



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CASE NO. 397 OF 2015



BETWEEN:

ELIAS MADEYA.....PLAINTIFF

-AND-

FIRST MERCHANT BANK LIMITED.....DEFENDANT

Coram: Hon. Justice M L Kamwambe

Wame Pearson of counsel for Plaintiff

Banda of counsel for the Defendant

Phiri....Official Interpreter

JUDGMENT

Kamwambe J

This application was commenced by way of originating summons seeking the following declarations and orders:

1. A determination on the question whether on the true construction of sections 29 and 31 (1) of the Constitution of the Republic of Malawi, the Defendant can restrict the Plaintiff not to engage in any business and/or trade save with the Defendant's consent.
2. A declaration that pursuant to the determination of the question in 1, the Defendant cannot have unlimited powers to restrict the Plaintiff to engage in any business or trade without the permission of the Defendant *vis-à-vis* to fair and safe labour practices prevailing in our jurisdiction.



3. A declaration that on true construction of sections 52 and 53 of the Employment Act, Cap.55:01 of the Laws of Malawi, the Defendant cannot withhold the Plaintiff's entire terminal benefits without any legal justification.
4. A declaration that on the true construction of the Banking Credit Facility Letter- Car Loan for MK3.0 Million, the Defendant cannot unilaterally terminate the agreement with an option of causing a forfeiture and sale of the security in the absence of the default on the part of the Plaintiff.
5. A declaration that on the true construction of the Contract of Employment and Loan Credit the Contract of Employment between the Plaintiff and the Defendant is independent from the Contract of Credit Facility and such a breach of either cannot automatically determine both contracts.
6. An order of permanent injunction restraining the Defendant from withholding the Plaintiff's motor vehicle registration number LL 9.
7. An order for costs of this action.

Plaintiff was an employee of the Defendant Bank which terminated his contract of employment due to Plaintiff operating a business in conflict with his employer's banking business. He was suspended first when a customer of the bank lodged a complaint with the Defendant Bank. He was charged with carrying out a business of car hire with conflicting interest with the Defendant's banking business. After a disciplinary hearing his employment was terminated. Under a Bank Facility Loan or Credit Agreement, Plaintiff had bought a car for MK3.0 Million which the Defendant was demanding back from Plaintiff after termination of

employment. Consequently, Plaintiff is seeking the above declarations and orders.

Article 19.4 of the Bank's Terms and Conditions of Service on conflict of interest read as follows:

Employment in the Bank should take priority over outside interests. As such employees shall:

19.4.1 Not engage in any trade, business and part time employment outside the scope of his duties except with the written permission of the Bank. When permission is granted, if later the outside commitment shall be deemed to be conflicting with the Bank's interest, the employee shall be requested to make a choice between employment and the private/outside commitment.

The first question to resolve is whether in the light of clause 19.4.1 of the Bank's Terms and Conditions violate sections 29 and 31 (1) of the Constitution. Plaintiff's contention is that the condition of service amounts to a restraint of trade under common law. That the clause is unreasonable and therefore unenforceable as it relates to any kind of business or trade. Section 29 of the Constitution stipulates to the effect that every person shall have a right to engage freely in any economic activity. Firstly, I should say that the Constitutional stipulation gives a general right which can be limited by circumstances. Limiting circumstances ought to be reasonable by using common law standard. This right just like any other right carries with it obligations. You are not expected to use this right to usurp the interests of others or to downplay contracts freely entered into since it is expected that human interactions should be orderly and not unduly restrictive. In my view, clause 19.4.1 does not prevent one to engage in personal business but merely demands that once you intend to do so, obtain the permission of the employer. This is not a restraint to do private business on the face of it. It gives the employer opportunity to vet the nature of business one is intending to run. Knowing that he has to obtain such permission, Plaintiff declined to do so and proceeded to carry out

the car hiring business. He was clearly in breach and he never gave the Defendant the chance to advise him whether he could run the business or not.

