



IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
Miscellaneous Civil Cause No 13 of 2015

Between

Themba Magawa ..... 1<sup>st</sup> Plaintiff

Baxter Thera Nyasulu ..... 2<sup>nd</sup> Plaintiff

-and-

Mzuzu Coffee Planters Cooperative Union Limited ..... Defendant

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CORAM:

HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. C. Duke ..... of counsel for the Plaintiff

Mr. M. Amidu ..... of Counsel for the Defendant

Mr A. Kanyinji ..... Official Interpreter

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*DeGabriele, J*

**Judgement on Hearing Originating Summons**

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**Introduction**

The Plaintiffs herein were employed by the Defendant as Assistant Estate Manager and Estate Manager respectively. They were suspended from duty in June 2014 and were subsequently dismissed on 28<sup>th</sup> October 2014 after going through a disciplinary hearing. The Defendant, through a letter dated 20<sup>th</sup> November 2014 wrote to each Plaintiff stating that the Plaintiff had to settle liabilities, indicated as MK3,356,324.19 for the 1<sup>st</sup> Plaintiff and MK3,172,966.19 for the 2<sup>nd</sup> Plaintiff.

The same letter stated that pension calculated as MK342,591.88 for the 1<sup>st</sup> Plaintiff and MK425,513.36 for the 2<sup>nd</sup> Plaintiff as well as goods that were in the possession

of the Defendant were to be seized to offset the liabilities. After such offset, the Plaintiffs still owed the Defendant the sum of MK2,476,732.30 for the 1<sup>st</sup> Plaintiff and the sum of MK2,552,452.83 for the 2<sup>nd</sup> Plaintiff. The Plaintiffs filed *inter partes* application for an interlocutory injunction pursuant to Order 29 of the RSC and it was granted on 9<sup>th</sup> June 2016, compelling the respondent by itself, its servants, agents or whoever to return to the applicants their personal properties which the Defendant had seized, until the determination of the main matter herein or until a further order of the Court.

The Plaintiffs herein do not dispute that they owe the Defendant money. They have come to court and filed an originating summons dated 16<sup>th</sup> December 2015, which was amended on 1<sup>st</sup> September 2016 to seek a number of declarations as follows;

1. *A declaration that the Defendant did not have authority or any legal basis to seize personal properties of the Plaintiffs because the Defendant is not a sheriff of Malawi Judiciary and because the Defendant did obtain a Court Order authorizing it to seize the property.*
2. *A declaration that the conduct of the Defendant in seizing the personal properties of the Plaintiffs was unlawful and amounted to trespass to goods and arbitrary deprivation of property.*
3. *A declaration that withholding of Plaintiff's pension to settle alleged office liabilities is unlawful as pension cannot be attached or be offset with office liabilities/debts.*
4. *An order that the Defendant pays the Plaintiffs money to the equivalence of the property unlawfully seized and pension unlawfully withheld as follows:*
  - a. **MK9,427,641.88** to the 1<sup>st</sup> Plaintiff, Themba Magawa.
  - b. **MK746,813.36** to the 2<sup>nd</sup> Plaintiff, Baxter Thera Nyasulu.
5. *An order that the Defendant pays the Plaintiffs damages for trespass to goods it unlawfully seized.*

6. *An order that the Defendant pays the Plaintiffs damages for loss of use of property it unlawfully seized.*
7. *An order that the Defendant pays the Plaintiff damages for the inconvenience it caused them by denying them the pleasure and comfort of using their property and to abandon their routine daily schedules to plead with the Defendant as well as pursue this matter in Court in an attempt to seek redress.*
8. *An order that the Defendant pays the 1<sup>st</sup> Plaintiff damages for loss of business that the 1<sup>st</sup> Plaintiff suffered when the Defendant seized his tobacco which he wanted to sell at Mzuzu Auction Floors.*
9. *An order that the Defendant pays the Plaintiff's withheld salary for the month of June, 2014 for which they worked and salary for the months they were on suspension from month of July, 2014 up to month of October, 2014, when they were dismissed, since for that period they remained employees of the Defendant.*
10. *An order that Costs be borne by the Defendant.*

The court record shows that a judgement was delivered by Justice Madise in favour of the Plaintiffs on 11<sup>th</sup> November 2016 when the Defendants had failed to attend the hearing. The judgement was eventually set aside by the same court on 15<sup>th</sup> November 2016, following an *ex parte* application by the Defendant, and the matter was subsequently set down for trial.

