



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 66 OF 2020

GESTETNER LIMITED

CLAIMANT

AND

**MCNEVER OPRAISE MHANGO
MBACHI SILUNGWE
DANIEL GONDWE**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

CORAM: HON. JUSTICE J. ALIDE

Mr. M. Msuku, of counsel for the Claimant
Ms. P. Chuma, of counsel for the Defendants
Mr. B. Ntonya, Court Clerk

RULING

- 1.0 This matter came before this Court for hearing on 23 October 2023. However, we could not proceed because both the Claimant was not ready as its sole witness was outside the jurisdiction and not available for the hearing. On the side of the Defendants, they had one witness ready but in any case it was not procedurally possible to proceed and hear the said witness. That being the case, however, the Court took notice that the Defendants had, in paragraph 6 of their Defence, brought up the issue of the Court's lack of jurisdiction in the matter. It was the Defendants' view that the present matter was not a commercial matter but a matter which fell under the jurisdiction of the Industrial Relations Court. Accordingly, the Court gave directions to the parties to proceed and make submission on the matter accordingly. This ruling therefore addresses the same.
- 2.0 The background of the matter is that the Claimant commenced the action in this Court against the Defendants for the enforcement of a restraint in trade provision contained in the employment contract between the Defendants and the Claimant. The provision was signed for by the Defendants in the course of their employment with the Claimant.

- 3.0 The facts of the matter are that the Defendants were at all material times the Claimant's employees, being technicians responsible for ATM hardware and software maintenance. It is the Claimant's story that as part of their employment, the Claimant paid for the Defendants' highly specialised training in hardware and software maintenance with the aim of serving the Claimant's customers better. The Claimant states that by virtue of their position and expertise, the Defendants were in constant contact with the Claimant's customers. Accordingly, it was an express term of the employment agreement between the parties that the Defendants were not, within two years from termination of their contracts with the Claimant, supposed to engage in any work that was in competition with the Claimant's customers or competitors. Allegedly, in or about October 2019, in breach of this specific term, the Defendants resigned from the Claimant's employment and took up jobs with National Bank of Malawi, who was one of the Claimant's major customers. Consequently, the Claimant has brought up the present proceedings claiming that it suffered loss by reason of the Defendants' conduct and is demanding damages for loss of business; reimbursement of the Defendants' training costs; an order for specific performance of the terms Employment Agreement; and costs of the action.
- 4.0 The Defendants have among other things denied having been caught by the specific term of the employment contract arguing that the employment agreements had expired long before they left employment with the Claimant. Further, they argued that the clause restricting the Defendants from being employed by any institution with an ATM machine was unreasonable and unjustifiable limitation of the Defendants' rights enshrined in Section 29 of the Constitution of the Republic of Malawi to freely engage in economic activity, to work and pursue a livelihood anywhere in Malawi. The Defendants have further argued that the Claimant's action in so far as related to the breach of the employment agreement should have been brought before the Industrial Relations Court because it was the only appropriate court versed with the original jurisdiction over employment related matters, and not the High Court, Commercial Division. They pleaded that the matter be dismissed on that basis.
- 5.0 In their submissions, the Defendants have argued that the Claimant's Statement of Case was clear that the Defendants were at all material times employees of the Claimant and were not engaged in any commercial business or other contractual arrangement with the Claimant. They have argued that it was clear that the claim was centred on their relationship as employer and employee, and on a provision that the Claimant caused the employees to sign in the course of their employment. It was therefore the Defendants' argument that the present matter was all about enforcement of an employment contract between the Claimant and the Defendants, which the Claimant alleges was breached by the Defendants. The Defendants argued that being the case, it was clear that the matter was a labour issue and not a commercial matter.
- 6.0 The Defendants have argued that there was no justification in taking the present dispute to the High Court, Commercial Division when it was very clear that the cause of action

was founded on employment agreements between the Claimant and the Defendants, severally, bearing in mind that it was only the Industrial Relations Court that had competent jurisdiction to hear and determine matters arising from an employment relationship between parties. The Defendant has argued that the extent of a loss, or claim, or value of damages arising from the claim, were not the determining factor on the issue of jurisdiction rather the nature of the dispute. It was submitted that the present matter had its roots in an employment contract and should have therefore been brought in the appropriate court. Accordingly, the Defendant called for the dismissal of the matter in its entirety with costs.

