

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 196 OF 1993

BETWEEN :

PERKS LIGOYA AND OTHERS PLAINTIFFS
AND
RESERVE BANK OF MALAWI DEFENDANT

CORAM :

W.W. Qoto, Deputy Registrar
Bazuka Mhango of counsel for the plaintiffs
Banda of counsel for the defendant

ORDER

W.W. QOTO, DEPUTY REGISTRAR: The plaintiffs, Perks Ligoya, Nimrod Chidati, Veronica Hiwa and Andrew Kumwenda, claimed against the defendant, damages for breach of contract, terminal benefits and costs of the action. The action proceeded to trial and in the course of it, the parties entered a consent order for the settlement of the action.

That consent order is in the following terms:-

"The parties having agreed to settle the above matter in full and final satisfaction of all claims herein that the plaintiffs have against the defendant and consenting that an order be made in such terms as hereinafter provided BY CONSENT it is ordered that :-

(1) The 1st, 2nd and 4th plaintiffs be reinstated into the employment of the defendant with effect from 1st April, 1995.

(2) The defendant pay to the 1st, 2nd and 4th plaintiffs and the lawful representative of the 3rd plaintiff all salaries which would have been payable to

the respective plaintiffs from the date of termination of their services until 31st March, 1995.

(3) That the computation of the amounts due to the plaintiffs in paragraph 2 above take into account all annual salary revisions (including annual increments) less all terminal benefits, ex-gratia payments, gratuity and other sums received or credited to the respective accounts of the plaintiffs.

(4) Save for costs by the trial judge to be paid by the plaintiffs, the defendant do pay the plaintiffs the legal costs of this action. The costs to be taxed if not agreed.

Dated this 21st March, 1995."

The factual background to the action can briefly be stated. The plaintiffs were and still are in the employ of the defendant, the Reserve Bank of Malawi, a Statutory Corporation. On 27th August, 1992, the defendant's acting Governor, one Francis Zebron Perekamoyo, called the plaintiffs individually and terminated their services from the defendant on the grounds of their participation in the Staff Representative Council. The Representative Council had been formed to discuss staff grievances with the defendant. The plaintiffs were elected officials of the council and there was an express agreement between the said Council and the defendant that no member of the council would be subjected to threats, suspension or expulsion from the defendant on account of his or her participation in the council. The plaintiffs, by a writ of summons issued on 16th February, 1993 claimed against the defendant damages for breach of contract, terminal benefits and costs of the action. They averred in the statement of claim that the purported termination by the Acting Governor was in breach of the agreement between the Council and the defendant. They further averred the said agreement was additional to the contract of employment subsisting between them and the defendant.

The defendant served a defence and the action went to trial. In the course of it the parties agreed to settle the action by consent. The terms of the settlement are those I have adumbrated above.

The plaintiffs were reinstated into the employment of the defendant with effect from 1st April, 1995 and I am called upon to assess all salaries which would have been due and payable to them between the date of termination of their contracts and the date of their reinstatement. In making the assessments, I have to take into account all annual salary revisions (including annual increments). I have to subtract from them terminal benefits, ex-gratia payments, gratuity and other sums received or credited to the plaintiffs' accounts. The case of BRITISH TRANSPORT COMMISSION V GOURLEY (1956) A.C. 185 obliges me to reduce the salaries on account of the tax to which the salaries are subject.

Both parties called witnesses. For the plaintiffs the evidence was given by one plaintiff, Mr. Nimrod Robert Chidati, on his own behalf and on behalf of others. For the defendant the evidence was given by its Personnel Manager Mr. Adams Kajiya.

According to the same settlement order, the defendant was ordered to pay "all salaries which would have been payable to the respective plaintiffs from the date of termination of their services until 31st March, 1995." In computing such salaries, an account had to be taken of all annual revisions (including annual increments). Apart from tax, what had to be subtracted from such salaries are terminal benefits ex-gratia payments, gratuity and other sums received or credited to the respective accounts of the plaintiffs. These salaries have not been paid to the plaintiffs to this day.

It is again common ground that the defendant computed the salaries due to the plaintiffs between 26th August, 1992 and 31st March, 1995. The plaintiffs also computed those salaries on exhibit P3. The computation by the defendant is shown on exhibit P4. There are differences between the two computations but I do not regard those differences as of great moment. The figures computed by the plaintiffs on exhibit P3 are higher than those computed by the defendant on exhibit P4 because those computed by the plaintiffs include some items which are not salaries.

