without any notice obligation.
6. The defendant admits paragraphs 4, 5 and 6 of the Statement of Claim.
7. The defendant however states that it erroneously calculated that the plaintiff was only indebted to it in the sum of MK 1,571,299.05 when in fact his debt to the defendant exceeds the said sum.
8. The defendant denies that its Acting General Manger had any discussion with the plaintiff on 31st August, 2005 and further denies that the contents of the defendant's letter of 31st August, 2005 reflected the agreement between the plaintiff and the

- defendant's Acting General Manager on the alleged discussion and puts the plaintiff to strict proof thereof.
9. The defendant admits having written a letter whose contents are captured in paragraphs 8 of the Statement of Claim but denies that it reneged from any agreement of 31st August, 2005 as there was no such agreement and puts the plaintiff to strict proof thereof.
 10. The defendant refers to paragraphs 9 and 10 of the Statement of Claim and denies having wrongly failed and/or neglected to pay the plaintiff any terminal benefits or at all and puts the plaintiff to strict proof thereof.
 11. The defendant denies that the plaintiff is entitled to the sum of MK2, 368,750.00, general damages or at all, and puts the plaintiff to strict proof thereof.

COUNTER – CLAIM

12. The defendant states that during the time of his employment the plaintiff wrongfully and unlawfully paid himself the sum of MK3, 259, 763.20 as non – taxable benefits when he was not entitled to the same.

PARTICULARS

In respect of

| | | |
|------|-----------------|-----------------------|
| i. | Electricity | MK195,000.00 |
| ii | Water | MK195,000.00 |
| iii | Guard | MK208,000.00 |
| iv | Securicor Alarm | MK275,860.00 |
| v | Gardener | 78,000.00 |
| iv | Cook | 14,300.00 |
| vii | School fees | MK1,833,603.00 |
| viii | Driver | 460,000.00 |
| | TOTAL | MK3,259,763.00 |

13. Since his resignation the plaintiff has wrongfully failed or neglected to return office keys and NOKIA 8250 cellphone handset whose current value is MK45, 000.00.
14. By a memorandum made on and dated 9th May 2005 the plaintiff guaranteed payment to the defendant of loans due to the defendant from the following amongst others, the following persons:-

| | |
|----------------|------------------------|
| Francis Kapesi | 1, 307,856.72 |
| Laston Bandawe | 434,590.00 |
| Rhoda Lizibowa | 1,213,026.64 |
| Owen Chiokopa | 2,407,012.00 |
| Ruth Namaona | 735,965.00 |
| L. Nawena | 204,184.05 |
| Harry Mononga | <u>877,013.20</u> |
| TOTAL | MK7, 179,647.61 |

15. The stated loans guaranteed by the plaintiff remain due and unserviced and the outstanding balance is MK7, 179,647.61.

AND the defendant claims:-

- i. MK3, 259, 763.20 being amount wrongfully and unlawfully received by the plaintiff.
- ii. Compound interest at 1% above ruling bank lending rate on MK3, 259, 763.20 from 1st August, 2005.
- iii. MK7, 179, 647.61 being balance on loans guaranteed by the plaintiff.
- iv. Interest on (ii) at the defendant's lending rate.
- v. Return of the keys.
- vi. Return of the cellphone or alternatively the value thereof.
- vii. Costs of this action.

The plaintiff in its amended reply to the amended defence and counter – claim pleaded as follows:-

**AMENDED REPLY TO AMENDED DEFENCE
AND DEFENCE TO AMENDED COUNTER – CLAIM**

1. The plaintiff refers to paragraphs 5 of the defence and pleads that:-

- 1.1 In or about August, 2004 the Finance and Administration Sub – Committee of the defendant Board resolved that as from 1st January 2005 the General Manager, The Finance and Administration Manager and the Operations Manager (The Senior Management) were to be employed on contract terms.

- 1.2 Pursuant to the said resolution, the defendant withdrew the Senior Management from the Pension Fund.
 - 1.3 As a result of the withdrawal from the Pension Scheme the senior Management received both the defendant's and their contributions from NICO Pension Fund.
 - 1.4 The Senior Management stopped being employed based on conditions of service applicable to all the defendant's employees.
 - 1.5 On 1st January, 2005 the plaintiff continued working for the defendant based on terms and conditions contained in a contract that was being discussed with the Chairman of the Board.
 - 1.6 At the end of January, 2005 the defendant paid 80% of the school fees for the plaintiff's two children at St Andrews International High School and a new salary of MK442, 750.00 based on the new terms of contract.
 - 1.7 The plaintiff pleads that a contract therefore existed between the plaintiff and the defendant.
2. Save as pleaded herein above the plaintiff joins issue with the defendant's defence.
 3. The plaintiff denies that he unlawfully and wrongfully paid himself any sum of MK3, 259, 763.20 or any sum and puts the defendant to strict proof thereof.
 - 3.1 The plaintiff will contend that the electricity, water etc were benefits paid to all Senior Management staff i.e. the Operations Manager, Finance and Administration Manager and General Manager.
 - 3.2 All Senior Management were entitled and were paid the benefits referred to in paragraph 12 of the defence and counter – claim.

4. Further, or in the alternative if the payments referred to in paragraph 12 of the defendant's counter – claim were wrongful and unlawful, which is denied, the plaintiff will contend that the defendant is estopped and precluded from saying that the plaintiff was not entitled to such payments because the said payments were made with the full knowledge and approval of the defendant and the defendant never quarried the said payments in all the years/months that the same were made and further that the defendant never raised the issue of the said payments or made any deductions from his pension benefits when the plaintiff left the pension scheme and continued work on the new contract from January, 2005. By the defendant's silence the plaintiff was induced to believe that he was entitled to the said payments.
5. The plaintiff denies that he wrongfully kept the office keys as alleged in paragraph 1.3 of the defence and counter – claim.
 - 5.1 Soon after the plaintiff was suspended the Defendant changed locks to all the doors to the offices thereby rendering the office keys that were in the custody of the plaintiff virtually useless.
6. The plaintiff denies that the defendant is entitled to NOKIA 8250 that was bought for the exclusive use of the plaintiff.
 - 6.1 The said NOKIA 8250 cellphone was bought around June 2003 at a price of about MK37,000.00
 - 6.2 It was a policy of the defendant that cellphones were to be offered to the user at the depreciated value.
 - 6.3 The plaintiff is ready and willing to pay for the depreciated value of the cellphone as on the date of 30th October, 2005 when he officially left the defendant's employment.
 - 6.4 The plaintiff denies that the value of the said cellphone was MK45, 000.00 at the time he left the defendant's employment or at all.

7. The plaintiff denied that he made the alleged or any agreement of guarantee as alleged in paragraph 14 of the amended counter – claim or at all.
 - 7.1 If the plaintiff made such a memorandum which is denied, the plaintiff will contend that the said memorandum did not give any guarantee as is alleged in paragraph 14 of the amended counter – claim, or any other guarantees.
8. The plaintiff denies any damages and loss allegedly suffered by the defendant as alleged in the counter – claim.
9. The plaintiff denies paragraph 15 of the amended counter – claim and in particular denies that the defendant is entitled to:-
 - i. Compound on any interest on MK3, 259, 763.20 or any sum from 1st August, 2005 or any date or at all.
 - ii. MK10, 147, 474.41 or any sum at all.
 - iii. Interest or any interest at any rate or at all.
10. Save as herein specifically admitted the plaintiff denies each and every allegation contained in the counter – claim as if the same were herein set forth denied and traversed seriatim.

THE EVIDENCE

The plaintiff called one witness to give testimony on his behalf whilst the defendant called two witnesses.

THE PLAINTIFFS CASE

PW1 was Maynard Sawerengera of Care of Moonlight, Box 32326, Blantyre, Chiromo Village T/A Chimaliro, Thyolo district. The witness adopted his written statement which he made on 18th January, 2006 and in which he stated that he was on 16th June, 2003 employed by the defendant as its General Manager. The nature of employment was on pensionable terms, and that the plaintiff's pension was managed by NICO through AON Limited as Insurance Brokers. When the plaintiff was employed the defendant had been in operation for 4 years and its total portfolio was said to have gone to up MK49 million and total beneficiaries were around 6, 000. The plaintiff further stated that when he joined the defendants the defendant

company's portfolio had grown by December 2003 to MK109 and clientele to 7,915, as a result of which the defendant's Board of Directors awarded bonuses to all employees. The plaintiff stated that at the dawn of 2004 the defendant's external auditors pointed out an anomaly which showed that the Finance and Administration Manager, and the Operations Manager had their water, electricity, gardeners, cook and security guard services paid by the defendant despite the fact that the General Manager [the plaintiff] never got any in 2003. The witness stated that the said query was resolved at the defendant's Management meeting where the Finance and Administration Manager and the Operations Manager resolved that similar benefits be extended to the General Manager. The witness further testified that in August 2004, Management of the defendant in its presentation of amended Personnel Policies to the Board of Directors recommended that the General Manager, namely the plaintiff, Operations Manager namely Mr James Kajamu and the Finance and Administration Manager namely Cornelius Majawa be employed on contract as opposed to pensionable terms. The said Board of Directors however resolved that the said recommendation be presented and resolved by the Finance and Administration Sub – Committee of the defendant company's Board of Directors. The said Sub – Committee sat on 26th August, 2004 and resolved that the movement of the three senior Managers from pensionable terms to being on contract would have financial implications on the defendant company's budget, as such, the recommendation was approved but resolved on minute 04/057 that its implementation be effected in January, 2005. So in December, 2004 the defendant company wrote to National Insurance Company [NICO] through its insurance brokers AON Limited and informed them of the defendant Company's decision to withdraw pension benefits for the General manager, (the plaintiff), Operations Manager Mr James Kajamu and the Finance and Administration Manager Mr Cornelius Majawa, on the basis that effective January, 2005 the three would now be on contract. The said NICO accordingly sent the pension contributions for the three senior officers up to December, 2004, and the defendant paid the witness as General Manager, all his pension and the company's pension contributions. The witness tendered exhibit P2 which was the Group Pension and Life Assurance Scheme withdrawal Benefits dated 31st January, 2005 which read as follows:-

