IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 13 OF 1992

(Being High Court Civil Cause No. 202 of 1990)

BETWEEN:

MALAWI RAILWAYS LIMITED.....APPELLANT

- and -

P T K NYASULU.....RESPONDENT

BEFORE: THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE KALAILE, J
THE HONOURABLE MR JUSTICE TAMBALA, JA

Kaphale, Counsel for the Appellant

T Chirwa, Counsel for the Respondent

Ngaiyaye (Mrs), Official Interpreter/Recorder

J U D G M E N T

Kalaile, JA

Counsel for the appellant, Malawi Railways Limited, filed eighteen grounds of appeal which were classified into six categories when being argued. The following are the classified categories:

i) pleading and implication of terms;

ii) whether the existence of a pension scheme would tie the hands of the appellant in such a way that despite the existence of a term giving each party the right to terminate the contract on a month's notice and without assigning any reason, the employment of the respondent could only be terminated on good grounds;

iii) whether the Judge was right in finding that the appellant owed a duty of care in tort and that the appellant breached that duty;

iv) whether the appellant breached its contract with the respondent by terminating the respondent's services and refusing to give him full retirement benefits;

v) the award of damages;

vi) the judgment is contrary to law.

The trial Judge in his judgment very eloquently summarised the facts of the case as follows: The appellant joined the Malawi Railways Limited on the 10th October 1969 as an executive trainee (transportation). At that point in time, he was twenty-eight years old. He was retired on 31st October 1989 when he was in good health and there was nothing to suggest that he would not have attained the age of sixty and retire normally. The full text of the letter which was exhibited in the Court below states as follows:

"CONFIDENTIAL

MALAWI RAILWAYS LIMITED

OFFICE OF THE GENERAL MANAGER P O BOX 5144

LIMBE MALAWI

Dear Sir

NOTICE OF TERMINATION OF SERVICE

I have to advise you that you are to retire from the service of Malawi Railways on the 31st of October, 1989, with six months notice commencing on the 1st of May, 1989.

Yours faithfully

(Signed)

W. L. GILLMAN

GENERAL MANAGER

cc: The Comptroller of Statutory Bodies, Lilongwe 3

cc: The Chairman, Malawi Railways Ltd

cc: The Acting Secretary for Transport and Communications, Lilongwe 3"

Now, under the contract of employment made in writing and dated the 10th October, 1969, the appellant offered, and the respondent accepted, employment as an executive trainee (transportation) where a number of conditions were stipulated. Among some of the relevant terms of the contract of employment were that the respondent would initially be placed on probation for a period of six months and that on confirmation, after the six months probation period, he would be required to join the company's pension scheme. This latter term was compulsory for all permanent staff. It was further a term of the contract of employment that the contract may be terminated by giving the other party one month's notice. In a nutshell, these are the facts of the case.

Let us now revert to the first category of the grounds of appeal, namely, that of pleading and implications of terms. The main ground emphasized under this category is that the learned Judge erred in law in implying into the contract between the appellant and respondent a term that the contract would not be terminated by the appellant except on good grounds being shown, when such a term was not alleged or pleaded by the respondent in the statement of claim.

Counsel for the appellant expounded his argument by referring the Court to pages 11 and 12 - 13 of the judgment where the trial Judge made reference to what he termed the "narrow view" and the "wider view" of his judgment. The "narrow view" is stated as follows at page 11 in the penultimate paragraph of the judgment:

"In my judgment, and looking at the contract of employment in its narrow view and independent of the pension scheme rules, I find nothing unlawful about the termination of the plaintiff's contract of employment which more than complied with the terms contained in his letter of appointment. I find also by looking at the pension scheme rules in their narrow sense and independent of any other consideration, from the evidence before me, both oral as well as documentary, that the plaintiff who was only 48.1/2 years old at the time he left

his employment did not qualify for pension under the rules governing benefits."