### **The application**

The Plaintiffs' claims and story are similar save for personal details and the type of property that was seized. A reading of the affidavits sworn by the Plaintiffs in support of the amended originating summons shows that the Plaintiffs were individually called to a meeting which ended up being a disciplinary hearing and that they were summarily dismissed following the disciplinary hearing. The Defendant wrote the Plaintiffs on 20<sup>th</sup> November 2014 and informed them that they would seize property of the Plaintiffs that was in the Defendant's possession and their pension dues to offset the debt. The Plaintiffs claim that the Defendant had



no court order to seize the goods nor was he the Sherriff of Malawi as there was no proof that the goods were acquired using the Defendant's money. The Plaintiffs further claim that the withholding of pension was wrong as it was not supported by a court order, and in any event pension cannot be attached to settle a debt. The Plaintiffs state that they were deprived of the use of their property and were put at an inconvenience. The Plaintiffs claim that the Defendant does not dispute seizing the said property and that the order by Madise, J stated that the property had to be returned to the Plaintiffs. The 1<sup>st</sup> applicant is claiming a total of **MK9,427,641.88** and the 2<sup>nd</sup> Plaintiff is claiming a total of **MK746,813.36**.

The Defendant denies the claims of **MK9,427,641.00** and **MK746,813.36** by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff respectively, arguing that the sums are based on exaggerated lists of property alleged by the Plaintiffs without basis. The Defendant acknowledges that the pension claim is right and that all the property seized by the Defendant are in the Custody of the Court. The Defendant claims that this was a material fact which was not disclosed. The Defendant further alleges that the Plaintiffs had not served the Defendant's Legal Practitioners with documents of the matter in order to prejudice the Defendant's case.

### **Preliminary Observation**

The issues that have been brought to this Court all emanate on the issue of employment relationship. This Court is very much aware that the Industrial Relations Court has jurisdiction on issues of employment. To this effect this matter should have been taken to that court. For that reason, all the issues relating to the actual relationship between the employer and employee will not be determined by this Court, since the Plaintiffs themselves have already indicated that they will commence proceedings in that court for unfair dismissal. I will limit myself to general issues raised in the originating summons as indicated below.

### **Issues for determination**

The major issues for determination are;

1. Whether the Defendant acted arbitrarily in withholding the property of the employees without a court order

2. Whether pension benefits can be withheld by an employer to offset a debt incurred by an employee

I have read the affidavits of the Plaintiffs in support of the first originating summons as well as the amended originating summons. In my view, this is matter that should have been brought by way of a writ of summons as there are many contentious issues outlined.

### **The Law and Analysis of the matter**

The Plaintiffs have claimed that the order of injunction had stated that the seized property be returned to them. The order of injunction granted by the court and as endorsed, was formulated in the *inter partes* summons for an interlocutory mandatory injunction pursuant to Order 29 of the RSC. The wording was to the effect that

*“... an injunction compelling the respondent by itself, its servants, agents or whoever to return to the applicants their personal properties which the respondent seized from the applicant a until the determination of the main matter herein or until a further order of the Court”*

The court granted the injunction, but endorsed its own terms which were;

*“That the main matter be filed within 7 days*

*That the seized items be deposited at court within 7 days”.*

This clearly shows that the order drafted by counsel for the Plaintiffs and endorsed by the Acting Assistant Registrar was both wrong and aimed at misleading the court. The order as drafted by counsel was to the effect that

*“... an injunction be and is hereby granted compelling the respondent by itself, its servants, agents or whosoever to return the applicants properties which were in their custody”*

This was wrong and such underhand dealings, and addition of clauses in the orders drafted by counsel is not acceptable. The Judge could not have said return the property in one breath and then deposit the property with the court in another breath. Indeed, it is advisable for Assistant Registrars to check and ensure that the

order endorsed by the Judge is exactly as reflected in the wording of the order drafted by counsel. In the alternative, it is strongly advisable for the Assistant Registrar to draft their own orders to ensure that the words they use give effect to the order as put down by the Judge.

***1. Whether the Defendant acted arbitrarily in withholding the property of the employees without a court order***

The Plaintiffs herein owed the Defendant some money and this is not disputed at all. The intention to seize the Plaintiffs' property was clearly communicated to the Plaintiffs through the letters dated 20<sup>th</sup> November 2014, and marked as **TM2** and **BTN4** respectively. The Defendant was in his right to seek to recover the debt. The Plaintiffs obtained an order of injunction, which stated that the seized goods be deposited at court. The effect of this order was that the Plaintiffs still owed the Defendants the sum of MK3,356,324.19 for the 1st Plaintiff as outlined in the document marked **TM2**; and MK3,172,966.19 for the 2<sup>nd</sup> Plaintiff as outlined in the document marked **BTN4**.

The Plaintiffs are seeking to have this Court determine whether or not they can withhold the property of the Plaintiffs without a court order. To begin with, section 56(4) of the Employment Act, 2000 permits an employer to deduct an amount of money from an employee's wages as restitution for property damaged by the employee. This deduction is from wages of the employee and it does not require a court order, and such deductions cannot be deemed to be arbitrary. However, the employer must act reasonably in so deducting.

