- Wrongful dismissal
- bonus

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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 585 OF 1987

BETWEEN:

LAWRENCE DE SILVEIRA (MALE).........................PLAINTIFF

- and -

PROPRIETARY MANUFACTURING COMPANY LIMITED.........DEFENDANT

CORAM: MTEGHA, J.

Chirwa, of Counsel, for the Plaintiff
Msiska, of Counsel, for the Defendant
Chigaru, Court Clerk
Phiri, Court Reporter

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J U D G M E N T

The plaintiff in this case, Lawrence De Silveira, is claiming from the defendant, Proprietary Manufacturing Company Limited, a total sum of K230,000.00, being his bonus, gratuity, leave pay, passage and baggage allowance in respect of two agreements of service.

By an agreement of service dated 28th September, 1983 (the First Agreement) the defendant agreed to employ the plaintiff at a salary of K2,600.00 per month with effect from 1st October, 1983 for a period of 30 months. Clause 2 of the First Agreement provided, inter-alia, that the plaintiff would be paid annually a minimum of 10% of the nett profit of the defendant. It was further pleaded that in pursuance of this clause, the defendant agreed that for the financial year ending 31st March, 1986, the plaintiff would be paid K100,000.00, but only K50,000.00 was paid to him.

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By another agreement of service dated 14th March, 1986 (the Second Agreement), the defendant agreed to employ the plaintiff as General Manager for a period of 30 months, at a salary of K6,000.00 per month. Clause 2 of the Agreement provided that the plaintiff would be paid a bonus of 10% annually, and Clause 4 provided that the plaintiff would be entitled to a gratuity of 25% of salary received by him; Clause 5 provided that the plaintiff would be entitled to local leave at the rate of 4 weeks per year. Finally, Clause 11 provided that upon termination of the Second Agreement, the plaintiff would be provided with first class air passages, together with a baggage allowance for personal and household effects to his future country of residence.

The plaintiff's evidence was that he was in Zimbabwe and prior to October, 1978 he came to Malawi. He met Mr Fry, one of the Directors of Proprietary Manufacturing Company Limited, who asked him to revive the company since it was dormant. The parties then entered into an agreement of service for 30 months. He commenced his work on 1st October, 1978. At the expiry of this contract, he entered into another agreement - the First Agreement. Under this agreement, he was supposed to get K100,000.00 bous, but in fact he only got K50,000.00, because of liquidity problem, and he did not insist to get the balance. It was again his evidence that on 14th March, 1986, he entered into another agreement - the Second Agreement - to work for the defendant for another 30 months, commencing 1st April, 1986. It was his evidence that for the first year, under Clause 2 of the agreement, he was awarded K150,000.00 as bonus; but he has not received this money and at the commencement of this action, this amount was due to him. In support of his contention that he was entitled to this money, he produced a certificate of total emoluments and tax deducted for the year ending 31st March, 1987 - Exh.P3. This certificate, which is to be given to the employee and retained by him, shows that he was awarded a bonus of K150,000.00. It was his evidence that he was to get this money as and when the funds were available.

It was his evidence that according to Clause 4 of the Second Agreement, he was supposed to get a gratuity of 25% of the salary he received and if he served a full period, i.e. 30 months, the gratuity might be tax-free. He further informed the Court that his services were terminated on 11th July, 1987, and by that time he had earned K96,000.00 and 25% of this amount was K24,000.00 - which he is claiming. He did not receive this gratuity.

It was further his evidence that under the Second Agreement, he was entitled to 4 weeks' local leave and by the time his employment was being terminated, he had completed 16 months, without going on leave, because his assistant was on overseas leave. If his services were not terminated, he would have taken his leave; but since his services were terminated, he is claiming K6,000.00 for the 4 weeks.

It was his evidence that according to Clause 9 of the Second agreement, he was entitled to 3 months' notice. Since the defendant summarily terminated his employment, he is claiming K18,000.00 for the 3 months.