The "wider view" held by the trial judge and which was the ratio decidendi of the case was more elaborately expounded as follows at pages 12 - 13 of the lower Court's judgment:

"It may be of assistance to consider the plaintiff's employment as distinct and completely independent of his pension contract. There was in existence a contract of employment between the plaintiff and the defendants. This contract was terminable at a month's notice. Then there was the pension contract. It is to be observed that the successful discharge of the pension contract depended upon the successful discharge of the employment contract. With regard to the employment contract, there was a provision that it was terminable by giving one month's notice on either side. In simple parlance, this means that any party who breaks the continuous flow of what was agreed in the contract will suffer the simple penalty of having to inform the other one month before making the actual break or having to lose the equivalent of one month's pay. There is no similar term in respect of the pension contract. Another peculiarity of the pension contract is that it is only the employee who suffers by its breach. It follows from this reasoning that the employer should not be allowed to cause a breach of the pension contract at his whim. He can only be justified in doing so upon justifiable grounds. We have observed that a breach of the employment contract is automatically remedied by one month's notice. We have further observed that while the operation of the pension contract depends upon the continuance of the employment contract, its breach, unlike the employment contract, does not have a built-in remedy. It must follow, since a breach of the pension contract does not have a built-in remedy, and realising that its continuance depends upon the continuance of the employment contract, that any party which causes a breach of the employment contract which in turn causes a breach of the pension contract, must be liable in damages, unless the reasons for breaching the employment contract can be justified. The defendants' liability may be based on tort rather than on any contractual relationship". [Emphasis supplied]

The last paragraph in which the trial Judge summed up his ratio decidendi reads:

"In my judgment I find that both the plaintiff as well as the defendants read and

understood, from the plaintiff's employment, that subject to good health, good conduct and continuance of the defendants' business the plaintiff's contract of employment could not be terminated until he attained the retirement age. The termination of the contract, therefore, was in breach of that mutual understanding and entitles the plaintiff to damages."

Counsel for the appellant argued, quite correctly, in our opinion, that it is worth noting that although the learned trial Judge implied into the agreement between the parties the underlined terms that he did, the respondent had not pleaded or alleged such implied terms in the statement of claim. Counsel also pointed out that Order 18, rule 7 of the Rules of the Supreme Court, 1995 Edn, at page 291makes it a duty on every party to the proceedings to plead all material facts which that party will rely upon at the trial.

Counsel cited quite a multitude of authorities in support of his argument. We shall only refer to two of these. The first is **Blay v Pollard and Morris (1930), 1 KB 628**, where **Scrutton, LJ** said at page 634 that:

"Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."

Counsel for the respondent submitted in argument that in paragraph 4(4) of the statement of claim, the respondent prayed for "further or other relief". We do not believe that this satisfactorily complies with the terms of O.18, r.7, paragraph 10, at page 292, which states that:

"**All the material facts-** It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (perCotton L.J. in Philipps v. Philipps (1878) 4 Q.B.D. 127, P.139. "Material means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott L.J. in Bruce v. Odhams Press Ltd. [1936] 1 All E.R. 287, P.294). Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action. (West Rand Co. V. Rex [1905] 2 K.B. 399; see Ayers v. Hanson [1912] W.N. 193). Where the evidence at the trial establishes facts different from those pleaded, e.g. by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the action will be dismissed

(Waghorn v. George Wimpey & Co. Ltd. [1969] 1 W.L.R. 1764; [1970] 1 All E.R. 474). Moreover, if the plaintiff succeeded on findings of fact not pleaded by him, the judgment will not be allowed to stand, and the Court of Appeal will either dismiss the action (Pawding v. London Brick Co. (1971) 4 K.I.R. 207) or in a proper case will if necessary order a new trial (Lloyde v. West Midlands Gas Board [1971] 1 W.L.R. 749; [1971] 2 All E.R. 1240, C.A.). Similarly, a defendant may be prevented from relying at the trial on a ground of defence not pleaded by him (Davie v. New Merton Board Mills Ltd. [1956] 1 W.L.R. 233; [1956] 1 All E.R. 379; but cf. Rumbold v. L.C.C. (1909) 25 T.L.R. 541, C.A., which was not cited in Davie's case; for the subsequent history of Davie's case, see [1959] A.C. 604, H.L.)."

Counsel for the appellant cited an article from the (1960) Current Legal Problems entitled "**The present importance of pleadings**" written by **Sir Jack Jacob**. The author stated as follows, at page 174:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an

item called "Any Other Business" in the sense that points other than those specified may be raised without notice."

We concur with Counsel for the appellant in his submission that since the respondent did not, in his statement of claim, plead that a term was to be implied in the agreement that subject to good health, good conduct and the continuance of the appellant's business, the respondent's employment could not be terminated until he attained the retirement age of sixty years, the court erred in law in making such an implication.

The second category of grounds of appeal was summarised by the appellant's Counsel thus:

"Whether the existence of a pension scheme to which the respondent was a member would impliedly fetter the hands of the appellant in such a way that despite the existence of a term giving either party the right to terminate the contract of employment, the appellant could only terminate the respondent's employment on good ground."