As regards the property that already belongs to an employee, the employer cannot just withhold the property because it is within his possession. However, where conditions of service stipulate the mode of recovery, then the employer and employee will be governed by the same. The Defendant argues that they did not seize the property but just withheld the property with the view to sell and recover the damage. In such a scenario there was no need to get a court order to hold on to the property. The question is whether or not the employer can recover a debt, through other means, other than the wages which he has in custody? The Defendant had argued that it had no wages of the Plaintiffs in its custody at the



time, but had some of the Plaintiff's property in its custody. The Defendant further state that the property and the pension were still not enough to cover the debt which ought to have been paid.

As stated above, the Plaintiffs have not disputed in any way that they owed money to the Defendant. This money has to be paid back. My view is that the employer ought to sue the employee to recover the debt, if the amount that is due is not covered by the wages of the employee. I hasten to add that each case must be treated in accordance to the circumstances of the case, which are to do with *'the nature of the violation, the employee's duties, the penalty imposed by the employer, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee'*, as stipulated in section 56(5) of the Employment Act 2000. In the present case, since an order of injunction was obtained against the Defendant, the property was deposited at court. The status quo is as if the property was never withheld and the Defendant did not benefit. Had the Plaintiffs paid back the sums of money within the period stipulated in the documents marked as **TM2** and **BTN4**, there would have been no purported inconvenience. I am therefore reluctant to award any damages for trespass or inconvenience or loss of use of the property. This is more so because the Plaintiffs did not challenge the debt owed within the 8-week period they had to pay the debt.

Going through the record, I have observed that the plaintiffs have filed an amended originating summons showing that they are owed **MK9,427,641.00** and **MK746,813.36** as being the value of seized property and pension. The Defendant states that these are exaggerated lists which have no basis. The court record and the documents submitted outlying the seized property to appreciate the lists of property differ.

As regards the 1<sup>st</sup> Plaintiff, he received a letter dated 20<sup>th</sup> November 2014 which is marked as **TM2** showing the items seized that were in the possession of the Defendant. The items are specified as 6 bales of tobacco, one sofa set, one three-quarter-bed, and one single bed. There is another list on the court file marked as **TM2** but is not dated nor signed by the author but was attached to the original

originating summons, which has many items all valued at MK559,2000 but there is no tobacco included. There is yet another list marked as **TM3** dated 10<sup>th</sup> March 2016 (attached to the amended affidavit), reflecting seized property as of 27<sup>th</sup> June 2014 valued at MK9,427,641.88. On this list tobacco is included. The list of property handed over to the court, dated 24<sup>th</sup> June 2015, has the following items;

- a. Tobacco 355kgs
- b. 2 beds, 1 broken
- c. 2 big buckets
- d. 1 small bucket
- e. 1 suitcase expand
- f. 1 sofa set
- g. 1 sack bag
- h. 3 cooking pots
- i. 1 mattress.

As regards the 2<sup>nd</sup> Plaintiff, the letter from the respondent marked **BTN4** and dated 20<sup>th</sup> November 2014 shows that the 26 iron sheets were seized and they were worthy MK195,000. The 2<sup>nd</sup> Plaintiff has then exhibited in his amended claim a list marked as **BTN3** dated, 10 March 2016 showing seized property as of 27<sup>th</sup> June 2014; that included 26 iron sheets, 2 volumes of coffee hand books, 1 8GB flash disc and a social science book. The list for property belonging to the 2<sup>nd</sup> Plaintiff as handed over to the High Court, and dated as 24<sup>th</sup> June 2015, shows that 26 (15ft 28 gauge) iron sheets were deposited at Court.

Based on the facts outlined above, I have made the following observations. Firstly, is that the amended lists by the Plaintiffs, purporting to show the property that they had as of 27<sup>th</sup> June 2014, should not have been brought into this case on 10<sup>th</sup> March 2016. The matter was begun in November 2015 and surely had the list been genuine and in existence at that in November 2015, these items would have been filed with the court at that time. Again, if there were any items that had been lost while in the possession of the Defendant, those would have been indicated as early as June 2015, when the seized property had been handed over to the court. I note that the amended originating summons, with the affidavits to which the new list **TM3** and **BTN3** were attached was only filed in court on 31<sup>st</sup> August 2016. I am convinced that the new lists were not a genuine reflection of the property that was seized.



Secondly, as regards both the Plaintiffs, the Defendant had clearly outlined what items they had in their possession and would seize those items. This was indeed what happened with the 2<sup>nd</sup> Plaintiff. For the 1<sup>st</sup> Plaintiff further items of buckets, suitcases and bag, mattress and pots were deposited at court although they were not among the items earmarked for seizure. There is tobacco in 6 bales earmarked for seizure but the tobacco delivered at court was 355kgs. I am not sure if the 6 bales weighed 355kgs.

