



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 175 OF 2016**

**IN THE MATTER OF SECTIONS 52 AND 53 OF THE EMPLOYMENT ACT
CAP 55:01, LAWS OF MALAWI**

AND

**IN THE MATTER OF SECTION 35 OF THE COMPETITION AND FAIR
TRADING ACT CAP 48:09, LAWS OF MALAWI**

BETWEEN:

SHYMMMA KULESI.....PLAINTIFF

AND

MALAWI SAVINGS BANK LIMITED.....DEFENDANT

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Pearson, Counsel for the Plaintiff

Mr. Ngwata, Counsel for the Defendant

Mr. Kanchiputu, Court Clerk

RULING

The plaintiff commenced this action through an originating summons seeking various declarations and orders among them an order of permanent injunction restraining the defendant from withholding the plaintiff's terminal benefits. At the



commencement of the action, the plaintiff sought an *ex parte* injunction order restraining the defendant from withholding her terminal benefits pending the determination of the originating summons or until further order of the court. The court, however, ordered and directed that the prayer for the interlocutory injunction be heard *inter partes* and this is the court's determination on the *inter partes* hearing.

The pertinent facts are borne out in the affidavits filed by the parties. The plaintiff is a former employee of the defendant. It is common case that that upon the termination of the plaintiff's employment by way of redundancy, the defendant in paying out terminal benefits deducted money representing an outstanding car loan the plaintiff obtained from the defendant by virtue of her employment. On the one hand, the defendant contends that the plaintiff having obtained the loan under the defendant's terms and conditions of service, the defendant was entitled to deduct the outstanding loan from the terminal benefits as provided for in clause 4.1 (v) thereof. On the other hand, the plaintiff contends that the loan was executed independent of her contract of service and that there was no default on the credit agreement on her part as such the defendant cannot be entitled to withhold her terminal benefits without legal justification as that would be contrary to sections 52 and 53 of the Employment Act.

The grant or refusal of an injunction is a matter in the discretion of the court. The discretion has to be exercised on sound basis and to that end, there are principles and guidelines courts apply in considering whether to grant or refuse an application for interlocutory injunction as authoritatively enunciated in **American Cyanamid Co. v. Ethicon Ltd** [1975] A.C. 396; [1975] 2 W.L.R. 316. Broadly put, when an application is made for an interlocutory injunction the initial question that calls for consideration is whether the applicant has a good arguable claim to the right he seeks to protect with the aid of the injunction. If the answer to that question is in the

affirmative, then court must move on to consider whether damages be an adequate remedy for a party injured by the court's grant of or refusal of an injunction and if not where does the balance of convenience lie. The first is a threshold requirement which means if the answer is in the negative the application would collapse there and then as it would lack foundation. And having said that, it must be stated at this juncture that it is no part of the court's function at this stage of the matter to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. This is because the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete as is given on affidavit and has not been tested by oral cross-examination.

Has the plaintiff in this case established an arguable claim against the defendant's action of deducting outstanding loan from her terminal benefits? The plaintiff's case in her bid to fault the defendant's action is in paragraph 4 of her affidavit in support of the application in which she deposes as follows:

***THAT** the Defendant in **SK 1** decided to forfeit all my terminal benefits on ground of outstanding loan which was executed independent of the Contract of service, and also in the absence of any default on the credit agreement on my part. I exhibit marked "**SK 2**" a Staff Loan application Form attesting my deposition*

It is really baffling that the plaintiff is saying the loan was executed independent of the contract of service (her employment with the defendant) yet her own evidence **SK2** is clearly headed as **MALAWI SAVINGS BANK LTD STAFF LOAN APPLICATION FORM** which in itself clearly shows that she goat the loan on the

basis of her service contract or employment put simply. According to clause 4.1 (v) the defendant's conditions of service which the plaintiff would reasonably be presumed to have been aware of when she obtained the loan, upon termination of employment the defendant is entitled to recover outstanding loan balance from terminal benefits. The contention by the plaintiff that there was no default on the credit agreement on her part is a non-issue on the facts of the case since the deduction of the loan was triggered by the termination of the employment and not necessarily default on the part of the plaintiff and as pointed out such an eventuality is properly covered and provided for in the conditions of service binding on the parties.

The court has also had occasion to consider whether sections 52 and 53 of the Employment Act would aid the plaintiff's case in establishing an arguable claim. The two provisions quoted in full are as follows

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 connexion 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 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 Act.

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.

Mindful that at this interlocutory stage it is not the business of the court to decide on the claim, the court wishes to say that section 52 appears to relate payment of remuneration during the currency or subsistence of the employment and that is why there is section 53 which deals specifically with payment of remuneration on termination. The considered view of the court is therefore that section 52 does not apply to the present case.


With regard to section 53, the contention of the plaintiff is that the defendant's action is such that it offends section 53(1) which requires terminal benefits to be paid within 7 days from the date of termination. What happened in this case has to be properly appreciated. The defendant did not withhold the plaintiff's terminal benefits as the plaintiff seems to suggest in some vein; rather the defendant made some legitimate deductions from the terminal benefits payable to the plaintiff. The plaintiff was paid what was legitimately due to her. The case therefore is outside the purview of section 53(1).

The court would, in the premises, take the position that the plaintiff has fallen short of establishing an arguable claim and therefore her application has failed the

threshold requirement. Even if it had passed this requirement, the application would most likely have not succeeded as the case is one which in the opinion of the court damages would be an adequate remedy as they would easily be calculable, that is, the deducted sum plus interest, if any, and the plaintiff having not shown that the defendant would not be in a position to pay such damages. The end result is that the applicant's application has to fail and is accordingly dismissed.

The defendant is awarded costs of the application.

Made this day of June, 2016, at Blantyre in the Republic of Malawi.



H.S.B. POTANI
JUDGE