It was also the plaintiff's evidence, that in accordance with Clause 11 of the Second Agreement, upon termination of the Second Agreement he would be provided with first class air passages for himself, his wife and children, together with a baggage allowance for personal and household effects to his future country of residence. However, it was the plaintiff's evidence, that instead of

providing him with air tickets to Australia, which was his future country of residence, the defendant only provided him with air tickets to Zimbabwe and never paid him baggage allowance for personal and household effects.

It was further the evidence of the plaintiff that, according to the terms of the Second Agreement, school fees for his children were to be paid by the defendant. The defendant never paid these. The plaintiff, therefore, spoke to Mr Carter, the main shareholder of the defendant, based in Zimbabwe. It was his evidence that Mr Carter instructed him to take school fees from the sales, and in order to avoid income tax, it was agreed that the plaintiff should open separate cash sale books in Lilongwe and Blantyre. The money collected on these cash sales books was to be handed to him and utilised for schools fees. These instructions were being carried out, and, to his surprise, Mr Fry did not like it and his services were terminated on 11th July, 1987. The plaintiff contends, therefore, that he was unlawfully dismissed. This, in brief then, is the case for the plaintiff.

I will now turn to the case for the defendant. The first witness for the defendant was Mr Elwin Mwafulirwa. It was his evidence that he was employed as a counter salesman for the defendant in Blantyre. The plaintiff, at that time, was his General Manager until 1987. He stated that he got special instructions from the plaintiff regarding cash books. He was instructed to use separate cash books and money realised on those cash sale books was to be set aside for tax purposes, and he handed the money from these cash books to the plaintiff. All in all, he handed over about K4,500.00 to the plaintiff. He was surprised, therefore, when one day Mr Fry, the 'Managing Director' called him and asked him about these cash sales books. He explained what had transpired.

The second witness for the defendant was Mr Anthony Gajda. He was employed by the defendant in 1984 as a Technical Sales Manager. He was working directly under the plaintiff. His evidence was that he was not consulted about separate cash sale books which the plaintiff authorised that they should be opened. He only became aware of them when Mr Fry asked him to attend a meeting at which Mr Mwafulirwa, Mr Fry and the plaintiff attended. This was on 9th July, 1987. At that meeting, when the plaintiff was asked, he confirmed that he opened separate books in Blantyre and Lilongwe and that it was with the knowledge of Mr Carter. When Mr Carter flew in from Harare another meeting was held and he was appointed Acting General Manager and the plaintiff was told not to appear at the premises. In cross-examination, the witness told the Court that his bonuses were paid on time - about three months from the date of declaration and he never experienced any difficulties at all about his gratuity. It was further his evidence that under the contract, he would only receive 25% gratuity after satisfactory completion of the contract.

The main witness for the defendant was Mr Fry. It was his evidence that he was a Director of the defendant company, and in 1978 the plaintiff was employed as Manager to revive the company which was dormant. It was his evidence that the plaintiff was responsible for all the day-to-day running of the company. He was, however, also responsible for the finances of the company. It was his evidence that within six months of the plaintiff's arrival the company was self-suporting; the plaintiff was an excellent manager - he produced extremely good results, and eventually the plaintiff took over the running of the company's affairs, and he, Mr Fry, was only responsible at audit level - recommendation of bonuses, etc.

It was his evidence that in July, 1987 the plaintiff's employment was terminated. A member of staff reported to him that there were certain cash books which were being used without the knowledge of the company. He checked and indeed he found these books, which were in the handwriting of Mr Mwafulirwa. He asked Mr Mwafulirwa, and indeed Mwafulirwa agreed that he did open these books on the instructions of the plaintiff. He then summoned the plaintiff, Mr Mwafulirwa and Mr Gajda. The plaintiff admitted to have opened the books and that Mr Carter knew about them. He then asked him to leave the premises until Mr Carter arrived from Zimbabwe. Mr Carter arrived and the following morning a meeting took place; the plaintiff failed to give a satisfactory reason, except to say that he was avoiding taxation. Mr Carter then decided to dismiss him then and there without any pay. He, however, pleaded with Mr Carter not to report the matter to Police, because his application to emigrate to Australia was advanced and a criminal action would prejudice his going there, and the fraud was not more than K10,000.00, and his record of service was excellent. The loss of his job was sufficient punishment. This, Mr Carter accepted