Thirdly, as regards the 1<sup>st</sup> Plaintiff, I note that the list as filed on 10<sup>th</sup> March 2016 was very highly exaggerated. The Defendant had specifically stated what was to be seized. I find that the only genuine list for Themba Magawa is that which is at court, reflecting the items in **TM2** and a few other items. The other list on the court record is not dated nor endorsed with the author and it can be a list from anybody. I note that there was no tobacco on that list too. The court only received 355kgs of tobacco which would be closer to the value claimed by the respondent. There is no record whatsoever of where the amounts of tobacco from the new amended list came from. Furthermore, if the 1<sup>st</sup> Plaintiff stood to lose such huge sums, why did he not file the list dated March 2016 in November 2015? I find that this new list cannot stand. This new list of the seized goods submitted by the 1<sup>st</sup> Plaintiff was meant to give a bigger value for money. I find this to be fraudulent behaviour.

A number of issues exercise my mind. The first is that the amended lists by the Plaintiffs, purporting to show the property that they had as of 27<sup>th</sup> June 2014, should not have been brought into this case on 10<sup>th</sup> March 2016. The matter was begun in November 2015 and surely had the list been genuine these items would have been files at that time. As regards both the Plaintiffs, the Defendant had clearly outlined what items they would cease. This was clear in terms of the 2<sup>nd</sup> Plaintiff. For the 1<sup>st</sup> Plaintiff further items of buckets, suitcases and bag, mattress and pots were deposited at court although they were not among the items earmarked for seizure. There is tobacco in 6 bales earmarked for seizure but the tobacco delivered at court was 355kgs. I am not sure if this was the same as 6 bales. As regards the 1<sup>st</sup> Plaintiff, I note that the list as filed on 10<sup>th</sup> March 2016 was very highly exaggerated and it cannot stand. First, the respondent specifically stated what was to be seized. And the list of the seized goods was meant to give a bigger

value for money. The only genuine list for Themba Magawa is that which is at court. The other list is not dated nor endorsed with the author. It can be a list of anybody and anything. I note that there was no tobacco on that list too. The court only received 355kgs of tobacco which would be closer to the value claimed by the respondent. There is no record whatsoever of where the amount from the new amended lists **TM3** and **BTN3** came from.

## ***2. Whether pension benefits be withheld to cover liabilities?***

The law on pension has evolved in the recent years. Before the year 2011, pension benefits which were to be paid to the employees directly at the end of an employment relationship. Further, some employers were able to withhold employee pension benefits to offset a debt or to recover loss.

The new pension regime offers a form of social security to employees so that they have a financial cushion once they have retired from active employment. Pension is indeed not part of wages as it is a form of social security and cannot in any way be attached to a debt. The change in the law entailed that pension cannot be paid to the employee at the cessation of employment, regardless of how the employment is terminated, but that the pension should be transferred to a pension fund of the employee's choice. Section 64 of the Pension Act 2011, provides for circumstances under which pension is payable, that is at retirement either mandatory or on other basis, leaving Malawi permanently, death, permanently leaving service of employer, where the benefits are transferred on to another pension fund. As such it is inconceivable that the law intends that pension benefits be used as a form to clear liabilities of employees. As such no employer can legally withhold pension as restitution. Doing so would defeat the purpose and spirit of the Pension Act, 2012.

The Plaintiffs herein owed the Defendant some money and this is not disputed at all. The Defendant was in his right to seek to recover the debt. But as seen above, he is prohibited by the law to recover the debt by forfeiting pension benefits. The Plaintiffs obtained an order of injunction, which stated that the seized goods be deposited at court. The effect of this order was that the Plaintiffs still owed the Defendants the sum of MK3,356,324.19 for the 1<sup>st</sup> Plaintiff as outlined in the

document marked **TM2**; and MK3,172,966.19 for the 2<sup>nd</sup> Plaintiff as outlined in the document marked **BTN4**.

### **Determination**

Having read at the affidavits and submissions, I make the following orders;

1. The Plaintiffs have not disputed that they owe the Defendant the sums of MK MK3,356,324.19 and MK3,172,966.19 respectively. The said sums of money ought to be paid to the Defendant within 21 days of this judgement. Failure to pay back the said sums of money will lead to a warrant of execution being issued against the Plaintiffs in respect of the sums owed.
2. The seized property as recorded, and in the custody of the court should be given back to the Plaintiffs.
3. The declarations and reliefs sought by the Plaintiffs in the amended originating summons fail in their entirety

It is so ordered.

**Made in Chambers at Mzuzu Registry this 30<sup>th</sup> day of November 2017**

  
D.A. DeGabriele

**JUDGE**