AON Malawi Limited
Insurance Brokers
Hannover House
P.O. Box
Blantyre

The Finance and Administration Manager
PRIDE Malawi
P.O. Box 2131
Blantyre
Attention: Mr M J Bisika

31st January, 2005

Dear Sir

**GROUP PENSION & LIFE ASSURANCE SCHEME WITH
BENEFITS**

We are pleased to enclose assured's cheque in the sum of MK779, 042.58 being settlement of the following claims, which have been arrived at as below:-

| | |
|---------------|----------------------|
| C Majawa | MK217, 908.83 |
| J Kajamu | MK174, 696.59 |
| M Sawerengela | <u>MK386, 437.16</u> |
| | MK779, 042.58 |

Kindly acknowledge receipt of the cheque

Yours faithfully

Signed

C E Lungu

Employee Benefits Manager

The witness further explained that when on 10th January, 2005 he met Mr George Patridge who was the Board Chairman for the defendant company' Board of Directors he reminded him that as of January, 2005 the plaintiff's employment was on contract terms pursuant to the Board resolution of minute 04/057 of August, 2004. The said Mr Patridge (DW1) then advised the plaintiff to draft a contract for his editing and so the plaintiff accordingly drafted the said contract and the said Chairman duly edited it and directed

that the edited contract could be implemented since signing was a formality that would be done anyway. The witness exhibited a copy of the new contract exhibit P3, undated and unsigned, which however had the Chairman's handwritten comments and it was entitled 'Contract of Employment between Pride Malawi and Maynard Sawerengela.' The witness further stated that he and the Board Chairman sat down and together went through the contract and that it was the Board Chairman who scribbled the plaintiff's monthly salary of MK442,750 .00, school fees up to 80% of the plaintiff's two children at any of the approved schools to wit St Andrews International High School, up to the age of 19 i.e.. The Board Chairman also scribbled the plaintiff's monthly ceiling amounts of MK7, 500 each for electricity, water, local telephone calls, USD 100 air time for cellphone, security guard, gardener and cook.

The witness stated that there were also further benefits like the provision of a company car with a maximum allowance of 150 litres of fuel per month, club membership, medical cover, annual leave. The plaintiff testified that he enjoyed all the benefits of the new contract including the new salary from January end 2005 until the time he left PRIDE Malawi, and that these benefits were not there in the original contract that expired in December, 2004. Further, the witness told the court that the January 2005 contract was never signed between him and the Chairman of the Board of Directors, despite the fact that the same was finalised and submitted for signing.

PW1 further stated that on 9th May, 2005 he was called by the Chairman who gave him a letter of suspension from employment with full benefits to pave way for an independent investigation. The said letter, exhibited P4 was in the following terms:-

Pride Malawi
P.O. Box 2131
Blantyre
Malawi

STRICTLY PRIVATE & CONFIDENTIAL

9th May, 2005

Mr Maynard Sawerengela
General Manager

Pride Malawi
P.O. Box 2131
Blantyre

Dear Maynard

SUSPENSION FROM EMPLOYMENT

You will recall that at its meeting of 6th May 2005, the Board stayed behind to deliberate further on the serious issues that have led to the loss of control leading to poor performance of the company especially those regarding write – offs in general and individuals lending in particular. This is against the background of good performance that had continuously been reported to the Board.

In addition, some members of the Board have also been individually approached by whistle blowers on related issues. The Board has therefore resolved to engage an independent consultant to thoroughly look at the allegations. The Board had further authorised me to suspend you with immediate effect to pave way for such an investigation. Mr Cornelius Majawa has been appointed Acting General Manager while you are on suspension and therefore you should make a thorough handover to him. The final decision will of course depend on the outcome of this independent inquiry. The suspension is on full benefits.

Yours sincerely

Signed
G B Patridge
CHAIRMAN

Cc: Mr S Chikoti
Mr C Kapanga
Mr J Nsomba
Dr N Ngwira
Mrs T Mbvundula

The witness stated that the nature of the allegations against him was never revealed to him and that he proceeded to go on suspension after handing over to Mr Cornelius Majawa. Up to the time of his suspension, the Chairman had not yet signed the plaintiff's contract. On 14th July, 2005 the

witness received a report from the Corporate Governance Centre, tendered as exhibit P1, which concluded that there was gross mismanagement of the company, and generally recommended a general overhaul of the company. The Corporate Governance Centre also admitted that no prior discussions were held with the plaintiff to discuss its findings. The said report came with a request for the witness's written responses, which he submitted on 15th July, 2005. On 17th July, 2005, the witness was summoned to appear before the Board of Directors to make his verbal comments on the report, during which the witness informed the Board that he rejected the report on the grounds *inter – alia* that the investigator was not neutral, and further that even if the Corporate Governance Centre had been neutral, the witness was never consulted during the investigation. The witness therefore contended that he was not heard. The witness also said that he felt that as General Manager of the defendant company, he was not given an opportunity by the Board of Directors to be heard and therefore the process was not fair. The witness said that this compelled him to resign as it showed that the Board had already taken a position. The witness tendered exhibit P5, which was a letter from the Chairman addressed to the witness dated 27th July, 2005 as follows:-

Pride Malawi
P.O. Box 2131
Blantyre

27th July, 2005
Mr Maynard Sawerengela
C/O Pride Malawi
P.O. Box 2131
Blantyre

Dear Maynard

Following the report of your misconduct that was issued by the Corporate Governance Centre, and your responses both written and verbal that were made before the Board at its sitting of 19th July, 2005, it was unanimously agreed that the findings were very serious and warranted an outright dismissal.

However, having considered the request which you made at the same meeting, it was agreed on compassionate grounds that we should accept your proposal to resign voluntarily, without any notice obligations on your part, with immediate effect..

Yours Sincerely
Signed
George B Patridge
CHAIRMAN

The witness told the court that on 1st August, 2005 he resigned from the defendant company as its General Manager, as is evident from exhibit P6, which is a copy of a letter dated 1st August 2005, in which the witness wrote:-

M Y Sawerengela
C/O Pride Malawi
P.O. Box 2131
Blantyre
1st August, 2005

Mr George Patridge
Board Chairman
Pride Malawi
P.O. Box 2131
Blantyre

Dear Mr Chairman

RESIGNATION FROM EMPLOYMENT WITH PRIDE MALAWI

I acknowledge receipt of your letter of 27th July, 2005 and hereby write to advise that I want to resign from my employment as General Manager of pride Malawi Limited. In accordance with the provisions of my employment contract, that came into force on 1st January, 2005 I hereby give three month's notice of my intention to resign effective today 1st August, 2005. My last day of employment with Pride Malawi will therefore be 31st October, 2005. May I take this opportunity to thank you Mr Chairman and the entire Board of Pride Malawi Limited for giving me an opportunity to work for the company and also for all the support that has been provided to me during my tenure of office.

Yours sincerely
Signed
MAYNARD SAWERENGELA

The witness stated that the Board Chairman accepted his resignation but insisted that he continued serving notice whilst still on suspension. However, to his surprise the Acting General Manager stopped paying him salary and all benefits for the 3 months that he was serving notice. He further stated that he has not been paid his terminal benefits. The witness tendered exhibit P7 which is a letter from the Board Chairman addressed to the witness dated 3rd August, 2005. The said letter was in the following terms:-

Pride Malawi
P.O. Box 2131
Blantyre
Malawi

3rd August, 2005

Mr Maynard Sawerengela
C/O PRIDE Malawi
P.O. Box 2131
Blantyre

Dear Maynard

RESIGNATION FROM PRIDE MALAWI

Your letter of 1st August, 2005 refers. Your resignation from the employment of PRIDE Malawi as General Manager is hereby accepted. You will however remain under suspension till your last working day.

Could you please call at the offices of PRIDE Malawi to discuss your terminal benefits position with the Acting General Manager and how you intend to extinguish your exposures to the company in the form of your own personal loans as well as exposures arising out of personal guarantees that you had made on behalf of some friends and relatives. This should also give you an opportunity to discuss the orderly handover of any company assets, which are currently in your possession. On behalf of the Board, I wish you all the best in your future endeavours.

Yours sincerely

Signed
George Patridge
CHAIRMAN

Cc: Acting General Manager
PRIDE Malawi

Cc: Chairman, Finance & Administration
Committee, PRIDE Malawi

On 5th August, the witness wrote the Acting General Manager Mr Cornelius Majawa. That letter was exhibited as exhibit as P8 and was in the following terms:-

Mr Sawerengela
C/O PRIDE Malawi
P.O. Box 2131
Blantyre

5th August, 2005

Mr Cornelius Majawa
Acting General Manager
PRIDE Malawi
P.O. Box 2131
Blantyre

Dear Cornelius

Re: TERMINAL BENEFITS

Your letter of 4th August, 2005 regarding the above refers. I have noted the contents of your letter and wish to make a few observations for you to consider and reflect on.

