IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1623 OF 1994

BETWEEN:

ROSE KAMWANA..... PLAINTIFF

AND

THE MINISTER OF EDUCATION
SCIENCE AND TECHNOLOGY .....DEFENDANT

CORAM:

KUMANGE, ACTING JUDGE
Nampota, Counsel for the plaintiff
Nyirenda, Official Interpreter

RULING

By an originating summons the plaintiff, a primary school teacher brings this action against her employer, the Ministry of Education etc seeking some declaratory orders so as to enforce performance of the contract of employment. The summons was supported by her affidavit. Having been satisfied that service of process was duly effected on the defendant ministry, I ordered, pursuant to Order 35 Rule 1 of the Rules of Supreme Court, that the case be heard in absence of the defendant. The type of evidence that Mr Nampota, Counsel for the plaintiff tendered, was in no way different from that contained in the affidavit, and only one exhibit was attached to it. Counsel made submissions in support of the plaintiff's case. A synopsis of the nature of the remedy she is seeking from the court is of the following declaratory orders:-

(a) That she is still an employee of the Government in the teaching profession.

(b) That she be retired on medical grounds as per her doctor's advice.

(c) That she be paid all her dues from January 1993 when the defendant stopped paying her salary, plus her retirement dues.

(d) That whatever money will be found due under (c) above interest at the normal bank lending rate be paid on it.

(e) Costs for this action.

I must admit that this action though appears to be simple, but upon analysing the substantive law vis-a-vis the adjectival law, provokes a hair-splitting problem when one's mind vassilates between the two.

The facts are as follows:- The plaintiff had worked for almost two decades. Through natural upheavals she found that she had contracted a disease of consumptive nature. A physician's diagnosis came up with positive results of pulmonary tuberculosis. Her physician at the Queen Elizabeth Central Hospital advised her not to continue teaching. He also informed the defendant about her health problems in a letter dated 13th March 1991. In that letter the doctor recommended that she should be retired forthwith since the plaintiff always experienced a lot of fatigue and some breathlessness due to her consumptive condition.

Whether the Ministry replied to the physician or not the plaintiff does not know. Instead, however, the Ministry of Education forced her to keep on working. By January 1993 the above stated fatigue condition disabled her from teaching, and she therefore stopped working in that month. The Ministry continued paying her up to September 1993. The sweet juice then stopped flowing. She now leaves in utter abject poverty. Her frequent efforts to persuade the Ministry to retire her as per the doctors recommendations was received with unpleasant and rude remarks from the officials of the Ministry on District, Regional and National level. She therefore had no choice but to bring this action for the above stated declarations.

On the substantive legal observation, I totally agree with Mr Nampota's submission that the plaintiff's job was of the type that is pensionable under clause 1:815 (3) of The Public Service Regulations. By that clause a pensionable officer may retire on medical grounds if he/she has completed 10 years of continuous service. At the time the doctor made his recommendation (as per exhibit R1) the plaintiff had completed 23 years of continuous service. Under clause 1:185:4 justice has been manifestly shown by further providing that, even in cases where an employee has not completed 10 years, the Minister may, in special circumstances, award such pension or gratuity as it appears appropriate to him so to do.

Here is a sick lady who has put in 23 years of continuous service and is met by a blatant stand of rebuffal by her employer not to grant her any benefits despite this admirable provision. It would appear the reason for such unfair and inhuman decision is to force the plaintiff to continue working as if she is indispensable at the school.

Once a person falls sick and the disease contracted

appears to be one which is difficult to wipe out from a person, the best an employer can do is to let that employee go and rest. There must therefore be fair terminal benefits that will flow from the terms of the employment contract. If it is a civil service contract, the terms are no secret at all. They are embodied in statutes of variuos types and climaxed in the Public Service regulations. Whosoever is behind such decision, unless the plaintiff is accused, charged and found, guilty of some offence, is sailing in the devils bandwagon of the bilking and balking class of the executive. I am of the opinion that the Secretary for Education should have the compassion to assist such a teacher the very moment the doctor wrote the letter above captioned.

Before making my final decision over this matter, I would like to make a brief observation of the adjectival law. That is the law relating to the procedure.

Cases brought against a Ministry, a department or any Public Officer are governed by The Civil Procedure (Suits by or Against the Government or Public Officers) Act (Cap 6:01). Although the nature of claims and presentation of evidence may not be different from cases involving private individuals, there is nonetheless one significant aspect worth bearing in mind by both bench and bar alike. It is section 4 of that Act.

