

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3644 OF 2000

HIGH COURT
LIBRARY

BETWEEN:

**DONALD H. MPHANDE
AND
ROYAL INTERNATIONAL
INSURANCE HOLDINGS LTD**

PLAINTIFF

DEFENDANT

CORAM:

**Dorothy nyaKaunda Kamanga,
Ms. Phiri,
Mr. Chiphwanya,**

**Registrar
Counsel for Plaintiff
Counsel for Defendant**

ORDER

1. INTRODUCTION

This is the defendant's application for disposal of a matter on a point of law taken under Order 14A of the Rules of the Supreme Court. The plaintiff commenced this action by writ of summons 23rd November 2000. The plaintiff's claim is for damages for breach of contract of employment entered into in February 1998 and costs. The defendant served a defence to the statement of claim and the parties executed a consent order for directions. This is the order made upon hearing the summons for disposal of a matter on a point of law.

2. THE ISSUE:

The court has to determine the following issues:

- 1 Whether this is a matter fit for disposal on a point of law under Order 14A.
- 2 The defendant is requesting this court to determine whether or not there was a valid contract between the parties whose terms are contained in "SC2" so as to enable the plaintiff to claim damages for breach of that contract: refer to From paragraph 15 of the affidavit in support of the application.

3. THE ARGUMENTS

The defendant filed an affidavit in support of the application sworn by Mr. Chiphwanya, a legal practitioner in the firm of Messrs Savjani and Company. It is deponed from paragraphs 3 to 17 of the affidavit in support of the application as follows:

- 3 *By letter dated 17th October, 1997, the plaintiff applied for the post of Financial Manager which the defendant had advertised in the Daily Times edition of the same date. A copy of the application letter is exhibited hereto marked thereon "SC1".*

- 4 By letter dated 5th January 1998, the defendant offered the plaintiff the said post of Financial Manager, giving him 14 days within which to accept the said offer and the terms contained therein. A copy of the said letter is exhibited hereto marked thereon "SC2".
- 5 On the 11th day of January 1998, the plaintiff returned a signed copy of the offer letter to the defendant, and sent therewith a letter in which he made a counter-offer on the issue of housing, stating that this was a major conditionality of his acceptance of the defendant's offer. A copy of the said letter is exhibited hereto marked thereon "SC3".
- 6 By letter dated 13th January 1998, the defendant countered the plaintiff's counter-offer on the issue of housing, which the plaintiff denied by his letter dated 16th January 1998. Copies of the said letters are exhibited hereto marked thereon "SC4" and "SC5" respectively.
- 7 By "SC5" the plaintiff raised a further issue of a loan he took from FINCOM, which he wanted the defendant to settle for him before he left KPMG's employ, failing which the defendant was requested to increase the salary it was offering.
- 8 By letter dated 20th January 1998, the defendant stated to the plaintiff its decision to stand by its offer contained in "SC2" as altered by "SC4". A copy of the said letter is exhibited hereto marked thereon "SC6".
- 9 By a letter of the same date, the plaintiff requested the defendant to assist on the loan mentioned in paragraph 7 herein, and the defendant replied in writing on the same day that it would not assist. Copies of these letters are exhibited hereto and marked "SC7" and "SC8".
- 10 By letter dated 21st January 1998, the plaintiff pleaded with the defendant to assist in the settling of the FINCOM loan, and made a further counter-offer on the salary structure. A copy of the said letter is exhibited hereto marked thereon "SC9".
- 11 By letter dated 11 February 1998, the defendant agreed to settle the FINCOM loan on behalf of the plaintiff, but by his letter of 12th February 1998, the plaintiff made yet another counter-offer on the issue of housing. Copies of the said letters are exhibited hereto marked thereon "SC10" and "SC11".
- 12 By letter dated 23rd February 1998, the plaintiff reiterated his counter-offer on the housing issue, requesting the defendant to pay six months' rentals for the plaintiff, but by its letter dated 25th February 1998, the defendant flatly refused this counter-offer. Copies of the said letters are exhibited hereto marked thereon "SC12" and "SC13".
- 13 By letter dated 26 February 1998, the defendant finally withdrew its offer of employment to the plaintiff on the basis that it could not meet the plaintiff's counter-offers not hitherto agreed on. A copy of the said letter is exhibited hereto marked thereon "SC14".
- 14 On 9th October 2002 the plaintiff served on the defendant's lawyers a statement of claim seeking damages for an alleged breach of the defendant's terms of offer contained in "SC2". A copy of the statement of claim is exhibited hereto marked thereon "SC15".