First, the computation of the terminal benefits has omitted some benefits that are either in my employment or provided for in employment law. These are severance allowance, electricity, water and telephone allowances, payments for night security guard, gardener, cook, fuel, club membership, medical cover and payment of 80% of my children's school fees. These benefits are covered in my

employment contract and must be paid in full until the last day of my employment. Please recompute the terminal benefits to include the same. Secondly, I note that you are proposing to recover some individual loans that PRIDE Malawi extended to its clients. I do not understand the basis for this. Of the four loans itemised in your letter, I only guaranteed one loan extended to Grain Kansadwa. Even then the loan and the other three loans are secured. My recollection is that should a loan get bad, security is called and realised. Should there be a shortfall after realisation of security, the borrower is asked to make good the shortfall and should he fail the guarantor is asked to make good of the loan. I am not aware that this has been done in respect of the one loan that I guaranteed and are surprised that I am being asked to pay for the other three loans that I did not guarantee but know are secured and Pride Malawi has means at its disposal of ensuring their recovery. Thirdly, in my view, my employment contract with Pride Malawi is different from loan contracts that the company entered into with some of its clients and must be treated as such. Lastly, I do not know the justification for your wish to replace my company car before my employment with PRIDE Malawi lapses. Similarly, though I would not belabour the point, I do not agree with the justification for withdrawing my driver before my employment contract expires. You may keep the driver.

Yours faithfully
Signed
Maynard Sawerengela

The witness also tendered exhibit P9 which is a letter he wrote to the Acting General Manager Mr Cornelius Majawa on 31st August, 2005. That letter read as follows:-

Maynard Sawerengela
P.O. Box 32326
Chichiri
Blantyre 3

31st August, 2005

Acting General Manager
PRIDE Malawi Limited
P.O. Box 2131

Blantyre

Attention: Mr Cornelius Majawa

Dear Mr Majawa

Re: TERMINAL BENEFITS

Please refer to the Chairman's letter Ref. GBF/Mat of 3rd August 2005 whereby my resignation from the employment of PRIDE Malawi as General Manager of PRIDE Malawi was accepted. You will further recall that I was required to call at the offices of PRIDE Malawi to discuss my terminal benefits position with the Acting General of PRIDE Malawi and how I intend to extinguish the exposures to the company in the form of personal loans as well as exposures arising out of personal guarantees that I made on behalf of some alleged friends and relatives.

I wish to sincerely thank you for your openness and co - operation during our meeting of 30th August, 2005. Resulting from this meeting the agreed terminal benefits were calculated as follows:-

| <u>Non Taxable Benefits</u> | <u>Period</u> | <u>Rate</u> | <u>Total</u> |
|-----------------------------|---------------|-------------|------------------------------|
| Fuel | 3 months | 48,000.00 | MK144,000.00 |
| Electricity | 3 months | 7,500.00 | MK22,000.00 |
| Water | 3 months | 7,500.00 | MK22,000.00 |
| Cellphone | 3 months | 12,000.00 | MK36,000.00 |
| Security Guard | 3 months | 8,000.00 | MK24,000.00 |
| Security Alarm | 3 months | 10,610.00 | MK31,830.00 |
| Gardener | 3 months | 3,000.00 | MK9,000.00 |
| Cook | 3 months | 5,500.00 | MK15,500.00 |
| School fees | 1 term | 352,616.00 | MK352,616.00 |
| Masm | 3 months | 8,000.00 | MK24,000.00 |
| SUB –TOTAL | | | MK682,946.00 |
| Gratuity | 10 moths | 110,687.50 | MK1,106,875.00 |
| Leave Grant | 20 days | 19,250.00 | MK385,000.00 |
| 3 months salary | 3 months | 442,750.00 | MK1,328,250.00 |
| Severance Pay | 4 weeks | 442,740.00 | <u>MK442,750.00</u> |
| SUB – TOTAL | | | <u>MK3,262,875.00</u> |

| | |
|--|----------------------------|
| Total Gross Terminal Benefits | MK3,945,821.00 |
| Income Tax on Leave days & Gratuity | MK670,093.75 |
| Income Tax on 3 months salary | MK443,812.50 |
| SUB – TOTAL TAXES PAYABLE | MK1,113,906.25 |
| STAFF LOANS BALANCE NET PAYABLE | <u>MK463,163.58</u> |
| TERMIANL BENEFITS | <u>2,368,750.00</u> |

I noted that you are proposing to recover some individual loans that PRIDE Malawi extended to its clients. I do not understand the basis for this...

In my view my employment contract with PRIDE Malawi is different from loan contracts the company entered with some of its clients and I believe must be treated as such...

Please reflect on the issues raised above and revert to me.

Yours sincerely

Signed
Maynard Sawerengela

Cc: G B Patridge – Board Chairman
G B Chikoti – Chairman, Finance & Administration Sub -
Committee

The witness also tendered exhibit P10, which is a letter from the Acting General Manager addressed to the witness dated 6th September, 2005 in which the defendant counter – argued the plaintiff’s letter, exhibit P9 and among other things the defendant refuted the plaintiff’s claims on payment of non – taxable benefits as the defendant said it could not trace the contract that the plaintiff had referred to. On severance pay, whilst the defendant agreed that their policy provided for severance pay, the defendant argued that the circumstances of the plaintiff’s departure did not warrant payment of severance pay, as the plaintiff’s resignation was a result of disciplinary

hearing and not retrenchment. The defendant also demanded that the plaintiff had to ensure that individual loans amounting MK11, 452,180.77 which the plaintiff personally guaranteed were recovered. The defendant's calculations of what was payable to the plaintiff less income tax, and staff loans therefore came up to MK940, 000.17. It was the plaintiff's contention that the defendant in exhibit P7 did not raise the issues that it has raised in its counter – claim. Further, the plaintiff told the court that from January 2005 and May 2005, it was DW1 Mr Cornelius Majawa who used to prepare his salary, including all his entitlements and used to deposit it into the plaintiff's bank account, and that during all this period nobody raised any eyebrows or queried the plaintiff's entitlements. Finally the plaintiff also tendered exhibit P11 which was a letter from Chisanga & Tomoka dated 21st October, 2005 in which the plaintiff's lawyers demanded the plaintiff's salary and other benefits.

In cross – examination by Mr Kaluwa, the plaintiff told the court, that he was employed by the defendant as its General Manager on 16th June, 2003. His contract was in a form of an offer letter and that under that contract his remuneration was MK335, 000.00 and there was also the provision of a company car. The plaintiff told the court that the contract of 2003 was on pensionable terms. Further the plaintiff told the court that when he joined the defendant company he was reporting to Mr Rashid Malimo of Pride Management Services in Nairobi, Kenya, who in turn was reporting to the Chairman Pride Malawi and that this arrangement ceased in December, 2003 and from January 2004 the plaintiff was now reporting to the chairman, Pride Malawi. The witness admitted that the 2003 contract had a variation clause, and that the same had to be in writing. He further told the court that he could not recall during his employment of ever signing a document that varied the terms of the 2003 contract, but said that there were Board Minutes which reflected the variation of the terms of the contract. The witness read the Minutes of the Finance and Administration Board of the defendant company held at MASM Boardroom August, 2004, in which the senior manager's status were to change from pensionable to being contractual, which the witness said was a serious amendment. This, the witness explained arose due to an audit query which noted that the said benefits were only being accorded to the Finance and Administration Manager and not the General Manager, and that this decision was made by the defendant company's Management team. As a consequence, the witness explained that since he, alongside with other senior managers were to be on contract, a letter was written to ION Malawi advising them of the defendant company's

intention to withdraw from their pension. Eventually, the witness said that he was paid his pension contributions by the defendant. The witness further explained that there was no need to inform the Board, as the procedure was that NICO pays the company and the company pays the employee. The witness told the court that in May 2005, he was suspended from employment. On the Corporate Governance report, the witness said upon his receipt of the said report on 14th June, 2004, he made comments on it and never associated himself with the report as he said he was never allowed a chance to be heard. The witness however admitted that on 17th July, 2005 he appeared before the defendant's Board of Directors at which he made some verbal responses, but that he was unaware of the decision the board made as he had walked out before the meeting ended. However, the board later allowed him to resign. The witness insisted that it was a decision of the Board of the defendant company that the three of them namely the General Manager, the Finance and Administration Manager and the Operations Manager effective January, 2005 were to be on contract, and that the plaintiff personally did discuss the issue with the Chairman of the Board of Directors of Pride Malawi, and the three were therefore receiving remuneration based on the new contracts, whose negotiations went up to March. The witness admitted though that the said 2005 contract was neither signed nor dated. As regards the handset NOKIA 8250, the witness told the court that the company policy was that whoever was given a handset, at the end of their contract they were offered to buy the same. The witness further told the court that after his resignation he sat down with the defendant and agreed on his terminal benefits, from which the defendant subsequently renegeed.

