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IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY



M.S.C.A. CIVIL APPEAL NO. 20 OF 1987
(Being Civil Cause No. 267 of 1986)

BETWEEN:

R. A. CHUPA APPELLANT

- AND -

MALAWI HOTELS LIMITED RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE UNYOLO, J.A.
: THE HONOURABLE MR. JUSTICE MBALAME, J.A.
: THE HONOURABLE MR. JUSTICE KALAILE, J.A.

Saidi, Counsel for the Appellant
Mbendera, Counsel for the Respondent
Manda/Maore, Court Reporters
Kadyakale, Law Clerk

J U D G M E N T

Kalaile, J.A.

The history behind this appeal can be summed up quite briefly in the following resume. By a High Court Writ of Summons dated 22nd April, 1986, the Appellant in this Court (who was the plaintiff in the Court below) brought an action against the Respondent (who was the then defendant in the Court below) so as to recover the sum of K4,263.47 being money had and received by the Respondent to the use of the Appellant.

It is common case that the Appellant was employed by the Respondent until 10th December, 1985, as the Operations Manager at Mount Soche Hotel. The Appellant retired thereafter. It is also not in dispute that having been employed by the Respondent, the Appellant became a member of a pension scheme operated and administered by the Association Pension Trust (hereinafter referred to as 'APT') to which both parties made monthly contributions towards the Appellant's retirement benefits. It is again common case that when the Appellant retired on 10th December, 1985, he became entitled to receive his retirement benefits under the APT pension scheme.



In his statement of claim, the Appellant alleges that by a letter dated 13th January, 1986, the Respondent acknowledged receipt of the sum of K4,268.47 from APT which sum was to be paid to the Appellant as his benefits under the provisions of the pension scheme but that the Respondent wrongfully withheld such sum and refused to pay it over to the Appellant.

In its defence, the Respondent denied that the letter dated 13th January, 1986, was written as construed by the Appellant in the statement of claim. The Respondent further averred that on his retirement the Appellant owed the Respondent certain monies and it was agreed that the amount owing be deducted from the Appellant's retirement benefits and this was duly done.

At the trial in the Court below, the Honourable, the Chief Justice found that the Respondent did not wrongfully withhold the Appellant's monies as alleged. It was submitted by Counsel for the Appellant that some of the money withheld by the Respondent related to liquor consumed by the Appellant. That being so, it constituted an illegal contract. In considering the law on illegal contracts, the Learned Chief Justice found that as the Appellant was the Respondent's Operations Manager, he was aware, at all times, of the transactions which were alleged to be illegal so that he was a party to the illegality. The Learned Chief Justice dismissed the action with costs.

In arguing the appeal on behalf of the Appellant, Mr. Saidi filed the following grounds which are reproduced and dealt with seriatim. Grounds (a) and (b) can conveniently be dealt with together as they deal with the same subject matter - illegality in the sale of liquor. They are worded thus:

- "(a) That the learned Chief Justice erred in law in enforcing the illegal contract between the Plaintiff/Appellant and the Defendant/Respondent relating to sale of liquor in contravention of Section 76 of the Liquor Act Cap. 50:07 of the Laws of Malawi.
- (b) That the learned Chief Justice erred both in law and in fact in finding that because the appellant was a party to the illegal contract relating to the sale of liquor on credit in contravention of Section 76 of the Liquor Act Cap. 60:07 he was therefore not entitled to the declaration and relief he sought i.e.
 - (a) That the defendant/Respondent were not entitled to withhold his monies without his authority.
 - (b) The release of his money."

Mr. Mbendera tersely pointed out that the Respondent was not trying to bring an action to recover any debt in the Court below, but that it was the Appellant who was barred from doing so under the provisions of Section 76(2) of the Liquor Act which provides that:

"(2) No action shall be brought upon any debt incurred in contravention of this section."

Put simply, this section of the Liquor Act is of no avail to the Appellant. Mr. Mbendera had another arrow in his sling on this issue. This was the point whether the credit arrangements with the operations managers were illegal. He argued that they were not at all illegal. In order to bring home this particular point, it is necessary to reproduce the provisions of Section 76(1) of the Liquor Act which are worded in similar terms to Section 166(1) of the English Licensing Act 1984.