It seems absurd to turn around and say the employer is restraining one from pursuing freely his business ventures when the employer never gave its views on the business whether it could be undertaken or not. Without the Defendant Bank making a determination on the nature of business Plaintiff was running, it would not be safe to assume that he was restrained to run his private business in violation of section 29 of the Constitution. If the condition was broadly that Plaintiff could not engage in any personal business whatsoever, then I would readily have agreed with Plaintiff that such condition was an unreasonable restraint to run business, even such business that does not conflict with the banking business of the Defendant. In this regard, Plaintiff was clearly in breach for failing to obtain the Defendant's permission. If he had made the necessary application for permission and that he was turned down, Plaintiff would be free to seek reasons why in the event that the business did not conflict with the banking business at all, he could not pursue that line of business. He could even seek court's intervention. As it is now he avoided to do a simple request which means his hands are not clean and he begins to attack an otherwise innocent clause. However, as it transpired later, his conduct of business came into conflict with the Defendant's business interests in that one man who hired Plaintiff's cars complained to the Defendant that he was being mistreated by Plaintiff in the banking hall just because he returned one hired car to Plaintiff. The clause is nevertheless clear and reasonable in that if he had obtained permission, in the event of such conflict of interest, he would merely be asked to choose between employment and personal business. But since he never sought any permission, a dire consequence of dismissal faced him for the breach.

What I have stated above is in concord with the learned author, **Chitty on Contract Vol. 1, General Principles, 27th Edition, London, Sweet and Maxwell, 1994, pp 812-813** who opined thus:

"All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interest of the parties concerned and of the public. Unless the reasonable part can be severed by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant or the entire contract unenforceable. A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it."

In stating the same principle, in **Petrofina (Great Britain) Ltd v Martin [1966] Ch.146**, Lord Denning said:

"Every member of the community is entitled to carry on business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with the consequence that any contract which interferes with the free exercise of his trade or business by restricting him in the work he may do for others, or other arrangements which he may make with others, it is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest."

Obviously, it was wrong for Plaintiff not to seek permission before embarking on his trade when that was what he was simply asked to do in this new world of transparency. Otherwise, he was not restrained to carry out business so long as he obtained permission or clearance.

Having exhausted justifying that the condition was not unreasonable and not in conflict with section 29 of the Constitution, I can simply and safely say that on the same basis this court will not render the clause as being an unfair labour practice. By that clause

Defendant was trying to reasonably protect its banking business without unnecessarily and capriciously preventing its employees from carrying out any trade whatsoever. As such, section 31 of the Constitution is not violated. It follows therefore that it would be wrong to think that Defendant had unlimited powers to restrict Plaintiff to engage in any business or trade because, in my view, such permission would not be unduly withheld. After all Plaintiff did not even test Defendant how it would determine a request to run some personal business. This covers issue number two.

On issue number 3 it is queried that Defendant withheld Plaintiff's terminal benefits without any legal justification. In his skeletal arguments counsel for the Plaintiff has reproduced sections 52 and 53 of the Employment Act but has particularly referred to section 53(1) which states that terminal benefits shall be paid within 7 days after termination. For better comprehension of the two sections I deem it necessary that I bring out the full texts as follows:

Section 52 prohibition relating to payment of remuneration.

- (1) *No employer shall:-*
- (a) *Pay wages in the form of promissory notes, vouchers or coupons;*
 - (b) *Require or permit an employee to pay or repay to him any remuneration payable*

Or

Paid to the employee in accordance with this Act;

- (c) *require or permit a direct or indirect payment from the employee or deduction from the employee's wages for the purpose of obtaining or retaining employment;*
- (d) *do any act or permit any act to be done as a direct or indirect result of which an employee is deprived of the benefit or of any portion of the benefit of any remuneration so payable or paid;*
- (e) *require or permit an employee to give a receipt for or otherwise to represent that he received more than he actually received by way of remuneration;*
- (f) *pay an employee by requiring the employee to make use of any store which is established –*
 - (i) *in connection with the undertaking of the employer; or*

- (ii) for the sale of commodities to his employees;
- (g) require or permit wages to be paid in any place of amusement or where alcoholic liquor or noxious drugs are sold, shop or store for the retail sale of merchandize, except in the case of persons employed therein;
- (h) limit in any manner the freedom of the employee to dispose of his wages.
- (2) No employer shall deduct from an employee's wages any amount, except -

- (a) The employee's contribution to a compulsory social security Scheme;
- (b) an amount to be deducted in accordance with law or a court order:

Provided that such deduction shall deduction shall not be more than one-half of the employee's wages for the period in respect of which the wages are being paid;

- (c) an amount authorized by the employee in writing which is not greater in aggregate to an amount equal to one-half of the wages of the employee and which:-
 - (i) Is due to the employee in respect of housing furnished by the employer to the employee, goods sold by the employer to the employee or any loan or advance on his wages granted by the employer to the employee;
 - (ii) the employer has paid or has undertaken to pay in connexion with any loan granted to such employee in order to acquire a dwelling or in connexion with the hiring of a dwelling or other accommodation; or
 - (iii) the employee owes to a vacation, sick, medical, insurance, savings provident or pension fund;
- (IV) is deducted in accordance with section 36 of the Labour Relations

SECTION 53. PAYMENT OF REMUNERATION ON TERMINATION

- (1) Subject to subsection (2), wages and other remuneration due to an employee on the termination or completion of his contract of employment shall be paid within seven days after its termination or completion.