I will now turn to the evidence of the claims from the point of view of this witness. He went on to say that the bonus for the year ending 31st March, 1986 was declared on 9th June, 9186 and the plaintiff was awarded K100,000.00. The sum of K50,000.00 was paid and the balance was also paid as follows: A sum of K30,302.50 was paid and acknowledged by the plaintiff's legal practitioners on Exh.D7. A further cheque for K4,350.00 was also paid later by Savjani and Company on 7th June, 1988 - making a total of K34,652.50; this was after taxation. This evidence is not disputed at all.

It was further his evidence that a bonus of K150,000.00 was declared for the plaintiff on 9th June, 1987. The relevant minutes of the meeting of Directors stipulated as follows:

"Bonuses: The following staff bonuses were proposed: Mr L X De Silveira - K150,000.00, subject to conditions to be agreed."

It was his evidence that at this time the Directors of the company were not aware of the financial irregularities perpetrated by the plaintiff. It was his view that the plaintiff was not entitled to this bonus because the conditions were not agreed upon; but he would, in his view, be entitled to his 10% of the net profit. It was his evidence that the plaintiff was awarded a higher figure because of anticipated profit and that he would relinquish some of the benefits such as school fees, etc., but these conditions were not agreed upon, and in any case, his benefits were forfeited because of the dismissal as a result of the discovery of the financial irregularities.

It was the evidence of this witness that the defendant bought air tickets for the plaintiff and his family to Zimbabwe. The defendant did not buy tickets to Australia, because Australia was not the country of his origin. As a result, he advised the Immigration Department accordingly and cancelled a guarantee for repatriation at National Bank.

In cross-examination, this witness informed the Court that he had no evidence that the defendant paid school fees, but the plaintiff, being the in-charge of the operations, could have paid school fees from the company's funds; that he was entitled to 25% as gratuity on whatever salary he received; that he was entitled to 4 weeks' leave and that he was aware that the plaintiff hoped to go to Australia at the conclusion of his contract. It was further his evidence that he was not aware that the plaintiff had brought his personal machines into the company premises, etc.

The evidence of the next witnesses, Mr Abdula Mahomed Jussab, the Company Accountant, was to the effect that he was not advised by the plaintiff that the plaintiff had ordered the provision of separate cash sale books in order to evade tax; and these books were never given to him to check.

The last witness was Mr Andrew Thomas Carter. He is the Chairman of the defendant company, based in Harare. It was his evidence that the plaintiff was employed as General Manager of the defendant, responsible for the day-to-day running of the company. As such, he would make sure that school fees for his children were paid by the company. It was, therefore, nonsense to say that he authorised the plaintiff to open separate books of accounts in order to accommodate school fees. Neither did he authorise him to open these books in order to avoid income tax. It was further his evidence that when he was informed by Mr Fry about these books, he flew into Malawi and after examining

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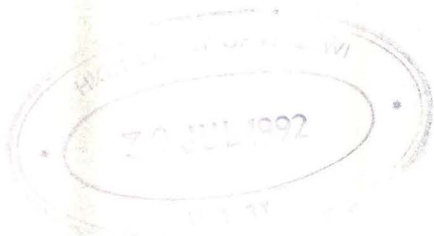
these books, he was of the view that the matter be reported to Police. He was, however, dissuaded from taking this course. When he confronted the plaintiff, the plaintiff admitted to have opened these books, because he needed the money, but never said he did this on his instructions.

This then was the evidence before me. I must now evaluate it and relate it to the law in this respect.

It appears to me that the issues raised in this matter mainly revolve on the interpretation of the agreements entered into by the parties. As far as the First Agreement is concerned, the only question to be determined is whether the plaintiff is entitled to K50,000.00 balance of the bonus declared in June 1986, which I will resolve presently. All the other issues concern the Second Agreement and, for the sake of clarity, I reproduce it hereunder:

"1. The Employer hereby employs the Employee from the First day of April 1986 for a term of thirty calendar months.