In re – examination, the witness explained that it was true as was suggested by counsel for the defendant that he wrote a letter withdrawing his pension and for a few others and that exhibit P2 was a reply to that letter. The witness told the court that he received MK386, 456.18 for the period 10th June, 2003 to 31st December 2004, and that exhibit P2 was addressed to the Finance and Administration Manager, Mr Cornelius Majawa. Further the witness explained that the decision to withdraw pension benefits was not unilateral but that it was followed a board decision. The witness also told the court that in the minutes of the Finance and Administration Committee at which he was present dated 26th August 2004, it is clearly indicated that the contracts for Senior Management were supposed to commence in January, 2005. Asked as to why the said minutes were not signed the witness explained that a signed copy is retained in the minute book which is always

available at the defendant's head office. The witness further stated that the major change in those minutes was the issue of school fees which went up to 80% for 2 children at an approved school i.e St. Andrews which the defendant begun paying for the plaintiff's two children from January, 2005. The witness heavily disputed exhibit P5 and dismissed the assertion that he was dismissed from the defendant's employment and that he never received any letter to that effect. Furthermore, the witness told the court that he was never consulted by Corporate Governance Centre when they compiled their report as they only consulted Mr Majawa and Mr Kajamu. The witness told the court that most of the issues contained in the report were lies, for example on delinquent accounts, he told the court that he had discovered that the Finance Department had written off some loans without his knowledge. At the time Mr Cornelius Majawa, the current General Manager, headed the defendant company's Finance Department. The witness further explained that out of the names that were listed, he only guaranteed the loan for Mr Kansadwa, which had since been recovered. Further, the witness reiterated that his suspension was with full benefits as is reflected in the last sentence in exhibit P4. Moreover, the witness said that in his letter of resignation, exhibit P6, he so resigned in accordance with his employment contract of 2005, a fact which was not disputed by the chairman, as he only said the witness had to discuss with the Acting General Manager.

The plaintiff then closed his case.

DEFENCE CASE

The defendant called two witnesses.

DW1 was Mr George Patridge, Chief Executive of National Bank of Malawi of Care of Box 947, Blantyre. The witness adopted his witness written statement in which he states that he previously held the position of Chairman of the Board of Directors of the defendant company. The witness further stated that the plaintiff was employed as General Manager of the defendant company from 10th June, 2003, and that all his terms of employment were provided to him in a letter of offer of Employment, exhibit D1 signed by the witness himself. The witness further stated that at clause 9 of exhibit D1, the plaintiff was offered a consolidated (inclusive) salary and that all benefits due to him were clearly spelt out with a stipulation that provisions of the employment contract could only be varied by agreement in writing by the parties. The witness further stated that the plaintiff's monthly salary was revised upwards to MK385, 594.00 effective 1st January 2004 and that the

plaintiff was communicated to in a letter dated 19th February 2004 exhibit D2 which was in the following terms.

PRIDE Malawi
P.O. Box 2131
Blantyre

19th February, 2004
Mr Maynard Sawerengela
C/O PRIDE Malawi
P.O. Box 2131
Blantyre

Dear Maynard

ANNUAL SALARY REVISION

You will recall that at the 7th Meeting of the Board of Directors of Pride Malawi, a resolution was passed to revise salaries for all the employees of the company.

I have noted with satisfaction the improvements you have made to the performance of the company since you assumed the role of General Manager in 2003. The smooth introduction of 2 new products and the growth of the portfolio by 76% while maintaining quality in very commendable. Your initiatives in sourcing out funding and cost reduction strategies have been quite remarkable. More importantly however has been the noticeable improvement in staff morale. In recognition of these achievements, I am pleased to award you a 15% salary adjustment effective 1st January, 2004. Your new salary will now be MK385, 594 per month.

I would like to assure you that you will have the support of the Board as you implement the year business plan in a bid to put Pride Malawi on track to self – sustenance.

Please accept my sincere congratulations on these achievements.

Yours sincerely
Signed
G B Patridge
Chairman

The witness further stated that in or about August 2004 Management of the defendant company made a recommendation to the Board of Directors that the General Manager, Operations Manager and Finance and Administration Manager be employed on fixed term contract as opposed to specified terms of contract. While the Board of Directors responded that it had no objection to the proposal, it nevertheless advised that the General Manager had to present before the Finance and Administration sub – Committee of the Board the proposed contracts which would show how much the company would be expected to meet in terms of remunerations for the officers who would go on fixed term contracts and then a final decision would be made whether to adopt the proposal or not. The witness continued to say that the plaintiff who was then the defendant company's General Manager did not produce the said draft contracts and the witness had to eventually ask him as to where the draft contracts were so that the Board could determine whether to accept the proposal for fixed term contracts or not.

The witness further stated that in January 2005 the plaintiff brought to the witness a draft of his contract as General Manager for his comments. The witness then asked the plaintiff for the draft contracts for the Personnel Manager and Finance and Administration Manager to which the plaintiff replied that they were still being worked on. The witness further told the court that he went through the draft contract with the plaintiff and suggested that some terms had to be changed and that figures had to be inserted in the gaps that had been left open. To that end the witness asked the plaintiff whether the defendant company would meet the payments which were being proposed and suggested that the plaintiff had to check with other similar organisations on how they were going about on issues of fixed term contracts before the Board could decide on the draft contracts. The witness said he told the plaintiff to work on proposed contracts of the Operations Manager and Finance and Administration Manager as well before holding further discussions with the witness. The witness further stated that the decision to adopt the proposed contracts could not be taken personally by the witness but the whole Board and so the discussions with the plaintiff were solely for the purpose that the witness could understand and appreciate the proposal so that he could in the end properly guide the Board member as he usually chaired the Board meetings.

The witness further stated that after the January 2005 meetings the plaintiff never brought the proposed contracts despite constant reminders. As such

the issue of contracts was never resolved by the Board until the time the plaintiff left the defendant's employment. The witness therefore stated that it was incorrect to say that the plaintiff was effective 1st January, 2005 put on a fixed term contract and that even the draft contract which is contained in the plaintiff's bundle had an express term that the contract would come into force on the date it was to be signed by both parties, which never happened at all.

The plaintiff further stated that the Board was not aware that the plaintiff was being paid in accordance with the terms of the proposed fixed contract which the plaintiff had drafted and which had not been adopted or approved by the Board. In any event, the witness said, actual payments of remuneration of all members of staff of the defendant were being prepared and effected by Management of the company which was at the time headed by the plaintiff himself. Further, each monthly payments were never referred to the Board for approval, and as such the Board could not and did not know that the plaintiff was receiving the amounts which had not been approved.

The witness therefore stated that the payments which the plaintiff was receiving on the strength of the draft contract were irregular and paid to him by mistake. Even payments for water, electricity, gardeners, cook and security guard services which the plaintiff was receiving from January, 2004 were irregular as they were neither known by the Board nor approved by the Board. The said irregular payments amounted to MK3, 259,763.20.

The witness also stated in his statement that the argument that since all other senior were getting payments for water, electricity, gardeners, cook and security guard services justified the plaintiff to be receiving payments for the same does not hold as contracts for the other offices contained express clauses for such payments. To back up his argument, the witness tendered exhibit D3, which is a letter of offer of contract of employment to Mr Cornelius Majawa dated 9th July 2002, which *inter - alia* at paragraph 10 provided.

Pride Malawi
P.O. Box 2131
Blantyre

9th July 2002

Mr Cornelius Majawa
P.O. Box 20801
Lilongwe 3
Malawi

Dear Mr Majawa

I am pleased to offer you a contract of employment with PRIDE Malawi under the 'terms and conditions stated in this letter...

...

10 Special Allowances

The following cash benefits are payable monthly in arrears net of statutory deductions

| | |
|------------------|--------------|
| House allowances | MK52, 840.00 |
| 50% of base | |
| 24 hr security | MK13, 000.00 |
| Domestic Staff | |
| i) Gardener | MK3, 900.00 |
| ii) Cook | MK4,550.00 |
| Water | MK4,680.00 |
| Electricity | MK7,800.00 |

Additional benefits

- i) Contribution Pension Fund 5% of base salary employer 7%
- ii) Non Contributory Medical cover for self: VIP MASM; 50% employer contribution for eligible family members
- iii) Group Life Cover
- iv) Workman's compensation
- v) Use of company vehicle: Outside official working hours between 4:30 p.m. and 7:30 a.m., week – ends and public holidays company vehicle will be made available and entrusted to you for your personal use.
- vi) Cellphone: a company owned mobile handset will be made available to you.

A U\$10 unit card will be provided to you each month.

- vii) Professional subscription fees: The company will directly remit membership subscription fees to recognised professional bodies directly related to your profession

...

Yours Sincerely

PRIDE Malawi

Signed

Mary Likwelile

Chief Technical Advisor

Signed

Cornelius Majawa Date: 29-07-2002

The witness also tendered in evidence similar letters containing such clauses like exhibit D4, which is a letter of confirmation in appointment as Finance and Administration Manager for Mr Majawa dated August 31, 2003 and exhibit D5 which is a letter of confirmation in appointment for Mr Kajamu Kajamu as Operations Manager dated August, 31 2003. The witness therefore reiterated that the salary that the plaintiff was receiving was consolidated and that his contract was all encompassing and that therefore all other payments outside the contract had to be specifically requested by the plaintiff and approved by the witness himself in his capacity as Chairman of the Board of Directors. The witness tendered exhibits D6 and D7 as evidence of such specific requests. Exhibit D6 was an application for leave while exhibit D7 was a loan application by the plaintiff. The witness therefore stated that the benefits of the plaintiff were different from those enjoyed by Mr Cornelius Majawa and Mr Kajamu Kajamu.

The witness also tendered exhibit D8, which is a letter of suspension from employment dated 9th May 2005, and he further testified that he is the one who wrote the letter and that the suspension was with full benefits, on the terms and conditions. The same letter was also tendered by the plaintiff as exhibit P4.