(2) Pension benefits due to an employee shall be paid within six weeks of the termination or completion of the contract of employment, after its termination or

What is clearly on record is that the dues of the Plaintiff were computed and what transpired is that Plaintiff ended up owing the Defendant after deducting outstanding car loan and other personal loan from the net pay, the sum of MK976,305.03. This process that the Defendant took is clearly understandable but I doubt if it complies with the law which demands that dues be computed and paid within 7 days. The law under section 52 of the Employment Act does not provide for setting-off the car loan with the terminal benefits due but with any other accounts held by the Plaintiff. The Right of Set-Off clause states as follows:

"In the event of default by the Customer in any repayment due, or non-compliance with any of the terms and conditions of the Facility, all amounts due to the Bank shall immediately become due and payable and the Bank shall be entitled to combine all or any of the accounts opened by the customer with the Bank, whether current, loan, deposit or otherwise, by setting off or otherwise, by setting-off credit balances on any such accounts against amounts due and owing on any other accounts, and accordingly, in the event of the such default or non-compliance, the Customer's acceptance of the condition as signified by its signature on the Facility Letter will serve as due notice of the Bank's intention to combine its accounts and apply set-off."

The clause on the right of set-off would be unlawful if in contravention of the said sections 52 and 53 of the Employment Act and it would only apply if there was evidence of default which was clearly not there as it was not complained of.

The net pay terminal benefits which are not disputed amount to MK1,644,921.63 and the outstanding car loan is MK2,468,257.54 and the other personal loan is MK152,969.11 giving the aggregate outstanding sum of MK2,621,226.66. By consent of the parties dated 4th January, 2016 the parties agreed that the net pay terminal

benefits be given to Plaintiff and the Plaintiff do surrender the car to Defendant in whose name it was registered. This is in line with section 53 (1) of the Employment Act but compliance is made belatedly after threat of contempt proceedings. Again, it was not proper for the Plaintiff to have retained the vehicle because it is still the property of the Defendant, and this, he knew very well. It seems that because Plaintiff was holding onto the vehicle, Defendant thought it practically wise to withhold the terminal benefits so as to protect its interests. This issue is not an issue now because the consent order redressed the matter as explained above.

The fourth declaration sought is that on the true construction of the Banking Credit Facility-Car Loan for MK3.0million the defendant cannot unilaterally terminate the Agreement with an option of causing a forfeiture and sale of the security in the absence of the default on the part of the Plaintiff. We should lend support from clause 15 of the Terms and Conditions of Service which provides that the granting of loans to eligible employees is discretionary. On the other hand, the content of the Credit Facility itself declares that it is a **STAFF CAR LOAN** which means that the Conditions of Service should be read alongside the Credit Facility. This is not in the clause heading but in the body of the Credit Facility. Thus, the car Loan is not independent from the employment contract. The Staff Car Loan does not exist without the Plaintiff being an employee of the Defendant. Clause 17 relied upon by the Plaintiff reads as follows:

"Clause Headings

The clause headings in the Facility Letter and the Appendices thereto are for reference purposes only and should not be used in interpreting the meaning and effect of any of the terms and conditions of the Facility."

I have considered clause 17 and I find that it is not relevant in the circumstances because the term 'Staff Car Loan' does not arise

from clause headings in the Facility Letter nor the appendices I and II.

No wonder the car was registered in the name of the employer meaning that as soon as the employment contract was terminated, if Plaintiff could not redeem the vehicle, then the Defendant would be entitled to repossess the car. Plaintiff did not show any intention to redeem the car. This also covers issue number five.

The sixth order sought is a permanent injunction restraining the Defendant from withholding the Plaintiff's terminal benefits and forfeiting the Plaintiff's car registration number LL 9. This is clearly covered above and I need not dwell on it as I would not make any meaningful additions but only to say that it would be unfair business practice to allow the Plaintiff to retain the vehicle and also obtain his terminal benefits. The Consent Order brought about a fair and just position.

In the circumstances, the originating summons fails but due to the Consent Order each party bears own costs.

Pronounced in Open Court this 25th Day of May, 2016 at Chichiri, Blantyre.



M L Kamwambe

JUDGE