2. **REMUNERATION OF EMPLOYEE**



The remuneration of the Employee shall be Six thousand Kwacha (K6,000.00 per month in arrear, although salary or cost of living increases may be awarded at the discretion of the Directors. Participation in nett profits to a minimum of ten percent (10%) will be paid annually on completion of audited accounts.

3. **ACCOMMODATION**

During the term of this agreement the Company shall provide the Employee with suitable accommodation free of rent.

4. **GRATUITY**

The Employee shall be entitled to a gratuity of TWENTY FIVE PER CENTUM (25%) of salary received. It is understood that this gratuity may be awarded free of Malawi Income Tax provided that the CONTRACT PERIOD OF THIRTY MONTHS is served, and subject to the agreement of the relevant authority.

5. **LEAVE**

The employee shall be entitled to local leave at the rate of FOUR (4) weeks per year after the completion of ONE (1) year's service. The Employee shall make every effort to take holidays one yearly within the prescribed period.

6. **MEDICAL AND DENTAL AID**

The Employee shall be entitled to Medical and Dental Aid under the usual terms and condition which, inter alia, include that one half of the subscription shall be paid by the Employee and one half by the Employer.

In the event of the Employee or any member of his family falling ill and that specialised treatment in Malawi is unavailable, the Company will bear the expense of transportation to the nearest country where suitable treatment is available.

7. **SCHOOLING**

The Employer will meet the cost of schooling for the Employee's two children, in line with Company policy.

8. **DUTIES OF THE EMPLOYEE**

The position of the Employee shall be that of Manager of the Employer and shall consists of the Employee being responsible for the efficient and proper administration of the Employer. The Employee shall be responsible for the hiring of staff, administration, sales promotion, stock control and invoicing. The Employee shall consult and obtain approval of the Board of Directors and the Employer in regard to any decision involving the Employer in any financial arrangements, major changes of current policy and agency agreement.

9. **TERMINATION OF CONTRACT**

The Contract may be terminated by either party giving to the other party THREE (3) months' written notice of its or his intention to terminate the Contract.

10. SICK LEAVE

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Sick leave will be granted to the Employee if he is absent from duty as a result of illness or accident. If he is off duty for a period not exceeding three days he may be granted sick leave on making written application which satisfactorily explains the cause of his absence. If he is absent from duty for any period in excess of three days, sick leave will be allowed only upon provision of a certificate from a registered practitioner containing particulars of the illness or accident responsible for his absence.

11. REPATRIATION

First class air passages to his future country of residence will be provided for the Employee and his depandants upon termination of this Contract, together with a baggage allowance for personal and household effects."

As far as the facts are concerned, some of them have come out quite clearly from the evidence and are not in dispute at all. It is quite clear that the plaintiff was employed by the defendant in terms of the two service agreements as General Manager. There is no dispute again that the plaintiff was summarily dismissed by the defendant on 11th July 1987. The result is that he could not perform his contract in terms of the Second Agreement.

It will be noted that the First Agreement was properly executed by both parties. However, the plaintiff is claiming K50,000.00 as balance of his bonus. There is no doubt that at a meeting of the Directors held on 9th June 1986 the plaintiff was awarded K100,000.00 bonus. The evidence shows that only K50,000.00 was paid, leaving a balance of K50,000.00. This balance, if not already paid, should be paid to the plaintiff. My reasons for saying this will become apparent later on in this judgment.

This, therefore, leaves me with the matters raised in the Second Agreement.

As I have pointed out earlier on, the plaintiff's employment was terminated on 11th July 1987. The defendant has stated that the plaintiff's services were terminated because of financial irregularities perpetrated by the plaintiff, in that he opened separate cash books, proceeds from which were paid to him instead of being paid to the company. The plaintiff admits to have opened separate cash books, but he says it was on the instructions of Mr Carter, in order to