It partly reads as follows:

> "No suit shall be instituted against the Government or against a public officer ..... until the expiration of two months next after notice in writing has been ..... delivered to or left at the office of the Attorney Genenal, or delivered or left at the public officers office ....."

There are Common Law Cases and Statutory provisions in contract which restrict their enforcement unless the plaintiff first made a demand upon the defendant to pay. If the plaintiff elects to institute legal action without making the prerequisite demand to the defendant to pay, and should the defendant show to the court that such a prerequisite demand was never made, the action should fail. It should fail not due to substantive legal principle but on the basis of a procedural defect. To mention a few the following cases can fail unless the rule to demand is strictly observed.

(a) Bills of Exchange, promissory notes and cheques, give no right of action till a demand is first made (Bills of Exchange Act Section 45 to 48 and 92 to 93).

(b) A bank balance has been held not to become owing till the depositor first claims to withdraw it from the bank. Joachimson vs Swiss Bank Corporation (1921)

3KB 110. Arab Bank vs Barclays Bank (1953) 2 Q.B. 257.

(c) A bailor of chattels at will cannot sue for their return until they have been demanded and refused - Beaman vs A.R.T.S. (1949) K B 550.

The same applies to suit against a surety and an agent called upon to account for funds.

In all the above cases, as substantive legal principle, it is a defence if an action is commenced without first demanding payment, and whether the form of demand is to be oral or in writing, it varies with each type of cases under review.

A capable and ingeneous counsel will first resort to the adjectival aspect of such cases when it comes to testimony. The plaintiff has to prove to the court that he made a demand of the subject matter of the action before commencing action. The way to prove this fact has to be done by tendering "the letter of demand". That letter must be exhibited. Failure to exhibit such a letter may compel the bench to dismiss the action howsoever good the claim may be.

In the case now under review, Mr Nampota did not prove to me this procedural requirement. It is a statutory requirement under section 4 of Cap 6:01, that the plaintiff must first write a form of notice to the defendant. The notice must contain the relief which the plaintiff claims. In practice such letters contain two facets. Firstly the nature of claim demanded, and secondly, the intention by the plaintiff to commence action within two months from the date of that letter. It is not only of procedural convenience that such notice should be given, but it is of practical necessity that a demand in form of notice be made in writing to the defendant. If such a letter has not been written, then "No action can be instituted". It simply means what it says. If the court is informed in evidence that the statutory provision was not observed then the court cannot grant any relief to the plaintiff.

In this case Mr Nampota did not prove to the court whether this action was commenced after the two months prerequisite notice was written. If the case was properly defended, and that statutory provision proved infringed, I would have thrown the plaintiffs claim all out. Since the case is not defended, I do not want to act on speculations. But to me, I feel this is a statutory rule of procedure and any litigant suing the State fully devoid of such demand notice, cannot succeed. He or she will have to first prove his or her observance of this rule. That can only be achieved by tendering the Notice itself as an exhibit. Coming to the plaintiff's case it falls under the above unfortunate situation.

But since there is proof to the satisfaction of the court, that there was due service of process, and having heard nothing from the defendant, let alone, his intention to defend, I hold the view that the notice was written and served before action. If anything at all to the contrary, I leave that to the defendant as an appellate remedy. After all equity assists only the vigillant and not the indollent.

Finally therefore, I am of the view that the plaintiff has been a victim of oppressive and inconsiderate policy. She must get the benefit of her claims. Consequently I order as follows:-

(a) That the plaintiff is all along an employee under the auspices of the Ministry of Education, and that she should get her salary from January 1993 to date of her retirement.

(b) That under the sanction of the doctors letter dated 13th March 1991, the plaintiff must be retired at least three months from the date of this judgment.

(c) That up to the date of her retirement the plaintiff should be paid her leave grant for the years she never got it up to the date of her retirement.

(d) That all the plaintiff's retirement benefits be paid up in accordance with Rules and conditions of the Civil Service Regulations.

The plaintiff has claimed interest at the Bank's ruling lending rate on all what will be found due. The plaintiff is claiming remuneration, which will be in a form of salary. There is no way an employer can pay interest on arrears of salary unless there is proof in evidence that the defendant invested the money in some lucrative business. Here, the facts are different. The plaintiff used to get money from the consolidated fund. I do not think that that fund is put in any form of investment. Furthermore Mr Nampota has submitted to the court no authority to back up this claim and I dismiss it.

The actual amount that may be found due to the plaintiff may be calculated by the defendant, failing which, be computed before the Registrar.

The action succeeds with costs for the plaintiff.

Declared and ordered in Chambers this 25th day of October 1994.

D S L KUMANGE
ACTING JUDGE