The witness further stated that after the suspension of the plaintiff, the Board engaged the Corporate Governance Centre to investigate on allegations of mismanagement of the defendant company. The said Corporate Governance Centre dully carried out its investigations and produced a report, Exhibit P1 of their findings. The plaintiff was furnished with a copy and asked to comment on it which he did. On 19th July, 2005 the plaintiff was summoned to appear before the defendant company's Board of Directors to make verbal representations in addition to the written response on the report of findings of the Corporate Governance Centre. After the hearing the Board resolved that the allegations against the plaintiff were very serious and warranted an outright dismissal. The witness exhibited exhibit D9, which was a copy of the minutes of the Board meeting that was held at MASM building on 19th July, 2005. Further the witness tendered exhibit D10 which was a letter addressed to the plaintiff dated 27th July, 2005. This letter was already tendered and marked as exhibit P5 by the plaintiff. The witness explained that the reference to notice obligations in exhibit D10 (P5) meant three months notice on either side.

The witness also tendered exhibit D11, (exhibit P6) being the letter of resignation by the plaintiff giving three months notice and also exhibit D12, which is a letter written by the witness dated 3rd August, 2005 accepting the plaintiff's resignation. The witness further tendered exhibit D13, which read:

PRIDE Malawi
P.O. Box 2131
Blantyre
Malawi

04 August, 2005
Mr Maynard Sawerengela
C/O PRIDE Malawi Ltd
P.O. Box 2131
Blantyre

Dear Mr Sawerengela

Re: TERMINAL BENEFITS

Reference is made to the letter of August 3, 2005 accepting your resignation from employment with PRIDE Malawi. We write therefore to finalise the terminal benefits position between you and the company.

| | |
|----------------------------------|-----------------------|
| 3 months salary at MK442,750/m | MK1,328,250.00 |
| Leave days balance of 20 days | 385,000.00 |
| Gratuity accrued in 10 months | MK1,106,875.00 |
| Sub – Total | MK2,820,125.00 |
| Less | |
| Income Tax Payable | |
| Leave days + Gratuity | (MK515,131.25) |
| 3 months salary | MK443,812.50 |
| Staff loans balance | (MK463,163.58) |
| Individual loans | |
| Owen Chikopa | MK1,258,000.00 |
| Rhoda Lizibowa | MK1,213,000.00 |
| Grain Kansandwa | MK409,414.00 |
| Agness Bulla | MK70,902.00 |
| Total Individual Loans | (MK2,951,316.72) |
| | MK36,000.00 |
| NET owing to PRIDE Malawi | MK1,517,299.05 |

We would like to know how you intend to settle the MK1, 517,299.05 being the amount owing to PRIDE Malawi as per the calculations above. On the

use of the vehicle as per your terms of employment, we intend to replace with another car until October 31, 2005. We however can not continue providing the driver as he is intended to do your official errands, which are not applicable now.

We wish you best of luck in your future endeavours.

Yours sincerely

Signed

George Patridge

CHAIRMAN

The witness further testified that it was never the intention of the defendant to accord the plaintiff service of notice period and that therefore any purported acceptance of this serving notice was made under a mistake, so too was calculation of terminal benefits which included the issue of notice period, and so tendered exhibit D12 and D13. The witness further stated that before the plaintiff was suspended and eventually his services terminated, he had on 9th May 2005 written a memo in which he undertook to personally ensure that loans which had been advanced to some borrowers were recovered by 30th June, 2005, and that as of 10th July, 2006 the bulk of the loans had not been cleared and the total amount therefore stood at MK7, 179.647.61.

In cross – examination by Mr Chisanga the DW1 told the court that by exhibit P2, all the three officers including the plaintiff were paid their pension contributions which they had paid to the company. And when, the witness was confronted that the plaintiff was paid his pension, and could it be said then that the plaintiff was still on pensionable employment, the witness admitted that he could not be. Further the witness admitted that if one is paid his pension, that entails the end of his contract. The witness told the court that exhibit P3 was the contract of employment between Pride Malawi and Maynard Sawerengela, and that it bore his handwriting. He also told the court that the salary depicted in exhibit P3 was MK442, 750.00. However the witness told the court that exhibit P3 was never implemented. The witness further agreed with the plaintiff's Counsel that exhibit P13 which was signed on his behalf was on the plaintiff's terminal benefits. The

witness also admitted that the process regarding exhibit P3 begun in January, 2005 and yet exhibit P13 was written some 8 months thereafter. DW1 also admitted that exhibit P13 talks of 3 months notice at MK442, 740 per month. When asked to look at exhibit D1 the offer of employment and tell the court whether it provided gratuity, the witness said it did not provide for the same and yet in exhibit D13, the witness admitted that the defendant was paying the plaintiff gratuity, and so too was the case in exhibit P3, wherein the defendant said it would pay the plaintiff 25% gratuity. The witness admitted that provision for gratuity was not there in the initial contract. Further, the witness also agreed that before January, 2005 the plaintiff never used to receive school fees for his children. This provision of school fees up to 80% for the plaintiff's 2 children was there in exhibit P3, the draft contract. The witness however told the court that he did not know whether school fees was also paid to the other officers. Further, DW1 told the court that the letter of suspension exhibit D8 was with full benefits, which were those contained in the 2003 contract, but when quizzed that gratuity which was not present in the 2003 contract was included in the letter of August, 2005, the witness told the court that it was included although it was not part of the plaintiff's contract of 10th June, 2003. The witness could not therefore tell the court, if gratuity was not part of the 2003 contract as to where he got it from. Further, DW1 admitted in cross – examination that the corporate Governance Centre when compiling their report, and in their letter of 7th June, 2005, only interviewed the Finance and Administration Manager but never interviewed the plaintiff although the plaintiff was later called to appear before the defendant company's Board of Directors. The witness further told the court that the officers including Mr Majawa, all had their faults only that the plaintiff was found to have been guaranteeing loans, which as General Manager he was not supposed to do, and yet the witness could not recall if the other managers did the same. DW1, when asked failed to produce a document on which the plaintiff guaranteed the said loans. The witness further told the court that in his letter of 4th August, 2005 exhibit D12 wherein he accepted the plaintiff's letter resignation exhibit D11 which made reference to a contract of 1st January of 2005, he neither disputed the existence of the said contract nor the fact that the plaintiff had given the defendant 3 months notice. The witness actually admitted that in exhibit D13, the defendant paid the plaintiff 3 month's salary which he agreed meant that the witness agreed with the plaintiff's letter of resignation. The witness further agreed that according to his letter exhibit D13 the defendant agreed that it owed the plaintiff the sum of MK2, 820.125.00 as terminal benefits, and that the defendant was going to pay that amount to the

plaintiff except that the plaintiff guaranteed some loans. The witness was confronted on exhibit D14, memorandum dated 14th May, 2005, and he could not show the court where, if any, the plaintiff undertook to pay – off the debtors who did not pay. The plaintiff only undertook to talk to those debtors, and so the witness agreed that that was not guaranteeing at all, and the witness further conceded that since there was no letter of guarantee, then the plaintiff did not guarantee the said loans. The witness further admitted that the plaintiff was entitled according to the initial contract to a company car, but admitted that although exhibit D1 never mentioned a driver according to exhibit D13, the plaintiff had a driver and that this exhibit D13 was written by DW1, the witness himself.

In re – examination, the witness admitted that if somebody’s pension is withdrawn, that entails the end of his contract. Further the witness also admitted that the scribbling in pencil on the draft contract exhibit P3 were his. The witness told the court that the 3 month’s salary and the gratuity mentioned in exhibit D7 were all in error.

DW2 was Mr Cornelius Majawa, currently the General Manager of the defendant company. The witness adopted his written statement, in which he stated that he joined the defendant company on 2nd September, 2000 as Finance and Administration Manager. The witness stated that in or about August 2004 the Management of the defendant made a recommendation to the Board of Directors to the effect that the General Manager, the Operations Manager and the Finance and Administration Manager be employed on fixed term contracts rather than permanent and pensionable terms. The said Board of Directors advised that it had no objection to the proposal but wanted first to be presented with a draft of the contracts which would show how much the company would be expected to pay on those contracts so that a decision would then be made. The task to do that was given to the plaintiff, who was then General Manager. However the witness said, no resolution was made to change the contracts to fixed term. The witness said he did not see he drafts of the contracts and that his contract was not changed to a fixed term but remained open ended as was originally the case even at the time the plaintiff left Pride Malawi.

The witness tendered exhibit D15, a letter written by him to the plaintiff dated 5th September 2005, in which the plaintiff's 3 months salary is quoted as MK1, 225.000.00, and that this was in reference to the plaintiff's letter exhibit P9, and that some of the benefits which the plaintiff had claimed were being disputed. The witness also tendered exhibits D16 which were payment vouchers to Group 4 Securicor for the alarm system for the period year 2004 and January 2005 for MK94, 506, as well as exhibit D17 for MK12, 710 for July 2005. So too did he tender similar documents like exhibit D18, D19 d – n, D20 memo for approval of 11th Feb 2005 and payment vouchers, receipts and bills from Blantyre Water Board for the period 2004 – 2005 which were marked as exhibits D21A – N. The Witness stated that it is not correct to say that the issue of the benefits was referred to Mr Marima of Pride Management Services Limited (PMSL) In August, 2004 as its contract with Pride Malawi expired on 31st December, 2003. The witness tendered exhibits D23 (a) to D23 (1c), which are payment vouchers to draw money for the plaintiff's electricity.