avoid income tax and to pay school fees for his children. Having heard the evidence on this aspect, I hold it as a fact that Mr Carter did not authorise the opening up of these separate cash books. I also hold it as a fact that the plaintiff could have lawfully paid school fees from the defendant's funds. Was this misconduct? This question will be answered presently. For the moment, I would like to say one or two things regarding wrongful dismissal. Section 11(a) of the Employment Act empowers an employer to summarily dismiss an employee when an employee is guilty of misconduct. Apart from this statutory provision, there are numerous authorities which state that an employer is entitled to summarily dismiss an employee where the employee is guilty of misconduct or does anything inconsistent or incompatible with the duties he is expected to perform - Nyirenda -v- Lujeri Tea Estates Ltd, Civil Cause No. 507 of 1981 (unreported); Thom Mvula -v- Norse International Ltd, Civil cause No. 701 of 1987 (unreported). Again, there is no rule of law setting out the degree of misconduct which will justify dismissal. Anything which is incompatible with the due or faithful discharge of his duty to his employer is misconduct which justifies an employer to dismiss an employee, although the incompatible thing is done outside the service - Wasili -v- Clan Transport Ltd, Civil Cause No. 506 of 1981 (unreported).

Apart from these local authorities, there are other numerous cases on the point. For example, absence of a clause in a contract to provide for dismissal does not mean that the defendant cannot be dismissed if there is a breach - Boston Deep Sea Fishing Co. -v- Ansell, (1888) 39 Ch.D 339.

In the case at hand there is evidence that the plaintiff opened his own accounting books and collected the money from those books for his own use. This, to say the least, was fraud and the conduct was criminal. In such a case, an employer is entitled to dismiss him summarily - Laws -v- London Chronicle, (1959) 1 WLR 698. The dismissal of the plaintiff was, therefore, justified.

Mr Msisha has submitted that because of this misconduct on the part of the plaintiff, he had repudiated the contract and had, therefore, disentitled himself of the benefits under the Second Agreement.

It would appear to me that the proper approach would be to examine the claims separately.

I will first examine the claim for gratuity. The plaintiff is claiming K24,000.00 in terms of Clause 4 of the Second Agreement. Clause 4 stipulates:

> "The employee shall be entitled to a gratuity of twenty-five per centum (25%) of salary. It is understood that this gratuity may be awarded free of Malawi Income Tax provided the Contract Period of Thirty Months is served and subject to the agreement of the relevant authority."

It has been argued by Mr Msisha that there is nothing in the clause to suggest that gratuity would be paid even when a shorter period than thirty months has been completed. Therefore, there should be no payment for a shorter period. In the instant case, if the fraud was discovered in October 1986 he would have been dismissed then and there. Mr Chirwa, on behalf of the plaintiff, has submitted that according to Clause 4 of the Second Agreement, gratuity was to be paid on the salary which has been earned. In the instant case, the plaintiff had worked for 16 months and had earned K96,000.00. He submits that the 30 months completion is relevant only as to Income Tax.

The law on this aspect seems to be clear. In HEALEY -v- SOCIETE ANONYME FRANCHISE RUBASTIC (1917) KBD.946, the headnote reads:

> "The plaintiff brought this action to recover damages for wrongful dismissal and commission and arrears of salary. The dismissal of the plaintiff was justified. The misconduct took place in 1915 and preceding years. The salary claimed was for the period from May 31 to October 30, 1915."

AVORY J. had this to say at p.947:

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> "The plaintiff's employment under the contract was for fiteeen years at a salary of £2,500 per annum payable monthly and it was paid at the end of each month up to May 1915. In my opinion, the contract was divisible and the salary became due and the right to it vested at the end of each month; but the defendant contended that it was a condition precedent to the right of payment of the salary that the plaintiff should truly and faithfully serve his employers and that he had failed in the performance of this condition he was not entitled to recover. The misconduct relied on at the trial took place prior to May 1915......... the contract was determined in October 1915; but the defendants contended that the misconduct was continuing from April to October......... I cannot accept the view .... and I think the answer to the defendant's contention is that the contract of employment was in fact exsting up to the time of dismissal and that the right to determine it by reason of antecedent misconduct subsequently discovered does not entitle the defendant to treat it as determined from any

> earlier date and that the plaintiff is therefore entitled to recover his salary for the months that he actually served."