At pages 16 to 17 of the judgment is the following passage about which these grounds of appeal appear to relate:

"It must further be observed that a contract of employment creates status on the part of the employee although it rarely creates such status on the part of the employer. The right to terminate it must depend on some good reason....Inefficiency, ill health, impertinence on the part of the employee and loss of profits change of methods of work on the part of the employer may be some good grounds upon which the employer may exercise his right to terminate a contract of employment. The employer will be justified in taking that course because his action will be aimed at protecting his business. It is a contract which must not be terminated capriciously simply because the contract gives the employer the right to terminate it by giving the required notice."

Counsel for the appellant cited another bundle of authorities which categorically repudiated the trial Judge's line of reasoning. Some of the authorities are the following. First, is **Ward v Barclay Perkins & Co. Ltd (1939), 1 All ER 287**. In that case, the plaintiff was employed by the defendant company who had established a staff endowment and pension scheme to which the plaintiff had contributed for several years on the footing that he was a staff employee. The rules of this scheme indicated a distinction between employees in temporary employment and employees categorised as "staff employees". "Staff employee" was defined as meaning "every male employee on the permanent staff". The defendant gave the plaintiff three months notice to leave his post as it appeared that

there was no scope for advancement for him in the firm. No reflection whatever was made upon his character or performance of his duties.

The plaintiff contended that there was an implied contract that, if he came into the pension scheme, he became a member of the permanent staff, and that he thereby became by necessary implication subject to such considerations as health, the company's business, entitled to permanent employment and could not be given ordinary notice until he attained the age of sixty-five years, thereby obtaining the full benefit of his

contributions.

It was held by **Oliver, J** that such a stipulation could not be implied in a contract unless on the evidence it was demonstrated to have been mutually intended and necessary to give business efficacy to the agreement. This was not the case and the action was dismissed.

After the **Ward** case, the English Courts decided the case of **McClelland v Northern Ireland General Health Services Board (1957), 2 All ER 129**. The facts of the case in the **McClelland** case are important to narrate since they are very similar to the case under consideration.

In 1948, the Northern Ireland General Health Services Board advertised, inviting applications for posts as senior clerks, the appointments being expressed to be "permanent and pensionable". The appellant, having applied, was appointed and was shown the terms and conditions of service. These contained a clause providing for the dismissal of officers for "gross misconduct: or if they proved "inefficient and unfit to merit continued employment". There was also a provision for dismissal on failure to take or to honour the oath of allegiance and another related to termination of employment by reason of permanent ill-health or infirmity. There was no provision for dismissal in other circumstances. It was, however, provided that "permanent officers", who wished to terminate their employment with the Board, must give one month's notice. In 1953, the Board terminated the appellant's employment on six months' notice on the ground of redundancy of staff and without any suggestion of misconduct or inefficiency on the part of the appellant. It was held by a majority decision of 3 to 2 by the House of Lords that on the true construction of the terms and conditions of service the express powers of the Board to dismiss an officer were comprehensive and exhaustive and no further power could be implied so that the appellants's service had not been validly terminated.

Three dissenting dicta from different **Law Lords** in the **McClelland** case are very much on the point with regard to the case under consideration. The first dictum is by **Lord Goddard** who surprisingly agreed with the majority decision. He states at page 133:

"That an advertisement offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment, that is that the person employed would be on the general staff with an expectation that apart from misconduct or inability to perform the duties of his office, the employment could continue for an indefinite period. But apart from a special condition, in my opinion, a general employment is always liable to be determined by reasonable notice. Nor do I think that, because a person is offered pensionable employment, the employer thereby necessarily engaged to retain the employee in his services long enough to enable him to earn a pension."

The second pertinent dictum is by **Lord Tucker** at page 136B. It states:

"My lords, a contract of employment for life is rare...and one which gives such security to such a class of persons but enables them to terminate their employment on a months' notice must be almost unique. I would, therefore, expect to find express language in any contract intended to have this result and would require compelling words before I could feel justified in construing a contract as producing such a result by implication of some rule of construction."

The final dictum which we wish to quote from the same judgment is that of **Lord Keith** at page 149F. This is what **Lord Keith** observed:

"...it would need the clearest language to convince me that a contract of personal service was intended to be a contract for life, or a contract to endure till a servant has qualified for a full retirement pension. The position in the present case, if the appellant's argument is acceded to could be the more remarkable in that it would be only the board that was bound, for the servant is entitled to terminate his employment on one month's notice."