The witness further stated that he did not see any contractual document that showed that the plaintiff's contract had changed to a fixed term contract. The witness also stated that on 3rd August, 2003 he received a copy of the letter of acceptance of resignation (exhibit D13) and subsequently the witness also received a letter from the plaintiff in which the plaintiff was contending that his net terminal benefits payable to him were MK2,368.750.00. The witness said that having gone through the records of the defendant, he noted a number of anomalies regarding terminal benefits and so on 5th September, 2005 he wrote the plaintiff a letter raising the issues (exhibit D15) and that the plaintiff did not respond. The witness also tendered exhibits D26 (a) to D26 (h) which are invoices and payment vouchers. The witness also tendered the minutes of 26th August, 2004, the Finance and Administration committee meeting and those of the Board Meeting marked as exhibits D27 (a) and D27 (b) and exhibit D2.

In cross – examination the witness told the court that the plaintiff was not entitled to payment for alarm system as contained in exhibit D19, and that the defendant was therefore claiming that these be paid back. The witness however admitted that when he made his statement the plaintiff had already closed its case, and that the plaintiff was therefore not afforded an

opportunity to testify on the same, and that at the time the said document as contained in exhibit D19 were not before the court. The witness further testified that on 1st June 2005 the plaintiff was on suspension with full benefits and that it was the witness DW2 who was running the show as the defendant company's Acting General Manager and that it was not the first time that the alarm system was being paid, and that the defendant begun paying for these bills in October, 2003. Actually, DW2 admitted that he was the one who authorized the payments vouchers for water, electricity and security alarm. The witness admitted that before the plaintiff's suspension, he was the Finance and Administration Manager virtually making him number two in command, and that he actually attended Board meetings, and yet when asked why he allowed payment for water, electricity, securicor alarm for the plaintiff from as early as 2003 and never raised the alarm the witness said he had not seen the plaintiff's offer letter until September, 2005, neither did the Board raise the alarm. Further, the witness admitted that he would not have known what the chairman discussed with the plaintiff regarding the plaintiff's entitlements. DW2 conceded in court that he never saw exhibit P3 the draft contract between Mr Sawerengela and the defendant company, and that he did not know that they were discussing the same. The witness admitted that apart from the plaintiff's salary being adjusted upwards in the draft contract, to MK447, 250.00, the plaintiff was also entitled to other benefits like company car, gratuity and school fees for up to 80% of school fees for 2 children at any of the approved schools in Malawi up to the age of 19. This, the defendant paid. The witness also conceded that in exhibit D13, the letter written by the chairman to the plaintiff dated 4th august, 2004, entitled terminal benefits the defendant was supposed to pay 3 month's salary and also gratuity, which is not mentioned in exhibit D1, the initial contract of employment of 2003 but this is mentioned in exhibit D13. The witness told the court that he would not know if exhibit D13 was a contract that was to be signed later. The witness also told the court that the plaintiff was paid his pension around March 2005, and that at that time he was still in employment. So too did the witness get his pension. DW2 admitted in cross – examination that they withdrew their pension, because they were going to be on contract, and when asked if that was the reason why the pensions were withdrawn from NICO Life Insurance, the witness could not give any answer, he later stated that they lost out, but he admitted that the pensions were withdrawn as was evident from exhibit P2, the withdrawal of pension, and that the names of the top – management were all mentioned in that document. When asked whether the plaintiff was not entitled to claim his benefits under the draft contract which he had discussed

and agreed terms with the Chairman, the witness simply told the court that it was difficult, that it would have depended on the wording of the contract as regards the effective date. DW2 further said that the defendant was counter – claiming from the plaintiff on the basis on exhibit D19 in which the plaintiff is alleged to have guaranteed some debts and yet when asked to show the court where the plaintiff actually guaranteed, or indeed that he was going to be responsible for the said loans, the plaintiff could not pin – point despite his admission that he was responsible for payment of the loans.

In re – examination, the witness admitted that he authorised payment vouchers and that although the plaintiff was on suspension, the witness as General Manager continued paying for water, electricity and Alarm System. The witness also admitted that payment for the alarm system, begun in October, 2003. The witness told the court that if there was any mistake, it was supposed to be corrected by the General Manager or the internal auditor, not him because he only attended Board meetings to support his boss. The witness repeated that he only saw the contract of 2003 in August 2005. He however told the court that in January, 2005 the plaintiff's salary was MK442, 750.00. Further the witness said he is the only one who signed for exhibit D13 and that the chairman only saw it after it had already been sent to the plaintiff. The witness told the court that the draft contract was not signed and that he was not aware if Mr Sawerengela signed a new contract other than the contract of June, 2003, and that therefore the plaintiff was not entitled to gratuity.

This concluded all the evidence that the court heard in this case. Before I delve into my analysis of the evidence and the law, I wish to sincerely thank counsel for both their oral and written submissions. Let me however point out that I may not be able to recite all these submissions in the course of my judgement but I shall always bear them in my mind throughout this judgement. I however commend both Counsel for such industrious exposition of the law which is definitely going to enrich this judgement.

ISSUES FOR DETERMINATION

The following are the issues to be determined by the court:

- i. Whether the defendant requested the plaintiff to resign on 27th July, 2007.
- ii. Whether the plaintiff was required to give 3 months notice of resignation or entitled to 3 months pay in lieu of notice at the time he was resigning from employment.
- iii. Whether the purported 3 months notice of resignation given by the letter of 1st August 2005 and the purported acceptance by the defendant is/was binding upon the parties to constitute a fresh contract.
- iv. Whether any contract of employment came into force between the plaintiff and the defendant on 1st January, 2005?
- v. Whether the plaintiff had entered in any or any agreement with the defendant's Acting General Manager on 31st August, 2005 and in the event of an affirmative response, whether such agreement is binding and enforceable against the defendant.
- vi. Whether the plaintiff is entitled to the sum of MK2, 368,250.00 or any terminal benefit at all?
- vii. Whether the plaintiff wrongly and unlawfully paid himself the sum of MK3, 259, 763. 20 as non – taxable benefits?
- viii. Whether the Finance and Administration Sub – Committee of the defendant Board resolved that effective 1st January, 2005 the plaintiff as General Manager be employed on contract terms?
- ix. Whether, in the event of an affirmative response to (viii) above the plaintiff was actually employed on contract terms and what were such terms?
- x. Whether the defendant authorised payment of the sum of MK442, 750.00 as fees for the plaintiff's two children at St. Andrew International High School in January, 2005?
- xi. Whether the plaintiff was entitled to non – taxable benefits in the form of electricity, water etc like all other senior management staff.

- xii. Whether the plaintiff was/is entitled to keep keys for the defendant's office in the light of the fact that he resigned from employment?
- xiii. Whether the 1st plaintiff was entitled to retain the defendant's Nokia 8250 cellphone after his resignation.
- xiv. Whether the plaintiff had an obligation to ensure that the accounts of persons named in the defendant's letter of 5th September, 2005 were settled and whether he is personally liable for the said accounts which remain unsettled.
- xv. Whether the plaintiff is entitled on his claim and whether the defendant is entitled on his counter – claim?

THE LAW AND THE LEGAL ANALYSIS OF THE EVIDENCE

A well settled principle of ancient application is “**ei incumbit probatio qui dicit not qui negat.**” This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter or fact must prove it but he who denies need not prove it. The party on whom lies the burden must adduce evidence of the disputed facts or fail in his contention. Simply put, he who alleges must prove. The burden of proof is intimately connected with the standard or quantum of proof. When it had been ascertained where the burden of proof lies, it is necessary to know what evidence is required to discharge it. In contested actions, a party succeeds whose evidence establishes a preponderance of probability or a balance of probability. Thus the burden of proof rests upon the party who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining uncharged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See *Joseph Constantine Steamship Line Vs Imperial Smelting Corporation Limited*¹. The standard required in civil cases is generally expressed as proof on a balance of probabilities, and speaking of the same Justice Denning as he was then in *Miller Vs Minister of Pension*²

¹ *Joseph Constantine Steamship Line Vs Imperial Smelting Corporation Limited* [1942] AC 154 at p174

² *Miller Vs Minister of Pension* [1947] AllER 373 at pp 373 - 374

“That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that a tribunal can say; ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”

The law is such that a promise, intended to be acted on and in fact acted on should be binding. In the case of ***Central London Property Trust Limited Vs High Trees House Limited***¹ by a lease under seal dated September 24, 1937 the plaintiff company let to the defendant company (a subsidiary of the plaintiff's) a block of flats for a term of ninety nine years from September 1937 at a ground rent of £2,500 a year. In the early part of 1940 owing to the war conditions then prevailing, only a few of the flats in the block were let to tenants and it became apparent that the defendants would be unable to pay the rent reserved by the lease out of the rents of the flats. Discussions took place between the directors of the two companies which were closely connected and as result on January, 3 1940 a letter was written by the plaintiffs to the defendant confirming that the ground rent of the premises would be reduced from £2,500.00 to £1,250.00 as from the beginning of the term. The defendants thereafter paid the reduced rent. In September, 1945, the plaintiffs wrote to the defendants claiming that rent was payable at the rate of £2,500 a year and subsequently in order to determine the legal position, they initiated friendly proceedings in which they claimed the difference between rent at the rates of £2,500 and £1,250 for the quarters ending September 20 and December 25, 1945. By their defence the defendants pleaded that the agreement for the reduction of the ground rent operated during the whole term of the lease and as alternatives, that the plaintiffs were estopped from demanding rent at the higher rate or had waived their right to do so down to the date of their letter of September 21, 1945.