I think that this is the position in the instant case. For each salary he earned, there was 25% gratuity. I hold, therefore, that the plaintiff is entitled to gratuity for the months he actually worked. It has been contended by Mr Chirwa that the plaintiff worked from 1st April 1986 to July 1987 - a period of sixteen months. The position is this, that he worked for 15 months - from April 1986 to June 1987. The salary he earned is, therefore, 15 x K6,000.00, which is K90,000.00, and 25% of K90,000.00 is K22,500.00. I, therefore, award him K22,500.00 under this head.

I will now turn to the question of leave pay. Clause 5 of the Second Agreement provided as follows:

> "The employee shall be entitled to local leave at the rate of FOUR (4) weeks per year after completion of ONE (1) year's service. The employee shall make every effort to take holidays once yearly within the prescribed period."

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It has been argued by Mr Msisha that according to Clause 5 of the Second Agreement, there is no provision to the effect that accrued holidays should be carried forward, or that there will be payment in lieu of leave. He has further argued that it is not the policy of the Courts to imply terms in a contract, except if the purpose of the implication is to give some meaning to the contract or to give some efficacy.

On the other hand, Mr Chirwa has submitted that acording to the plaintiff, he did not go on leave because his assistant had gone on overseas leave. He had worked for sixteen months and the leave was already accrued to him. He submits that a right already accrued to him cannot be forfeited.

The position, in my view, is that there was no provision in the contract that the plaintiff could accumulate his leave; neither was there provision that he could get payment in lieu of leave. Can the Court imply that the parties intended the plaintiff would be paid in lieu of leave? An East African case, though not binding on us here, sheds some light on the matter in these circumstances. The case is <u>SCHWARTZ -v- GILL & CO. LTD</u> (1972) E.A.L.R 1. In that case the plaintiff had been employed by the defendant. He was entitled to two months' leave every four years, together with passages to England. He contended that if leave and passages were not taken, he was entitled to accumulate or be paid money in lieu thereof. He claimed the value of leave and passages which were not taken in 1963 and 1967.

WICKS J. had this to say:

> "Whether or not to imply a term in a contract is a matter for law for the court and the court will imply a term where it feels satisfied that failure to mention the matter was due only to the fact that it was felt wholly unnecessary to say what was obvious at the time to all parties concerned. On the other hand, a term will not be implied merely because the court thinks it would have been reasonable to have inserted it in the contract not if the contract is effective without the proposed term and it is not obvious that it was the intention of the parties at the time."

Accordingly, he dismissed the action.

Again, in Reigate -v- Union Manufacturing Co. (1918) 1 KB 592 at 605 Scruton LJ. set out the principle as follows:

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidenty be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case?'. They would have both replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear."

In the case at hand, could it be said that, according to Clause 5 of the Second Agreement, it was too clear that the parties intended that if leave has not been taken during the stipulated period, it would be accumulated and money paid in lieu of leave? In my considered opinion, the answer is no. This claim must, therefore, fail.

I will now turn to the claim regarding first class passage to Australia for his wife and children and baggage allowance.

It has been argued by Mr Chirwa, on behalf of the plaintiff, that according to Clause 11 of the Second Agreement, first class air passages to his future country of residence would be provided for the plaintiff and his dependants upon termination of this contract, together with a baggage allowance for personal and household effects. Yet the defendant only provided economy class air tickets to the plaintiff and his family to Zimbabwe - and no baggage allowance was made. This was clearly in breach of the agreement, especially when one finds that the clause does not say these will be provided only on satisfactory termination of service.

It is quite clear, when one looks at the evidence, that the defendant clearly knew that the plaintiff's future country of residence was Australia. However, according to Mr Fry, air tickets were not provided to Australia because the plaintiff had not, at the time the contract was terminated, acquired a right of residence in Australia - his papers were being processed. I do not agree with this. As far as the clause relating to passage is concerned, it departed significantly from a similar clause in the First Agreement, where the country was specifically mentioned as Zimbabwe.