- 15 *I verily believe that the real contention between the parties is whether there was formed a valid contract between the parties whose terms are contained in "SC2" so as to enable the plaintiff to claim damages for breach of that contract.*
- 16 *I verily believe that the determination of this question will automatically determine the parties' rights and obligations towards each other following the defendant's decision to withdraw its offer to the plaintiff.*
- 17 *In view of the foregoing, I verily believe that the construction of the correspondence between the parties and the legal effect thereof are matters that can appropriately be dealt with under 014A of the Rules of the Supreme Court since their determination would virtually determine the respective rights and duties of the parties hereto.*

The defendant's affidavit exhibits several correspondence between the plaintiff and defendant to enable the court determine if the offer was accepted. The defendants argue that there are two points in determining whether the offer of 5th January 1998 was accepted, the first point regards the question whether in the light of exhibit SC3, the plaintiff's first response to the offer, there can be said to have been an offer standing that according to the plaintiff's statement of claim it can be accepted in the plaintiff's letter dated February 1998, when he brought in the issue of housing as a conditionality. According to the defendant the meaning of acceptance of an offer is defined in Chitty on Contracts, 26th Edition, Vol 1, paragraph 54, as a final and unqualified expression of assent to the terms of an offer. The counsel also referred to the case authorities of *Northwest Leicestershire District Council v. East Midlands Housing Association* 1981 1 WLR 1396, *Butler Machine Tool Company Ltd v. X-Cell-O Corporation England Ltd* 1979 1 WLR 401, *Jackson v Turquand* (1869) LR HL 305, *Jones v Daniel* (1894) 2 CH 332. *Hydes v Range* (1840) 3 BIV 344.

The second point relates to whether even if the court were to hold that the original offer survived the plaintiff's letter of 11th January 1998, that there was an offer as stipulated in the plaintiff's statement of claim and that he should be accepting damages for its breach. The defendant argues that parties were negotiating, new terms came up and no final contract was agreed on between the parties so the defendant withdrew from the issue. The defendant's prayer is that the court declares that no valid contract came into effect, and that the plaintiff action should be dismissed with costs.

The plaintiff through his counsel admits that there was a lot of correspondence between the parties. According to counsel the issue at hand is whether a contract is concluded where there are continuing negotiations. The plaintiff contends that there is a contract even when both parties or one of them had a reservation not expressed in the correspondence. The plaintiff argues that under the housing in 2nd paragraph, line 10, it was not a counter offer it was just a mere request. The plaintiff accepted to start work on 2nd February and would be able to negotiate on any points raised. The plaintiff went onto request a reconsideration of his salary, exhibit SC5 and wanted to know if the defendant could settle his loan obtained from FINCOM whilst in the employee of KPMG. The contract was concluded when they agreed that he could join them on 1st March 1998.

Exhibit SC10, shows that the contract was concluded when they arranged for a medical test and the defendant confirmed that a car for the plaintiff's use would be available. According to the plaintiff the court should take into consideration the whole of the correspondence which was passed between the parties in determining if a valid contract was formed.

In reply the defendant argues that parties to a contract are equal. The defendant asserts that the housing issue was a major conditionality and not a mere suggestion. The acceptance letter dated 2nd February 1998 is not anywhere for the court to verify the contents. The defendant is of the view that there was no point at which the court can say the contract was concluded.

4. THE LAW

Order 14A rule 1 of the Rules of the Supreme Court provides for determination of questions of law or construction as follows:

- “(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -*
 - (a) such question is suitable for determination without a full trial of the action, and*
 - (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*
- (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.*
- (3) The Court shall not determine any question under this Order unless the parties have either -*
 - (a) had an opportunity of being heard on the question, or*
 - (b) consented to an order or judgment on such determination.*
- (4) The jurisdiction of the Court under this Order may be exercised by a master.*
- (5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.*

Order 14A rule 2 (2) provides for the effect of rule. An application for determination of a question of law or construction may be made by a party or the Court may make such determination on its own motion. The Court may proceed to make such determination at any stage of the proceedings. Further, this Order empowers the Court to make a final determination of a question of law without the need for a prior order of the Court under O.33, rr.3 and 4 (2) for the determination of a preliminary question of law whether raised on the pleadings under O.18, r.11 or otherwise. This Order provides an alternative procedure to that provided by O.5, r.4 by way of originating summons for the construction of a document or some other question of law.