"76-(1) Any licensee under an on-licence issued pursuant to this Act, who sells liquor for consumption on the premises otherwise than for money actually received before or at the time of such sale shall be guilty of an offence and liable to a fine of fifty kwacha and to imprisonment for a term of three months:

Provided that if liquor is supplied to any person who is in bona fide occupation of a room or rooms at such licensed premises, as tenant, paying guest or lodger, for consumption in such room or rooms, or to a person having a meal at such premises, for consumption with such meal, the provisions of this subsection shall not be deemed to have been contravened if the price of such liquor is paid before or immediately upon such person ceasing to occupy such room or rooms or immediately after such meal, as the case may be."

Now, Section 102(2) of the Liquor Act provides that:

"(2) Proof of consumption or intended consumption of liquor on licensed premises by some person other than the occupier of or a servant employed on the premises, shall be prima facie evidence that the liquor was sold by the licensee to that person."

Again this provision would appear to protect the 'operations manager' from the disabling and penalty provisions prescribed by the Liquor Act.

In the course of arguing his case, Mr. Mbendera made reference to certain provisions of English Licensing Legislation which expressly exempt employees such as hotel managers from liability. Under Section 63(2) and (3) of the Licensing Act, "a person carrying on or in charge of the business on licensed premises, whether or not the licence-holder, but not residing there, is treated as residing in the premises for the purposes

of the provisions exempting residents from the prohibitions of sale, supply and consumption otherwise than during permitted hours." Our own legislation does not have similar provisions so that this argument is of no assistance to Mr. Mbendera's case.

Nonetheless, we hold that the defence of illegality fails on the grounds of Section 76(2) as read with the provisions of Section 102(2) of the Liquor Act in that no action can be brought by either the Appellant or the Respondent upon any debt incurred in contravention of the said Section 76(2) of the Liquor Act.

Let us proceed to examine grounds (c), (d), (e), (f) and (h) since their common factor appears to be the existence of the alleged agreement to pass on funds from APT to the Appellant. These five grounds are couched in the following terms:

- "(c) The learned Chief Justice misdirected himself in finding that the appellant/plaintiff had failed to prove the allegations in the Statement of Claim.
- (d) The learned Chief Justice misdirected himself in not evaluating the evidence of the respondent/defendant in so far as this evidence contained an admission of receipt of pension monies for and on behalf of the appellant/plaintiff in excess of the sum of K4,119.50 actually remitted to the appellant/plaintiff.
- (e) The learned Chief Justice misdirected himself in ignoring the respondent's/defendant's pleadings which contained an admission that the balance of the pension monies had been used by the respondent/defendant to pay the plaintiff's indebtedness to the defendant pursuant to an agreement between the parties.
- (f) The learned Chief Justice erred in law in failing to make a finding as to the existence of the agreement alleged by the respondent/appellant."

Ground (g) was abandoned by the Appellant when arguing the appeal and ground (h) stated that:

"The learned Chief Justice erred in fact and in law in finding that the non production of pension regulating rules was fatal to the appellant's/plaintiff's case."

In order to fully appreciate these four grounds, we consider it proper to reproduce the Respondent's letter dated 13th January, 1986. The following is the full text of the letter:

"Our Ref. MCJ/APMC/MHL
13th January, 1986

Mr. R. A. Chupa,
BLANTYRE.

Dear Mr. Chupa,

I attach herewith a cheque in the sum of K4,119.50 being the balance on the refund from your pension contributions after having deducted the various amounts outstanding to Malawi Hotels Limited as agreed with you.

We have further retained the amount of K680.10 in respect of your wife's hospital charges which we have not yet received from MASM but will pass on as soon as the cheque arrives and a contingency of K200 against your final house telephone and electricity account. As soon as we know the exact figures any further refund will, of course, be made straight away."

The learned Chief Justice made the following observations regarding the above stated letter "Close examination of this letter does not show where the defendant acknowledges to have received the sum of K4,268.47 from the Association Pension Trust. Nor does the letter show where defendant purports to hold and refuse to pay the said monies to the plaintiff without his authority. There is no mention in the letter of the rules and regulations governing the pension scheme. When the plaintiff was in the witness box I thought he was going to adduce evidence in this regard. The rules and regulations were not produced, nor was there any evidence of their existence. The direction from Association Pension Trust to pay the sum to the plaintiff was not in evidence either."

These observations are very apt regard being had to the wording of the Appellant's pleadings which were in the following form in the paragraphs under dispute:

"3. By a letter dated 13th day of January, 1986, MHL acknowledged to have received the said sum of K4,268.47 from Association Pension Trust with direction from APT to pay the same to the Plaintiff. The said money was held by MHL to the use of the Plaintiff.