Mr Msisha, on the other hand, has submitted that the plaintiff's country of residence was Zimbabwe at the time the contract was terminated, and not Australia. He has also submitted that the conduct of the plaintiff had absolved the defendant from performing its part. There was fundamental breach by the plaintiff. He cited to me the case of Guy-Pell -v- Foster (1930) 2 Ch. 169. I have looked at this case. The headnote to the case reads as follows:

> "The defendant was the chairman of the Standard Petroleum Exploration Company, Ld., which at the end of 1921 was seeking to issue 15,000£. First Lien Debentures to rank pari passu with a previous issue of first lien debentures of the same amount; and the defendant, having interested the plaintiff in the matter, sent him a letter of indemnity dated February 17, 1922, in these terms:
>
> "Regarding the issue of 15,000£. First Lien Debentures of the Standard Petroleum Exploration Company, Ld., at the price of 80£. per 100£.......I understand that you are subscribing for 3000£. of the same at a cost to you of 2400£. In consideration of your giving me one-fourth of any profit you may received on such investment, I hereby indemnify you against any loss thereon. The expression 'any profit' only refers to the redemption price of 100£. per 8£., which, when received, will show a profit of 20£. per bond and the bonus out of the proceeds of any royalties on oil sales from the company's properties during the currency of the debentures....... The interest you will be entitled to receive from the company is excluded from the consideration of profits." The debentures were redeemable on July 1, 1925, but they were secured by two debentures trust deeds which gave power to extend the due date, and in April, 1925, steps were taken which resulted in its extension to July 1, 1930. In May and June 1925 a correspondence took place between the plaintiff and the defendant in which the plaintiff announced his intention of selling the debentures, and the defendant protested against this, claiming that they must be kept till their due date. On July 16, 1925, the plaintiff put the debentures up

for sale, and in the absence of other bidders sold them to his son for 25£. He then commenced proceedings to recover the amount of his loss, but the House of Lords decided that nothing was payable under the indemnity until the due date arrived. On July 18, 1928, the company went into liquidation and the plaintiff, having repurchased the debentures from his son, brought these proceedings to recover his loss:-

Held by the Court of Appeal (affirming Clauson J.), that in selling the debentures the plaintiff had committed a breach of an implied term of the contract, and having failed to maintain the position essential to enable the defendant to receive the consideration for the indemnity, he had committed a breach of a term going to the root of the contract. The defendant had elected by his pleadings in the previous action to treat the contract as at an end and the plaintiff could not therefore maintain the present action."

I do not think that the case is of much assistance in the present circumstances. In that case, the court was dealing with an implied term, but in the instant case, we are dealing with a specific term of contract. The clause specifically stipulates that the plaintiff was to be provided with first class air tickets to his future country of residence. There was evidence that he wanted to reside in Australia - Mr Fry knew about it. Whether he had acquired a right to reside in Australia or not was none of the defendant's concern. The clause also provided for baggage allowance for his personal and household effects. I do not think that the provision of these services depended on satisfactory performance of his duties. In the end, I enter judgment for the plaintiff on this head for K24,308.49.

I will now turn to the claim for K18,000.00, representing three months' pay in lieu of notice. I have held earlier on that the plaintiff was summarily dismissed and that the grounds for the dismissal were justified. Following from that, therefore, the plaintiff is not entitled to three months' notice pay. He cannot, therefore, claim under Clause 9 of the Second Agreement for three months' pay in lieu of notice. This claim must, therefore, fail.

I will now revert to the claim for Bonus for the year ending 31st March 1987. The evidence on this point is that a bonus of K150,000.00 was awarded to the plaintiff at a meeting of the directors held on 9th June 1987. The bonus was declared as follows:

"Mr L X De Silveira K150,000.00 (subject to conditions to be agreed on)"

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It was the evidence of the defendant that all the bonuses declared were to be paid within one year of the Annual General Meeting. Some members of staff had received their bonus, but not the plaintiff. It was the evidence of Mr Fry that the plaintiff did not get this amount, firstly, because the fraud was discovered and he was summarily dismissed on 11th July 1987; secondly, the bonus was not paid to the plaintiff because the conditions under which the bonus was to be paid were not agreed upon.