Again in arriving at the net amounts both parties took into account all salary revisions (including annual increments) which had been made during the period the plaintiffs' services were terminated from the defendant. This was in compliance of the consent order. The net salaries due to the plaintiffs without taking into account items which are not salaries and which are agreed between the parties as correct are as follows:-

- | | | |
|-----|----------------------|-------------|
| (1) | Mr. Perks Ligoya | K148,229.38 |
| (2) | Mr. Nimrod Chidati | K135,960.00 |
| (3) | Mrs. Andrew Kumwenda | K142,119.70 |
| (4) | Mrs Veronica Hiwa | K67,283.67 |

I accordingly order that these salaries be paid to the plaintiffs.

What is in dispute and what first arises for determination is whether, the plaintiffs were also entitled to commutation of leave days' pay during the material period when they were away from the bank. The plaintiffs' testimony as given by Mr. Chidati is that they were entitled to such commutation of leave days pay. The defendant denies this. Mr. Kajiya told the court that leave pay, according to the terms and conditions of service applicable is only payable where the defendant is satisfied that there is pressure of work which makes difficult for the officer to go on leave. The relevant condition is rule 7 (a) (iii) of the Terms and Conditions of Service, exhibit D I. This condition reads;

"All members of staff must avail themselves of their annual leave. Provided that where a member of staff due to pressure of work or some other reason accepted to the bank has been unable to take his leave, he shall be entitled to sell his leave days on the last working day of that year in which the leave was due."

It is clear from rule that the commutation of leave days in relation to an officer who is unable to take his/her leave depends on pressure of work or other reason acceptable to the bank. I accept the plaintiffs' claim that they were entitled to sell their leave days during the period they were away from the bank. They had been reinstated to their posts and the letter from the defendant's Governor, exhibit P1, said the plaintiffs' services were deemed to be unbroken. They were therefore entitled to all benefits pertaining to their posts one of which is leave. In the circumstance of this case, it is difficult to argue that during the period they were away from the bank, they should have gone on leave. It was impossible for them to go on leave and since their services with the defendant are "viewed as unbroken" the plaintiffs were therefore entitled to sell their leave days during the relevant period. By necessary implication the defendant has therefore allowed the plaintiffs to sell their leave days during the period they were away from the bank because it is the defendant who had made it impossible for the plaintiffs to go on leave. To hold otherwise would not only defeat the letter and spirit of the consent order but would be grotesque as well. This is all the more so because reinstatement, according to Tucker J. in HODGES V UTRA ELECTRIC LTD (1943) IKB 462 at p 480 "involves putting a specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment". The employer is put back in the same job and under the same terms and conditions. I cannot therefore give accord to the defendant's submission that the plaintiffs are not entitled to sell their leave days when they were away from the bank.

I now turn to the defendant's powerful submission that in terms of the consent order, leave pay does not fall to be assessed as it is not a salary and as such it is outside the scope of the consent order. Mr. Banda for the defendant argued that what I have to compute is salaries only and not leave pay.

I think one has to turn to the definition of a salary. In ADAMS V LIVERPOOL CORPORATION (1927) 137 L.T. 396 C.A. Lord Banks 397 said, "It seems to me after the decision in the House of Lords in RAILWAY CLEARING HOUSE V DRUCE (1926) 135 L.T. 417 to say that when the resolution speaks of man's full salary or wages, it is not speaking of something that somebody also in the same grade may be entitled to, but it is speaking of his full salary or wages, and I think, Druce's case does establish that where, the word used is 'salary' or 'pay' or 'wages' you are entitled to interpret that language as meaning something to which a person is contractually entitled."

Thus there must be some degree of permanency of employment and whether a particular sum paid to an employee is a salary or not has to be determined with reference to the contract of employment. With respect to Mr. Banda, when I look at the terms and conditions of service as contained in exhibit D1, I find from rule 7 (a) (iii) that leave pay is something to which the plaintiffs were contractually entitled. It was a financial remuneration for discharging duties of a definite rank and is payable where a member of staff who is unable, due to pressure of work or due to some other reason acceptable by the defendant, to take his leave. I have already held that in the instant case it was impossible for the plaintiffs to go on leave as such they became entitled to sell their leave days on the last working day in each year in which the leave was due. This leave pay is, I hold payable to the plaintiffs in terms of paragraph 2 of the consent order.