4. By the said letter of the 13th January, 1986, MHL held and refused to pay the said monies over to the Plaintiff without the Plaintiff's authority as is required under the rules and regulations of the APT pension scheme.

And there's the rub. The APT pension scheme rules and regulations were not put in evidence. Where else was it proved in the record that the Appellant's authority was a prerequisite to the withholding of the balance by the Respondent?

Counsel for the Appellant was clearly in difficulties in trying to establish this point. Hence the remarks by the Chief Justice on this point. If produced in evidence, the APT rules and regulations would have established the necessity for the Appellant's authority in whatever form.

We would also wish to comment, by the way, that in paragraph 5 of their pleadings, the Respondents also made reference to a letter dated 1st February, 1985, which is said to have been signed by the Appellant. This letter was not adduced in evidence either.

The importance of arguing one's case as pleaded was stated in no uncertain terms in Yanu Yanu v Mbewe M.S.C.A. Civil Cause No. 11 of 1984 as evidenced by the following passage cited by Jere, J.A. from an English case. In Bonham - Carter v. Hyde Park Hotel Ltd (1948) 64 T L R 177 p. 178 Lord Goddard C.J. stated that:

"Plaintiffs must understand that, if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

We are certain, this adequately explains why the learned Chief Justice adopted the course or attitude which he took.

The next category of grounds of appeal are that:

- "(j) The learned Chief Justice misdirected himself in placing weight on the fact that the amount claimed was K4,268.42 and not K4,263.47 and therefore coming to the conclusion that the appellant/plaintiff had not proved his case.
- (h) The learned Chief Justice misdirected himself in coming to the conclusion that it was hard (to) find the basis of the challenge of the figure of K4,059.68."

With respect, the learned Chief Justice did not so misdirect himself as alleged in these two grounds of appeal as evidenced by the following sentence which appears at the top of page 2 of the judgment.

"However, the amount of the claim is K4,263.47."

We hold that there is no merit whatsoever in these two grounds. The final grounds are two and are that:

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- "(1) The learned Chief Justice erred both in law and in fact in failing to consider the totality of the evidence adduced instead of looking at isolated pieces of evidence when he considered whether indeed the sum of K4, 268.47 was received from the Association Pension Trust.
- (m) The learned Chief Justice erred both in law and in fact in failing to consider the totality of the evidence adduced instead of looking at isolated pieces of evidence when he considered whether the respondent/defendant had withheld and refused to pay over monies it had received from the Association Pension Trust."

In order to fully appreciate the importance of these two grounds of appeal, it is imperative to return to the cause of action in these proceedings. This is money had and received. Bullen & Leake and Jacob's Precedents of Pleadings, 12 Ed. at page 671 has the following note on pleadings involving money had and received:

"Pleading. The facts from which it may be inferred that the defendant had and received the money to the use of the plaintiff must be clearly but concisely stated either in the body of the pleading or in particulars. A full statement of claim will sometimes be necessary, but it will often be sufficient to set forth the circumstances relied upon in a short form of pleading. Remedies depend upon the substance of the right, not on whether they can be fitted into a particular framework."

In the case at hand, the circumstances relied upon in a short form of pleading was the reference to the APT rules and regulations. These were not reproduced in the pleadings nor adduced in evidence as was observed by the learned Chief Justice. What then, are the principles which guide the courts when dealing with cases involving money had and received? In Thomas Wyatt & Son (W.A.) Ltd v. U.B.A. (1970) (1) ALR Comm. 234 Lagos S. Nig. at p.339 George, J. cites with approval the following:

"The real basis of an action for money had and received has been already explained by Lord Denning in 'The Recovery of Money', 65 Law Quarterly Review at 38 (1949), where he wrote:

'Indebitatus assumpsit for 'money had and received to the plaintiff's use' lay whenever the defendant had received money which in justice and equity belonged to the plaintiff. This action was not based on an implied contract or an implied promise. It was based on a concept of property.'