The requirements for employing the procedure under this Order as provided under Order 14A rule 2(3) are the following:

- (a) the defendant must have given notice of intention to defend;
- (b) the question of law or construction is suitable for determination without a full trial of the action (para. 1 (i)(a));
- (c) such determination will be final as to the entire cause or matter or any claim or issue therein (para. 1 (i)(h)); and
- (d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination (para. 1 (3)).

Further Order 14A rule 2 (5) provides that there be a suitable question of law or construction. The ambit of O.14A was considered by the Court of Appeal in *Korso Finance Establishment Anstalt v. John Wedge* (unrep., February 15, 1994, CA Transcript no. 94/387, cited in the notes to O.14A). The following principles are laid down thereby:

- 1. An issue is "a disputed point of fact or law relied on by way of claim or defence".
- 2. A question of construction is well capable of constituting an issue.
- 3. If a question of construction will finally determine whether an important issue is suitable for determination under O.14A and where it is a dominant feature of the case a Court ought to proceed to so determine such issue.
- 4. Respondents to an application under O.14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which the Court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the Court should not refrain from dealing with the application.

Order 14A rule 2 (8) provides for supporting evidence and states that

"the summons should be supported by an affidavit evidence deposing to all the material facts relating to the questions of law or construction to be determined by the court"

The question of law or construction to be determined by the Court under the Order should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity, about what is the question that has to be determined (see *Allen v. Gulf Oil Refining Ltd* [1979] 3 All E.R. 1008, CA, reversed on another point [1981] 1 All E.R. 353), and this is all the more important since the determination will be final (see para. 1 (i)(b)). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the Court to split the legal and factual determination, for to do so would in effect be to give legal rulings in vacuo or on

a hypothetical ruling, which the Court will not do (see per Taylor L.J. in *State Bank of India v. Murjani Marketing*, March 1, 1991, CA Transcript 91/0304, cited in the notes to the Order).

5. **THE FINDING**

Where a point of law arises in an action, a party can seek a court order to have the matter dismissed on that point of law summarily. This court is being requested by the defendant to determine that in light of the several correspondence that were being exchanged between the parties herein there was no valid contract to enable the plaintiff to claim damages for breach of that contract and that the plaintiff's action should be dismissed with costs.

After a careful examination of the summons, the affidavit evidence and the exhibits as well as the arguments and submissions of both the plaintiff and the defendant in light of the applicable law, this court is of the view that the plaintiff's application for disposal of a matter on a point of law lacks credibility and that this matter is not fit for disposal on a point of law under Order 14A of the Rules of the Supreme Court. There are issues in dispute which cannot be tried through affidavit evidence in regard to:

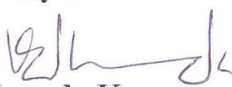
- 1 Whether or not on the issue of housing was a major conditionality and not a mere suggestion. Was it a counter offer or it was just a mere request?
- 2 Whether or not the plaintiff on starting work would be able to negotiate on any points raised in reconsideration of his salary, exhibit SC5
- 3 Whether or not the defendant could settle the plaintiff's loan obtained from his previous employer.

The matter herein being based on contract of employment, these factual disputes are better determined at full trial and not on affidavit evidence. The trial court will ably determines on whether they were counter offers as alleged by the defendant or continuing negotiations as contended by the plaintiff. Where the legal issues are inter-woven with the facts relating to a party's conduct it would be undesirable for the court to split the legal and factual determination.

The court is of the considered view that the question of law to be determined by this court on the issue whether or not there was a valid contract between the parties whose terms are contained in "SC2" so as to enable the plaintiff to claim damages for breach of that contract is not suitable for disposal on a point of law under Order 14A. Order 14A rule 2(3) (b) has not been satisfied by the defendant. On this issue it would be difficult to decide questions of legal principle without knowing the full facts.

Either party is at liberty to appeal to a Judge in chambers.

Pronounced in chambers this 23rd day of December 2010 at Blantyre.


Dorothy nyaKaunda Kamanga
REGISTRAR