The last dictum by **Lord Keith** cited from the **McClelland** case was applied with approval in the later Nigerian case of **Odaro v Central Bank of Nigeria (1974), (1) ALR Comm. 200**. In the **Odaro** case, the plaintiff brought an action against the defendant to recover damages for wrongful dismissal.

The defendant bank employed the plaintiff as a member of its permanent and pensionable staff under conditions of service which enabled either party to terminate the employment on giving a month's notice or on payment of a month's salary in lieu of notice. Under the heading "Staff Discipline", the conditions of Service set out specific grounds for terminating the employment, including particular grounds on which the plaintiff could be dismissed summarily. Members of the staff who retired before qualifying for pension might receive ex gratia payments at the discretion of the defendant's board of directors having regard to the merits of individual applications.

The defendant gave the plaintiff study leave to take a degree course, but did not tell him he would be required to give a bond for continuing in the defendant's service after completing the course. The plaintiff completed the course successfully, and the defendant gave him promotion and called on him to execute a bond in an unspecified amount obliging him to serve the defendant for an unspecified number of years. The plaintiff said the promotion was unacceptable and refused to execute the bond, but he worked in

the promotion post. The defendant dismissed the plaintiff with a month's salary in lieu of notice. The plaintiff had not qualified for pension, and he did not apply for an ex gratia payment.

The plaintiff instituted civil proceedings and claimed damages for loss of emoluments to the time when he would have attained the age for compulsory retirement, and for loss of pension and gratuity. He contended that his dismissal was wrongful because: (a) until he attained the age for compulsory retirement, his employment could not lawfully be terminated except on the grounds set out under the heading "Staff Discipline" in the conditions of service, since the grounds were exhaustive; and (b) he had done nothing which would justify the termination of his employment on any of those grounds.

The defendant contended that the termination of the plaintiff's employment was lawful, because, inter alia, the employment had been terminated in accordance with the express provisions of the conditions of service.

The action was dismissed on the grounds, inter alia, that the fact that a contract of pensionable employment described the employment as permanent does not mean that the employment cannot be terminated before the employee has attained the age for compulsory retirement or has qualified for full pension. The question is one of the construction of each particular contract and, while a contract of permanent and pensionable employment which contains provisions for termination which can be construed as exhaustive cannot lawfully be determined otherwise than in accordance with those provisions, and power to determine it on reasonable notice will not be implied, it requires the clearest language to show that a contract of personal service is intended to be a contract for life, or, a contract which is to endure until the employee has qualified for a full pension. Furthermore, any such construction will be precluded where the contract gives the parties reciprocal rights of terminating the employment on notice, so that the employee cannot have supposed that he would have employment for life.

The **Odaro** case clearly explodes the notion that "both the plaintiff and the defendant read and understood from the plaintiff's employment that subject to good health, good conduct and the continuance of the defendant's business, the plaintiff's contract of employment could not be terminated until he attained the retirement age", which is the viewpoint repeatedly expressed by the trial Judge in his judgment.

Counsel for the appellant cited the case of **East African Airways v Knight (1975) EA** as authority for the proposition of law which supports the dictum of **Lord Keith** in the **McClelland** case. It is stated by **Mustapha, Ag. VP** in the **Knight** case that:

"I would normally consider that a contract of service between an employer and an

employee for an indeterminate duration is intended to be determinable. Such a contract, similar to a contract of partnership or one of principal and agent involves more or less of trust and confidence, more or less of the necessity of being mutually satisfied with each other's conduct, and more or less of personal relations between parties. Such a contract is normally liable to be determined by reasonable notice, if no period is provided, in the absence of custom, legislation or provision expressed or implied to the contrary. It will be necessary to construe the memorandum of agreement to find out whether by clear and necessary implication the corporation in this case had divested itself of the power to terminate the agreement on reasonable notice as submitted by Sir William Lindsay on behalf of Mr Knight. There are no express words depriving the corporation of such right in the agreement, nor is there any custom or legislative enactment to that effect.

It is clear that Mr Knight was on permanent employment, as opposed to temporary employment. However, permanent employment does not mean that it is employment for life or until retirement, it merely means the employment is to continue for an indefinite period with an element of permanency and a degree of security of tenure. It is not necessarily a life appointment with the status of irremovability."