And he stated further:

'Rid of the error about the implied contract, the action for money had and received was and is an effective remedy for the recovery of money. Whenever money was wrongfully taken from the true owner, this action lay to recover it back. It applied to money in all its tangible forms, such as coins or banknotes which the owner had in his possession, or cheques which he held payable to himself or bearer. He might be deprived of such money by thieves or forgers, by fraudulent agents or merely by losing it. It might change its form from coins to cash at bank, or from cheques to notes or in any way whatsoever. It might come into the hands of persons innocent of any fraud.... (T)he plaintiff to whom it belonged had this action to recover it back unless and until it reached the hand of one who received it in good faith and for value and without notice of the misappropriation. This action therefore covered not only the same field as conversion of cheques but it also covered cases where conversion did not lie, such as where coins were taken'.

The principles discussed in this article are a summary of the following judgment by Denning J., as he then was, in Nelson v. Larholt (1948) 1 K.B. 339 at 342 - 3 where he pronounced hhat:

"The relevant legal principles have been much developed in the last thirty five years. A man's money is property which is protected by law. It may exist in various forms such as coins, treasury notes, cash exchange of which he is "the holder" (3) but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority."

The words which feature highly in both the article and the judgment by Denning J. are "receipt of the money in good faith and for value and without notice of the want of authority". Now, the Respondent in the case before this court claims to have received the APT funds bona fide and for value since the Appellant does not deny that he was indebted in the amount withheld by the Respondent. The Appellant's argument is that the debt in question arose out of an illegal contract. We have already held that the Appellant is barred from pleading illegality by the provisions of section 76 (2) as read with section 102(2) of the Liquor Act. In his pleadings, the Appellant placed heavy reliance on the rules and regulations of APT in order to prove that the Respondent had no authority to deduct any money from the pension scheme. How then can he say that the Respondent had no authority when he admits owing the sum in question and discussing ways and means of liquidating the same?

The following passage in which Mr. Mbendera is cross-examining Mr. Chupa explains the point which we are making even better. This appears at page 57 of the court record:

"Q. A loan of K4,059.68, right?

A. That is right.

Q. Electricity K180.39?

A. Correct.

Q. Rent K503.01?

A. That is right.

Q. Hospital K684.10?

A. That is right.

Q. Telephones (International) K10.50?

A. That is correct.

Q. And they were giving you allowance of K132.50?

A. That is correct.

Q. And they retained K200.00 for contingency?

A. Yes

Q. Which of these amounts do you dispute?

A. The first two amounts, the Staff Current Account and Loan Account and those two amounts added together will give you a nett amount of my claim. The rest are agreed to.

Q. I see. And this loan the only reason you raised is because it was a transfer from the loan account?

A. I said I disputed it because it was an additional loan account and it was not proper and fair for them to take it at once especially when it was for drinks.

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Q. What you are saying is it was unfair for them to take it at once, they should have skipped it?

A. They should have turned it into debt not a loan. As I was leaving the company we could have agreed on what I was going to afford, like K50.00. My Lord, I know something about this because I used to sit for them at the meetings, we could have agreed on the terms of repayments."

Later on Mr. Chupa goes on to explain that the Malawi Hotels never gave him all of the supporting documents of the loan. In this case, the Appellant argued his case on two principal grounds, that the sale of liquor to him was an illegal contract and that the withholding of the funds were without his authority as evidenced by the rules and regulations of APT and not on the basis that the loan had no supporting documentation.


Mr. Mbendera attempted to convince this court that the proceeds of the pension fund from APT constituted money had and received for the use of the Respondent. We do not agree with that submission. It would seem to us that the money in question constituted money had and received to the use of the Appellant, and not the Respondent. The debt or loan which that money liquidated was incurred by the Appellant.

Although the respondents did not adduce in evidence the letter referred to in paragraph 4(a) of their pleadings, it is clear that they acted in their dealings with the appellant on the understanding that the loan or debt would be offset from the proceeds of the pension scheme. The appellant failed to prove his case as pleaded, it would seem to us pointless to go into the merits of the arguments raised by the respondents any further than we have already gone. This appeal has failed mainly because what was given in the pleadings is not borne out by the evidence on record.


The appellant's appeal is therefore dismissed with costs to the respondents.

DELIVERED at Blantyre this 5th day of September, 1988.

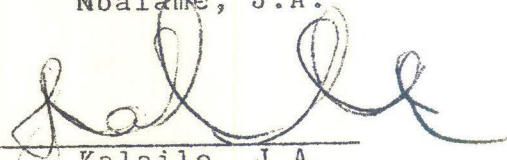
(Signed)


Unyolo, J.A.

(Signed)


Mbalame, J.A.

(Signed)


Kalaile, J.A.