The plaintiff himself said that he was not consulted about what conditions were to be attached to the bonus; he was not at the meeting which decided the bonuses. All what he knew was that he was awarded K150,000.00 bonus.

It was Mr Msisha's submission that the bonus was not due until 1988, and the discovery of the fraud repudiated the contract, and the bonus could not be enforced until 1988.

Mr Chirwa, however, has submitted that the bonus was declared on 9th June 1987. By the time the plaintiff's services were terminated, the bonus had already accrued to him, and he was, therefore, entitled to the bonus of K150,000.0. He cited the case of Button -v- Thomson (1888) LR 330. The facts of the case as outlined in the headnote were these:

> "The plaintiff shipped on board the defendant's vessel, as mate, at wages of 5£. 10s. per calendar month, under articles in the form sanctioned by the Board of Trade in pursuance of the Merchant Shipping Act, 1854, for a voyage from Shields to Alexandria, and, if required, to any port or ports in the Mediterranean, Black Sea, Danube, c., and home to the ship's final port of discharge in the United Kingdom or continent of Europe; the voyage not expected to exceed twelve months. During the voyage out there was evidence that the plaintiff had been guilty of drunkenness and violent and insubordinate conduct; and, being on shore at Sulina, a port in the Danube, he was left behind, and the vessel came home without him.
>
> In an action for wages for the time the plaintiff actually served on board, the jury found that he had been guilty of drunkenness and abusive language subversive of discipline, and that he was not left behind by the wilful misconduct or negligence of the captain, but through his own negligence and misconduct. They, however, negatived desertion:-

> Held, by Byles and Montague Smith, JJ., that, notwithstanding this finding of the jury, the plaintiff was entitled to recover wages up to the time of his being left behind at Sulina, - the contract being for a succession of voyages of indefinite duration, though "not expected to exceed twelve months," and the wages being vested in a debt at the end of each month of service, subject, it might be, to forfeiture in an event which had not happened, though perhaps not recoverable until the expiration of the period of service stipulated for."

I do not think this case falls squarely on all fours with the situation in the instant case. In the instant case, the bonus was given "subject to conditions to be agreed upon". It means, therefore, that at the time the bonus was declared, there were some conditions which had to be agreed upon. The plaintiff might have not agreed to those conditions; in such a case, the bonus might have been reduced or increased or indeed, might not even have been paid.

Mr Chirwa has submitted that the plaintiff was not there when the bonus was being declared; therefore, he could never have agreed to any conditions; what he was interested in was his bonus only. He further went on to say that Exh.D4 was prepared in contemplation of these proceedings. As to the former argument, if the plaintiff was not present when the bonus was declared, he cannot say with certainty that there were no conditions attached to the bonus. As to the latter argument, it is my considered opinion that there is no basis upon which Exh.D4 could be attacked.

The position, therefore, is that by the time the plaintiff was dismissed, the bonus of K150,000.00 had not accrued to him. This claim must, therefore, fail.

However, according to Clause 2 of the Second Agreement, the plaintiff was entitled to partipate in the net profit of 10%. He was, therefore, entitled to 10% of the net profit for the year 1987/88, because, by 11th July 1987 this had already accrued to him. According to the evidence of the defendant, 10% net profit came to K60,605.00. I enter judgment in this sum.

In summary, the plaintiff has succeeded in terms of Clause 2 of the First Agreement in the sum of K50,000.00. He has also partially succeeded in terms of Clause 2 of the second agreement in the sum of K60,605.00. He has succeeded in terms of Clause 4 of the Second Agreement in the sum of K22,500.00. He has finally succeeded in terms of Clause 11 of the Second Agreement in the sum of K24,308.49. He has failed in terms of Clauses 5 and 9 of the Second Agreement. In total, I enter judgment for the plaintiff in the sum of K137,413.49.

I now turn to the question of costs. I think the plaintiff has substantially succeeded in this matter. The costs are, therefore, awarded to the plaintiff.

PRONOUNCED in open Court this 3rd day of April 1992, at Blantyre.

H M Mtegha
JUDGE