Lord Keith's dictum in the **McClelland** case and the decisions in the **Odaro** and **Knight** cases also clearly reject what the trial Judge observed at page 17 of his judgment, where he opined that "although I would not go so far as laying down any principle but I think that the cumulative effect of the plaintiff's letter of appointment and the pension scheme rules may safely be said to have been understood by the parties to be that (a) the plaintiff was employed in a permanent and pensionable employment (b) that if he does not commit any offence disciplinary or criminal and assuming that he is in good health and is reasonably competent in his work he shall be allowed to work up to his retiring age." The above-cited passage is definitely not supported by the authorities.

The third category of grounds of appeal which Counsel for the appellant relied on in argument is abridged as follows. Whether the learned Judge was right in finding that the appellant owed the respondent a duty of care in tort and that the appellant breached that duty of care and was consequently tortiously liable to pay damages to the respondent. It should be borne in mind that the respondent did not plead that the appellant owed him any duty or any duty of care in tort and breached that particular duty of care. Clearly, what was pleaded was breach of contract.

Order 18, r.12(15) of the Rules of the Supreme Court, 1995 Edn, at page 315 states that:

"Particulars must always be given in the pleading, in what respect the defendant was negligent. The statement of claim 'ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff the breach of which the defendant is charged" per **Willes, J** in **Gautret v Egerton (1867), LR 2 CP 371** cited with approval by **Lord**

Alverstone, CJ in **West Rand Central Gold Mining Co. V R (1905), 2 KB 391, P.400**. The **Kavanagh (1913), 108 LT 433**. Then shall follow an allegation of the precise breach of duty of which the plaintiff complains and lastly particulars of the injury or damage sustained."

It was strongly submitted by Counsel for the appellant that as a matter of legal principle, the trial Judge erred in finding a breach of duty on tort in a situation where the parties were in a contractual relationship and when only a breach of contract had been pleaded. Counsel cited the dictum of **Lord Scarman** in the judgment of the Privy Council in **Tai High Cotton Mills Ltd v Liu Chong Hing Bank Ltd (1986), AC 80, at page 107**. This is what **Lord Scarman** observed:

"Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in commercial relationships. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of a banker and a customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law, when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other and for the avoidance of confusion and because different consequences do follow according to whether liability arises from contract or tort."

On this point, it was argued lastly by Counsel that the above-cited passage was relied upon by the Court of Appeal in **Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd (1988), 3 WLR 396, at 421** in holding that where an express contract governed certain issues between the parties, the courts should not find a duty of care in negligence based on voluntary assumption of liability for pure economic loss. We agree with Counsel for the appellant that the Court

below erred in holding that the appellant owed a duty of care in tort and that the appellant breached that duty.

The next set of grounds which Counsel for the appellant argued was whether the appellant breached the contract by terminating the respondent's services, and refusing to give him full retirement benefits. We believe that the appellant is correct in his submission on this point, but that the point was covered in his submissions when he was dealing with the second category of grounds of appeal which centered on termination of the respondent's employment on "good ground" rather than paying the respondent his full

retirement benefits. In our considered opinion, this point was adequately dealt with by Counsel when citing dicta from the **McClelland** case and the **Odaro** case.

The next categories of grounds of appeal are the "award of damages" and the "judgment is contrary to law". Both categories fall away, since we have found for the appellant on the first four categories of grounds of appeal. This appeal succeeds in its entirety. It appears, however, that the respondent was not paid what he was entitled to under the judgment in the Court below, since there was a stay granted by a Judge of the Supreme Court against execution of the judgment. In all fairness to the respondent, we believe that the justice of the matter will be met by awarding the respondent what he was entitled to under the pension scheme with interest calculated from the time the respondent was retired.

In conclusion, we are of the opinion that the trial Judge's judgment was wrong in law in adopting the "wider view". It is the "narrow view" which expresses the correct position of the common law where a contract of employment is terminated in accordance with the express terms of the contract. In the present case, the respondent should exercise the options given to him by the Old Mutual. If the proceeds of the retirement benefits

were paid into Court and deposited in an interest bearing account, then the respondent will naturally benefit from any interest earned thereby.

The last remaining question is the vexed one of costs. An examination of the **McClelland** case demonstrates how complex are the points of law which arose in a case which is very similar to the one before us. Even after the decision in the **McClelland** case was delivered, the issues dealt with in that case came up for determination in, first, West Africa, secondly, East Africa and now they are before us in Central Africa. For this reason, we have decided that each party should meet its own costs.

DELIVERED in open Court this 11th day of November 1998, at Blantyre.

Sgd. .....

L E UNYOLO, JA

Sgd. .....

J B KALAILE, JA

Sgd. .....

D G TAMBALA, JA