It was held by the House of Lords that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the

¹ *Central London Property Trust Limited Vs High Trees House Limited* [1947] 1KB 130

effect of the arrangement made is to vary the terms of a contract under seal by one of less value, and that the arrangement made between the plaintiffs and the defendants therefore in January, 1940 was one which fell within the above category and accordingly, that the agreement for the reduction of the ground rent was binding on the plaintiff company but that it only remained operative so long as the conditions giving rise to it continued to exist and that on their ceasing to do so in 1945 the plaintiffs were entitled to recover ground rent claimed at the rate reserved by the lease. Denning, J as he then was, had this to say:

“But what is the position in view of the developments in the law in recent years? The law has not been standing still since Jordan Vs Money¹. There has been a series of decisions over the last fifty years, which although they are said to be cases of estoppel are not really such. They are cases which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are Fenner Vs Blake², In re Wickham³, Re William Porter & Company Ltd⁴ and Battery Vs. Pickard⁵. As I have said they are not cases of estoppel in the strict sense. They are really promises - promises intended to be binding, intended to be acted on and in fact acted on.”

The learned judge in that case went on to distinguish the case of Jordan Vs Money (supra) because in that case the promisor made it clear that she did not intend to be bound. In each of the above cited cases the court held the promise to be binding on the parties making it even though under the old common law it might be difficult to find any consideration for it. The courts have refused to allow a party making a promise to act inconsistently with it. These decisions are a natural result of the fusion of law and equity; for the cases of Hughes Vs. Metroplitan Rly Co⁶, Birmingham and District Land Co. Vs London & North Western Rly Co.⁷ and Salisbury (Marques) Vs

¹ Jordan Vs Money (1854) 5 H. L. C. 185

² Fenner Vs Blake [1900] 1QB 426

³ In re Wickham [1917] 34, TLR 158

⁴ Re William Porter & Company Ltd [1937] 2AllER 361

⁵ Battery Vs Pickard [1946] W. N. 25

⁶ Hughes Vs Metroplitan Rly Co (1877) 2 App case 439

⁷ Birmingham and District Land Co Vs London & North Western Rly Co (1888) 40 ChD 286

*Gilmore*¹ afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In the *High Trees Case*², the learned Denning J concluded at p 135

“In my opinion, the time has now come for the validity of such a promise to be recognised. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon is binding notwithstanding the absence of consideration; and if the fusion of law and equity leads to this result, so much the better.”

Furthermore, in *Hughes Vs Metropolitan Railway* (supra) the facts were that in October, 1874 a landlord gave his tenant six month’s notice to repair the premises. If the tenant failed to comply with it, the lease could be forfeited. In November, the landlord started negotiations with the tenant for the sale of the reversion, but these were broken off on December 31st. Meanwhile the tenant had done nothing to repair the premises. On the expiry of six months from the date of the original notice the landlord claimed to treat the lease as forfeited and brought an action for ejectment. The house of Lords held that the opening of negotiations amounted to a promise by the landlord that, as long as they continued, he would not enforce the notice, and it was in reliance upon this promise that the tenant had remained quiescent. The six months allowed for the repairs were to run therefore, only from the failure of the negotiations and the consequent withdrawal of the promise, and the tenant was entitled in equity to be relieved against forfeiture. Lord Cairns said at p 445:

“It is the first principle upon which all Courts of Equity proceeded, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.”

¹ *Salisbury (Marques) Vs Gilmore* [1942]2KB 38,51

² *London Property Trust Ltd Vs High Trees House Ltd* (ibid)

In the instant case the plaintiff was employed by a letter of offer employment as the defendant's General Manager on 16th June, 2003 on pensionable terms. I shall come to the issue of the contract of employment later but suffice to say that the plaintiff and his other two fellow senior managers, namely Mr C Majawa and Mr Kajamu Kajamu later withdrew their pension from NICO following discussions which had been held between the plaintiff and the defendant's **Board** Chairman Mr George Patridge and subsequently the defendants.

This is evident from exhibit P2. On 1st August, 2005 the plaintiff as is evident from exhibit P6 resigned from his position as General Manager of the defendant company and gave three months notice. This letter of resignation followed a letter from the Chairman Mr George Patridge, exhibit P5 dated 27th July, 2005 in which the chairman had written that they had considered on compassionate grounds the plaintiff's request to resign. It must be pointed out however, that this letter was a catalyst for the plaintiff's resignation hence his writing of exhibit P6. In my considered view therefore the plaintiff was moved to write the letter of resignation based on exhibit P5. It is doubtful, still more unknown, whether the plaintiff would have resigned if exhibit P5 had not been written. In any case, the plaintiff in cross – examination told the court that the defendant's Board of Directors later, through a letter that was written by the Chairman Mr George Patridge wrote the plaintiff and purportedly accepted his request to resign. However, the plaintiff told the court that he walked out of the Board meeting and he never knew of any decision that was subsequently made. It is my finding therefore on this basis that the plaintiff was made to resign. Whether the plaintiff requested to resign or was asked by the defendants to resign is not material, the fact is the plaintiff resigned.

Having found that the plaintiff resigned from his employment, the next issue that has to be decided is whether the plaintiff was required to give 3 months notice of his intention to resign or whether the defendant had to pay him 3 months pay in lieu of notice. This issue, is in my view, governed by the contract of employment that was entered into by the plaintiff and the defendant. It should be noted that both under the Contract of Employment dated 13th June 2003 exhibit D1 and the unsigned Contract of Employment exhibit P3 containing new terms and benefits, the contract could be

terminated by either party by giving three month's notice. The 2003 contract of Employment exhibit D1 provided at Clause 5

TERMINATION OF EMPLOYMENT

“After confirmation, either party may terminate employment by giving three months written notice.”

And the exhibit P3, the Contract of employment provided at Clause 4:03 as follows:-

“4.03 TERMINATION OF EMPLOYMENT

- (a) This contract may however be terminated at any time before the expiration of the term hereby agreed if either of the following events happen.
 - i. If either party shall have given three (3) calendar months notice in writing of their intentions to terminate the contract, then the contract shall terminate at the end of such notice period.
 - ii. If PRIDE Malawi Ltd (1) finds that the employee has committed a serious misconduct or has been charged with having committed a criminal action or (2) has reasonable cause to be dissatisfied with the performance of the employee.”

In both, exhibits D1 and P3 each party could terminate the Contract of Employment by giving the other party three calendar months notice in writing of their intention to terminate the contract. In the instant case, the court has found that the plaintiff resigned as he was not dismissed, what had to happen then, is what is obtaining under the Contract of Employment. It must of course be appreciated, as is evident from exhibit D8, that before his resignation, the plaintiff was on suspension with full benefits. And when the

plaintiff resigned on 1st August, 2005 and gave the defendant 3 month's notice, the defendant replied in exhibit P7 *inter alia* as follows:-

“Your letter of 1st August 2005 refers. Your resignation from the employment of PRIDE Malawi as General Manager is hereby accepted. You will however remain under suspension till your last working day.”

It must be recalled that the plaintiff's suspension was with full benefits, and when the defendant accepted the plaintiff resignation, it was so on the understanding that the plaintiff would enjoy his terminal benefits till his last working day. It is very clear here in my view that the plaintiff was not dismissed, because had he been, then different consequences would have attended to the scenario. It is therefore my finding that the plaintiff was entitled to 3 month's notice or three month's salary in lieu of notice.

Consequently, it is my finding the three month's notice of resignation as expressed in exhibit P6 which was accepted by the defendant in exhibit P7 was binding. The evidence of DW1 on this aspect who was the defendant's Chairman at the time is, to say the least, in sharp contrast with exhibit P7. In his testimony Mr George Patridge told the court that it was not the intention of the defendant to accept the 3 months notice given by the plaintiff yet exhibit P7, which is a letter written by him clearly accepted the plaintiff's letter of resignation without exception. The argument by Mr Kaluwa Counsel for the defendant, on this point that the acceptance was made under a mistake and that all subsequent communication in reference to 3 month's notice was also under a mistake, is in my view, unassailable to say the least. This is because exhibit P7 was clear and unambiguous. It is not shown in that exhibit that the defendant did not intend to be bound by what exhibit P7 says. On the basis of the foregoing, it is my finding that the two parties were bound by the contents of exhibit P6 and P7 as this was in tandem with the terms of the Employment Contract, which as will be demonstrated in the course of my judgement was both valid and binding at law.

The next issue for consideration is the question as to whether a valid Contract of Employment came into force between the plaintiff and the

defendant on 1st January, 2005. Mr Chisanga, Counsel for the plaintiff submitted that a Contract of employment between the plaintiff and the defendant came into force on 1st January, 2005. He submitted that the law is that a promise intended to be binding, intended to be acted upon and in fact acted upon should be binding. In support of his position Mr Chisanga cited the case *Central London Property Trust Ltd Vs High Trees House Limited*¹. Mr Kaluwa, on the other hand, for the defendant however argued that it is settled law that liability of a contracting party may become effective only upon the happening of some further event, and that in such a case the contract is subject to a condition precedent. The failure of the condition precedent has the effect of suspending the rights and obligations of both parties. He relied on *Pym Vs Campbell*².