- 7.0 On the other hand, the Claimant has argued that the Court has jurisdiction to hear the matter bearing in mind the circumstances under which the employment contracts were entered into between the parties. The Claimant has argued that the question that this Court must attend to is whether this matter was a labour dispute or not.
- 8.0 The claimant has argued that what makes a matter a commercial matter is not the relationship between the parties but the nature with the transaction in dispute. Where a transaction has a commercial significance then the matter would be considered as a commercial matter irrespective of the relationship between the parties. In its argument, there was no labour or employment rights to be enforced by the parties in this matter. The issues were about the Claimant enforcing its business interests which had allegedly been injured by the Defendants' conduct. The Claimant has argued that it had apparently lost business because of the conduct of the Defendants. It was therefore the Claimants view that the present matter was not a labour matter but a commercial matter and therefore the court had jurisdiction to hear the same.
- 9.0 Having heard both parties, I must start by stating that the High Court has, by virtue of Section 108(1) of the Constitution of the Republic of Malawi, unlimited original jurisdiction to hear any civil or criminal matter under any law. However, Section 110 of the Constitution provides that there shall as well be courts that are subordinate to the High Court which may be prescribed by an Act of Parliament and may be presided by the professional or lay magistrates as may be determined. Under subsection 110(2), the Industrial Relations Court is established as subordinate to the High Court with original jurisdiction over labour related issues and such other issues relating to employment. Section 64 of the Labour Relations Act further states that the Industrial Relations Court shall have original jurisdiction to hear and determine all labour disputes and any other disputes assigned under the Act or any other written law.
- 10.0 Section 6A of the Courts Act establishes specialised divisions of the High Court. Section 6A(b) establishes the Commercial Divisions which is specialized in the hearing of any commercial matters. A commercial matter has been defined by section 2 of the Courts Act as follows:

“a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not including –

- (a) The formation or governance of a business or commercial organisation;
- (b) the contractual relationship of a business or commercial organisation;
- (c) liabilities arising from commercial or business transactions;
- (d) the restructuring or payment of commercial debts;
- (e) the winding up of companies or bankruptcy of persons;
- (f) the enforcement or review of commercial arbitration awards;
- (g) the enforcement of foreign judgments of commercial matters subject to the provision of the law;
- (h) the supply or exchange of goods and services;
- (i) banking, negotiable instruments, international credit, and similar financial services;
- (j) insurance services; or
- (k) the operation of stock and foreign exchange markets.”

11.0 Looking at the current matter, it is very clear that the root of the claim has its origins in an employment contract signed by the parties at the time that the Defendants were in the employment of the Claimant. Paragraph 5 of the Claimant’s Statement of Case reads as follows:

“Realising the Defendants’ expertise as trained by the claimant and the position of the Defendants in respect of the Claimants’ customers it was an express term of the agreement between the claimant and the defendant shall not within two years from termination of their contracts with the claimant engage in any competition with the claimant’s customers or competitors (sic).”


12.0 The present matter has been commenced solely based on this provision which is contained in the employment agreement signed by the Claimant and the Defendants. The Claimant is aggrieved because the Defendants resigned from its employment and immediately took up jobs with one of the Claimant’s major customers. Accordingly, the Claimant is demanding various reliefs based on the provision.

13.0 Looking at the pleadings, it is important to note that the Defendants have in their defence argued against the matter in so many angles. They have sought to question the validity of the agreement as they allege that the same expired long before they left the employment of the Claimant. In my mind, it is an issue that the court needs to decide as to at what point did the respective contracts of employment between the Claimant and the Defendants expire, and whether such an expiry has a bearing on their obligations contained under the provision. This shall form a basis of determining the number of years from the date of such expiry to the date that the Defendants got employed respectively. Further, the Defendants have sought to question the reasonableness and justification of the above provision vis-à-vis section 29 of the

Constitution of the Republic of Malawi. All these matters must be determined by the court.

- 14.0 It is trite that all matters touching on employment or the relationship between an employee and an employer must be dealt with by the Industrial Relations Court. In *Jean Nkhoma vs Chipiku Stores*, Civil Cause Number 123 of 2020, Justice Chigona did state when faced with an action where civil and employment matters were intertwined the Industrial Relations Court must take over responsibility of such matters regardless of their complexity.
- 15.0 Looking at the present matter, it is very clear that the Claimants and the Defendants were not engaged in any contractual commercial or business arrangement. Their arrangement arose out of an employment contract, and centred on a provision that restrained the Defendants from getting into the kind of employment that they had gone into before the expiry of a period of two years after termination of their contract. In my view, this matter is more about the contractual obligations arising out of the employment agreement between the Claimant and the Defendants, and not from any commercial or business arrangement between the parties. Further, looking at some of the issues that have arisen from the statement of case, it is imperative that the same be decided by an appropriate court as they touch on when exactly the termination of the Defendants' employment took effect, respectively, and on whether such a provision in the employment contract was reasonable and justifiable in view of section 29 of the Constitution. Accordingly, it is my view that this matter does not fall in the purview of the High Court, Commercial Division, but the Industrial Relations Court in the exercise of its original jurisdiction.
- 16.0 In view my position, the Defendants' application succeeds, and the matter is dismissed in its entirety. The Claimant retains the liberty to commence the same in the Industrial Relations Court.
- 17.0 On the issue of costs, it is trite that these are awarded at the court's discretion though they usually follow the event. Accordingly, I award costs of the action to the Defendants.

Made in chambers at Blantyre this 22nd January 2024.


Jabbar Alde
JUDGE

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