The number of leave days and their value have been worked out by the plaintiffs. I must say that the plaintiffs' evidence on this score as testified to by Mr. Nimrod Chidati was undisputed and unchallenged. I accordingly find it as a fact that during the entire period the plaintiff were away from the banks, they were entitled to leave days and leave pay as follows:-

		GROSS AMOUNT
1.	Mr Nimrod Chidati	K18,197.00
2.	Mr L. Ligoya	K18,736.24
3.	Mr Kumwenda	K28,065.38
4.	Mrs Veronica Hiwa	K10,550.57

I find these leave pays are taxable and according to the undisputed evidence on record, they are taxable at the rate of 38%. The net leave pay due to the plaintiffs are therefore as follows:-

1.	Mr Nimrod Chidati	K12,010.02
2.	Mr L. Ligoya	K12,365.92
3.	Mr A Kumwenda	K10,666.55
4.	Mrs V. Hiwa	K 6,963.38

During the hearing of assessment the plaintiffs also claimed subsidies on utilities like water and electricity which they would have received had they remained in the bank. They further claimed gardener and watchmen allowances and telephone allowances. Through Mr Chidati the plaintiffs testified that attached to the letter from the governor, exhibit P2, is a form on which their remuneration packages had to be worked out. Apart from salary, the form includes housing allowance, leave pay, water allowance, telephone allowance and gardener and watchman allowance. The form also shows, they say, bonus payments and other pecuniary benefits.

The plaintiffs would have these assessed by the court and awarded to them as well.

The plaintiffs testified that these allowances are non-taxable and the total allowances to which each was entitled and would have received had he be in the bank the period they were away are as follows:-

1.	Mr Nimrod Chidati	K26,033.00
2.	Perks Ligoya	K23,283.75
3.	Mr Kumwenda	K23,283.75
4.	Mrs Hiwa	NIL

The defendant, through Kajiya, testified that these allowances are not, and were not due and payable to the plaintiffs. The housing allowance was payable to those officers of the defendant who had obtained a loan from the defendant to build their own houses and who also become tenants of those houses. None of the plaintiffs had obtained such a loan and as such they were not entitled to housing allowances.

The defendant's evidence is that the gardener and watchman allowances are paid to management grade officers who are housed in fully furnished bank houses. The idea is to protect the bank's property in those houses.

I have already defined my duty in terms of the consent order. I have to assess all salaries that which would have been payable taking into account all annual salary revisions (including annual increments). I have already stated what a salary is. It is interpreted a meaning a sum of money to which a person is contractually entitled and this has to be defined with reference to the contract of employment.

There is no dispute that the terms and conditions of employment the contract between the plaintiffs and the defendant are contained in exhibit DI. The allowances to which the plaintiffs were contractually entitled are contained in article 10. They are payable in line with laid down and approved policies.

The only allowance to which the plaintiffs were contractually entitled according to exhibit DI is house rent allowance. The other allowances the plaintiffs claimed such as electricity and water subsidies telephone allowances and gardener and watchmen allowances are not mentioned. The plaintiffs were therefore not contractually entitled to these allowances and as such these allowances are not salaries. They cannot therefore be assessed in this exercise as they fall outside the purview of the consent order.

The house rent allowance is a salary but in terms of art. 10 it is paid whenever applicable in line with laid down and approved policies. I accept the evidence of Mr Kajiya which is uncontroverted that this house rent allowance was paid to officers of the defendant who obtained loans from the defendant to build their own houses of which they are also tenants. The plaintiffs I find did not get loans to build their own houses

and as such they were not entitled to house rent allowance. Whilst the house rent allowance was a salary, the plaintiffs I find, were not entitled to it.

I accordingly refuse to make any assessment with regard to non-taxable allowances claimed by the plaintiffs.

I have stated above that the defendant did compute the salaries due but failed to pay them allegedly on the ground that the plaintiffs did provide it with information about employment and salaries earned when they were away from the bank. The request for such information was made in exhibit P2 and was in line with the defendant's terms and conditions of service. According to these conditions, Mr Kajiya said an officer of the defendant cannot receive two salaries.

The plaintiffs claim that they supplied the defendant with the information but still the defendant did not pay the salaries due in terms of the consent order.