The evidence that was heard by this court was that On 10th January, 2005 the plaintiff met DW1 Mr George Patridge who was the Board Chairman at the time for the defendants Board of Directors and so the plaintiff reminded Mr Patridge that effective January, 2005 the plaintiff's employment was on contract terms pursuant to the Board Resolution, Minute number 04/057 of August 2004. The Chairman is said to have advised the plaintiff to draft a Contract of Employment for his editing, and as a consequence the plaintiff duly drafted the said contract which was accordingly edited by the Chairman, who according to the plaintiff directed that the edited contract could be implemented as signing was a mere formality that would be done anyway. The said Contract of Employment was exhibited as exhibit P3. The terms contained in the plaintiff's new Contract of employment were subsequently according to the evidence implemented by the defendant. The plaintiff testified in court that as a consequence, he was withdrawn from the pension scheme and that his employment thereafter was on contract. However, when DW1 Mr George Patridge testified in court he contended that the plaintiff was employed on 10th June, 2003 as the defendants General Manager and that all his terms of employment were provided to him in exhibit D1, which was the letter of offer of employment. It was the testimony of DW1 that in or about August 2004 management of the defendant company made a recommendation to the Board of Directors that the General Manager, Operations Manager and the Finance and Administration Manager be employed on fixed term contracts as opposed to

¹ *Central London Property Trust Ltd Vs. High trees Case House Ltd* (ibid)

² *Pym Vs Campbell* (1856) 6 E & 370

specified terms of contracts. The witness told the court that while the Board of Directors responded that it had no objection to the proposal, it nevertheless advised that the General Manager had to present before the Finance and Administration Sub – Committee of the Board the proposed contracts, before a final decision was made whether to adopt the proposal or not. The witness however admitted in his testimony that in January, 2005 the plaintiff brought to him his draft contract, for the comments of the witness, the witness went through the said draft contract, and he also asked for the contacts of the Operations Manager, and the Finance and Administration Manager. The witness however in cross – examination admitted that indeed by exhibit P2 all the three officers including the plaintiff were paid their pension contribution to the company. In my considered view therefore, this reinforces the Mr Chisanga’s submission that the plaintiff was therefore no longer on pensionable terms. Actually the payment of the plaintiff’s pension contribution effectively brought to an end the June, 2003 contract of employment. A question may be asked then as to which contract now governed the employment of the plaintiff with the defendant. The answer, in my considered opinion, can only be that there was now a new contract of, employment, which now governed the plaintiff’s employment and the defendant as the employer. I have considered several factors which have led me to come to this conclusion that the terms of the new contract were eventually implemented by the defendant. In the first place, the plaintiff alongside the other two senior managers was withdrawn from the defendant’s pension scheme with NICO Life; secondly the defendant paid for 80% of school fees for the plaintiff’s two children at St. Andrews a thing which was not being done prior to December, 2004 and was not there in the 2003 contract. Thirdly as a consequence of the new contract the plaintiff begun drawing a salary of MK442, 750.00 which was scribbled on the new contract by the Chairman himself moreover the Chairman already admitted that the scribbling on the draft contract were his. Moreover DW1 in cross – examination admitted that exhibit P13 which was signed on his behalf contained the plaintiff’s benefits, these benefits were based on the 2005 contract of employment, an example being that on gratuity which was not originally there in the 2003 Contract of Employment, exhibit D1. Further, the witness DW1 also admitted in cross – examination that before January, 2005 the plaintiff never used to be paid or receive school fees for his 2 children for up to 80%. Again, this provision was not there in exhibit D1, but was clearly provided for in exhibit P3. DW2 even admitted that exhibit D13, the letter on terminal benefits which was actually written by the witness himself provided for gratuity and told the court that

gratuity was indeed included though it was not part of the plaintiff's contract of employment of 2003. The witness could not explain where if at all he got this aspect of the plaintiff's gratuity, yet exhibit D13 was written some eight months after January, 2005. DW1 also admitted that in the said exhibit D13, as well as in exhibit D12, he never disputed the plaintiff's claim for the existence of the plaintiff's contract of employment of January, 2005 nor the fact that the plaintiff had, in his letter of resignation, given the defendant three months notice. Moreover, the defendant in exhibit D13 quite apart from accepting that the plaintiff was entitled to gratuity, a term that was present in the 2005 contract of employment, went ahead to say, *inter alia*

“On the use of the vehicle as per your terms of employment, we intend to replace with another car until October, 31, 2005. We however can not continue providing the drive as he is intended to do your official errands, which are not applicable now.”

Furthermore, the Minutes of Finance and Administration Committee Meeting Board of Directors in exhibit D27 a – b, held on August 26, 2004 at Masm Board Room at 09:00 hours, had at Agenda Item Number 6 a Proposal to Amend Personnel Policy on minute number 04/056

“04/056 “Directors noted that PRIDE Malawi conducted a

Team Building workshop in July, 2004 and amongst the recommendations made was to amend the Personnel Policy 04/057. Directors noted that some amendments impinged on the Budget and the same was factored in and could be accommodated except for changing contracts for senior managers which could only be implemented in January, 2005.”

The above analysis of the evidence only fortifies, in my humble opinion, the very fact that indeed the plaintiff, effective January, 2005 was on new contract terms, as all the terms that have been cited above were terms of the January, 2005 contract of employment exhibit P3. The argument by the defendant therefore that the coming into effect of the contract depended on the signing and therefore that the condition precedent was therefore not fulfilled as the contract was never signed does in my view, not hold. This is in the light of the evidence of DW 2 Mr Cornelius Majawa who testified in

court that his pension benefits alongside that of the plaintiff were as a matter of fact withdrawn and paid to him and the plaintiff before January end, 2005. DW2 also conceded that the defendant company begun contributing up to 80% of the plaintiff's two children's school fees, and that this was not the position before January, 2005. The assertion that the payments were made by error, or that there was a mistake in paying the plaintiff these benefits, is unconvincing and I accordingly dismiss it. It is my finding therefore that notwithstanding that the contract of employment was not signed the terms and conditions in exhibit P3 were the ones that governed the contract of employment between the plaintiff and the defendant, as they were intended to be binding, intended to be acted upon and were in fact acted upon from January, 2005 till the time the plaintiff left his employment. The plaintiff is therefore entitled to the three months salary for August, September and October, 2005 and also to such benefits like school fees, electricity, water, guard services, use of a car for the said three months etc. It is my finding therefore, and so I order that the plaintiff is entitled and is hereby awarded the sum of MK2, 368, 750.00 as pleaded in the Statement of Claim.

Having found that the plaintiff was as a matter of fact and the contract of employment entitled to utilities and other personal benefits, like water charges, electricity charges, security, driver and up to 80% of school fees for his two children at St. Andrews International High School, it is further my finding therefore that the plaintiff did not unlawfully pay himself the payment of MK3, 259.763.20 as non – taxable benefit as the same was proper and lawful. In fact these benefits were payable to all senior management staff of the defendant company such as The Operations Manager, The Finance and Administration Manager. After all the said payments were made with full knowledge and approval of the defendant. The only benefits which were unjustifiably paid to the plaintiff were those as regards water, electricity and guard services for the period prior to January, 2005 and the defendant's counter – claim only succeeds to this extent, and I order the Registrar to assess these payments.

As regards the office keys and the cellphone, I hold that there has not been proved before me anything showing that the plaintiff was entitled to keep the cellphone Nokia 8250 after his resignation as, the cellphones, was company property and as such had to be returned to the company unless the defendant

was willing to sell it to the plaintiff at a depreciated value. The same argument goes for the keys, the plaintiff was supposed to return the keys upon his handing over of the office to the then Finance and Administration Manager, Mr Majawa, now the General Manager.

On the issue of the loans that are named in the plaintiff's letter of 5th September 2005, the issue is in my view, simple. That letter notwithstanding the finding of the court is that the plaintiff had no obligation whatsoever to ensure that the said loans or accounts were settled and the plaintiff was therefore not personally liable. Counsel for the defendant submitted that there therefore existed a contractor of suretyship. The answer here should be in the negative. According to *Chitty on Contracts: Specific Contracts*¹ at par 5010, the learned authors have said:

“A contract of suretyship is in essence a contract by which one person (the surety) agrees to answer for some liability of another (the principal debtor) to a third person (the creditor). The contract may be constituted by a personal engagement on the part of the surety, or by a charge on property without personal liability or both.”

The memorandum that the plaintiff wrote did not give any guarantee that in the event of default then he was going to become personally laible. The scenario here did not even, in my humble consideration, come close to a contract of suretyship, as the plaintiff was neither a surety nor a guarantor. The defendant's counter – claim therefore for the sum of MK1, 179,647.61 being the balance on unpaid loans is dismissed.

In these circumstances, and on the basis of the foregoing the plaintiff is entitled to judgement for the sum of MK2, 368,750.00 less the water, electricity and security charges for the period prior to January, 2005. Consequently the defendant's counter – claim only succeeds to this limited extent.

¹ *Chitty on Contracts: Specific Contracts* 26th Edition Sweet and Maxwell, London, 1989.

The plaintiff has, from the time that he resigned been unable to access his salary and benefits, which would have assisted him in several ways. In these circumstances I grant the plaintiff general damages to be assessed by the Registrar.

As regards costs, these normally follow the event, and since the plaintiff's claim has succeeded, I ward costs of these proceedings to the plaintiff.

Pronounced in Open court at Principal Registry this 7th day of March, 2008.

Joselph S Manyungwa

JUDGE