Let me say without mincing words that the defendant's request was unnecessary and most irrelevant. The consent order does not require salary gained from employment elsewhere to be taken into account either for or against the salaries due. That order does not even require or oblige the defendant to seek such information. The action of defendant was ultra vires the consent order and is of no effect. What the consent order enjoins the defendant to deduct from the salaries due are terminal benefits, ex-gratia payments, gratuity and other sums received or credited to the respective accounts of the plaintiffs. These sums of money namely, terminal benefits, ex-gratia payments, gratuity are sums of money the defendant paid to the plaintiffs on termination of their contracts of employment and the phrase "other sum received or credited to the respective accounts of the plaintiffs" must according to the ejusdem generis rule, be taken to refer only to things of the kind which fall within that category i.e. the category of monies received by the plaintiffs on termination of their contracts of employment with the defendant. It does not include salary received by the plaintiffs after termination of their contracts of employment with the defendant.

On another score there is no evidence on record that the plaintiffs earned incomes from elsewhere when they were away from the bank. Of course the law imposes a duty upon a plaintiff to take reasonable steps to mitigate the loss caused by the breach of contract and debars him from compensation for any part of the damage which is due to his neglect to do so. BRITISH WESTING HOUSE ELECTRIC & MANUFACTURING CO. V UNDERGROUND ELECTRIC RLY CO OF LONDON (1912) A.C. 673. Whether the plaintiff failed to take reasonable opportunity of mitigation is a question of fact dependent upon particular circumstances of each case and the burden of proving such failure rests upon the defendant (PAYZU LTD V SANDERS (1919) 2 K.B. 581). It is clear

from a reading of this case that the burden which lies on the defendant is not an easy one.

The defendant has not discharged this burden in this case.

Thus the total net salaries due to the plaintiffs after deductions of tax are as follows:

1. Mr Perks Ligoya K148,229.38 + K12,365.92 = K160,595.30
2. Mr Nimrod Chidati K135,960.00+ K12,010.02 = K147,970.02
3. Mr A. Kumwenda K142,119.70 + K10,666.58 = K152,786.25
4. Mrs V. Hiwa K67,283.67 + K6,963.38 = K74,247.05

The consent order enjoins me to subtract from these amounts terminal benefits, ex-gratia payment, gratuity and other sums received or credited to the plaintiffs' accounts.

Here, I must not deduct from these salaries the amounts in respect of which the defendant paid water and electricity bills left by the plaintiffs as shown on exhibit 10. Those amounts had been deducted from the plaintiffs' payments paid to them on termination of their services.

I propose I deal with each plaintiff in turn.

First, is Mr. N. Chidati. Exhibit D2 shows that he received ex-gratia payment in the sum of K4,024.85. Exhibit D3 also shows he was paid K2,509.00 as salary in lieu of notice. In total he was paid K6,531.85. When I deduct this from K147,970.02 it leaves a balance of K141,438.17. Exhibit D3 shows that Mr N. Chidati had a balance of K4,931.76 in respect of a loan granted to him for a cooker. When this too is deducted from K141,738.17 it leaves a balance of K136,506.41. There is evidence that when Mr N. Chidati rejoined the defendant he sought and was granted some money from the defendant and it was agreed that the same be deducted from the compensation. the defendant is entitled to deduct the loan so granted from the K136,506.41 which I award to him.

I now turn to Mr P. Ligoya.

Exhibit D7 shows that he received gratuity in the sum of K20,520.88. The salary in lieu of notice came to K2,852.00. The total of these two comes to K23,372.88. When I deduct this from K160,595.30 it leaves a balance of K137,222.42. I award this to him.

Next is A Kumwenda.

The ex-gratia payment he received was, according to exhibit D6 K4,892.44. Exhibit D5 shows that the one months salary he received in lieu of notice was K2,421.00. The total of these payments is K7,313.44 when this is deducted from K152,786.25, it leaves a balance of K145,472.81. Exhibit D5 also shows he had a balance on a loan which had been extended to him of K2,680.83.

When this is deducted from K145,472.81 it leaves K142,791.98. I award this to him.

Finally I come to Mrs V. Hiwa. Exhibit D8 shows that the one month due to her and which was paid to her was K2,126.25. The ex-gratia payment was K4,385.39. the total comes to K6,511.64. When this is subtracted from K74,247.05, it leaves K67,735.41. I award this to her.

In the final analysis therefore I award N. Chidati K136,506.41 from which a loan granted to him after joining the bank must be deducted. I award P. Ligoya K137,222.42, A. Kumwenda K142,791.98 and Mrs V. Hiwa K67,735.41.

Save for the costs ordered by the trial judge to be paid by the plaintiffs, the defendant do pay plaintiffs costs of the action to be taxed if not agreed.

MADE IN CHAMBERS THIS 19TH DAY OF JULY 1996.


W.W. QOTO
DEPUTY REGISTRAR