

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3180 OF 2004**

BETWEEN:

DAVID MALEKANO BANDA.....PLAINTIFF

- and -

SDV MALAWI LIMITED.....DEFENDANT

CORAM: CHIMASULA PHIRI J.

Salima of Counsel for the plaintiff

Chiphwanya of Counsel for the defendant

Mrs Katunga – official interpreter.

RULING

Chimasula Phiri J,

By Originating Summons (expedited) the plaintiff commenced this action on 8th November 2004. The matter was scheduled for hearing on 29th November, 2004. The plaintiff sought the following orders:-

- (i) That the defendant, having employed the plaintiff as a Stock Clerk instead of Stock Controller, has been in breach of the employment contract between the plaintiff and the defendant.
- (ii) That by reason of paragraph (i) above, the plaintiff suffered damage and loss particulars whereof are said to be in the accompanying affidavit.
- (iii) That in view of paragraphs (i) and (ii) above the defendant be ordered to revise the plaintiff's position from Stock Clerk to Controller.
- (iv) That, alternatively, the defendant do pay the plaintiff damages as aforesaid.

- (v) That the defendant be condemned in costs of this application.

The Originating Summons is supported by an affidavit of the plaintiff as well as his Supplementary Affidavit. In his affidavit he has, among other things, stated that in the year 2003 a vacancy appeared in the local newspaper wherein the defendant was looking for a suitable person to occupy the position of Stock Controller. By that time, the plaintiff was working for Malawi Widows and Orphans Association (MWASSO) as an Operations Manager. The plaintiff states that he applied for the vacancy and successfully attended interviews. The plaintiff states that the defendant phoned inviting the plaintiff to the office to sign an appointment letter. Upon hearing the news about the offer of a job, the plaintiff whether unwittingly or through over-excitement resigned from his job at MWASSO in readiness for the new job. When the plaintiff went to the defendant's office, he was given an appointment letter for the post of Stock Clerk and not Stock Controller. The plaintiff was asked to sign signifying his acceptance. The letter is exhibited. It is entitled "Letter of Appointment" and is dated 1st December 2003. The plaintiff alleges that upon noticing this discrepancy in the offer letter he protested and that the defendant acknowledged that there was a mistake in the offer letter but nevertheless asked the plaintiff to sign the offer letter. The plaintiff states that the defendant promised to correct the mistake but surprisingly never did so. The plaintiff alleges that he continued to raise his protests but to no avail. He has exhibited his letter dated 29th July 2004. This was eight months of serving in his job as a Stock Clerk. The relevant paragraphs are entitled "No Job Motivations and Delayed Confirmation....." these read as follows:-

NO JOB MOTIVATIONS

Refer to my personal file, in principle SDV did advertise the post of Stock Controller in one of the daily news papers which in turn I responded and I was called for the interviews. When I was successful, I was urgently requested to start work as soon as 28th November, 2003. I was offered the job as Stock/Export Clerk and not as a Stock Controller as previously agreed. Furthermore the reasons behind this development were not communicated to me. More over by this time I had already resigned from where I was working before. There I personally feel that my future career is being threatened – that is to mean instead of rising –up the ladder of achievements, my career ladder is adversely going down.

DELAYED CONFIRMATION OF MY EMPLOYMENT

Confirmation has been delayed or extended without reasons so far which have been communicated to me. May be because of the complications realized of how to evaluate

and calculate my job performance based on what practically I am doing as compared to the stated job requirements as enshrined in the appointment letter.

The plaintiff is of the view that the defendant's action has been prejudicial to him in that the defendant has been guilty of breach of contract that was signed and that he plaintiff has suffered loss and damage. The particulars of such loss and damage have been stated that the defendant's act has amounted to a demotion since the plaintiff previously worked in a position of or similar to that of Stock Controller. He contends that this obviously has an adverse effect on his future career prospects. Further, the plaintiff complains that the defendant's act depicts incompetence on the plaintiff's part as someone who does not have the capacity or competence to work in a position of Stock Controller.

Finally, the plaintiff alleges that the defendant has frustrated his legal expectations in building up his career in the field of stock control and management.

In his Supplementary Affidavit, the plaintiff has exhibited a letter dated 8th September 2004 from the defendant. The plaintiff alleges that he signed the Letter of Appointment under duress and upon a mutual understanding between the defendant and the plaintiff that his position would be that of Stock Controller and not Stock Clerk. The plaintiff alleges that the defendant ignored the complaints of the plaintiff and instead issued him with letters of warning and threats of disciplinary action. The plaintiff's employment was terminated whilst he was still on probation.

On behalf of the defendant, Simon Chilima Banda swore an affidavit in opposition. The first issue taken is of jurisdiction of the court to deal with such a case on Originating Summons. The second issue is that the plaintiff was in 2003 offered and he duly accepted, the position of Exports and Stock Clerk and that at no time was the plaintiff offered any other position by the defendant. The defendant states that at no time was the issue of offer of employment misrepresented by the defendant to the plaintiff. Thirdly, the defendant states that the plaintiff's acceptance of the defendant's offer was free and voluntary on the part of the plaintiff. The defendant expressed surprise that the plaintiff's concerns contained in the Supplementary Affidavit. The defendant further alleged that the plaintiff performed his work incompetently and thereby earned his dismissal. The letter of dismissal is exhibited. The defendant states that the plaintiff was duly offered an opportunity to defend the allegations of his incompetence but failed to parry them. In short, the plaintiff was a liability and not an asset for the defendant. The plaintiff made an Affidavit In Reply.

Both parties made written skeleton arguments.

It is my view that issues relating to employment raise emotional issues and usually such issues are contested. It is very rare that one would be seeking construction of a contract of employment in terms of rights and duties provided thereunder. In most instances, the issues range from simple termination of contract to complex issues of quantifying damages. It must be the usual instinct of a lawyer to commence claims of such matters by way of writ and not Originating Summons. If one commences such action by Originating Summons but notes existence of disputed facts, such a party must be quick to apply to court for directions to proceed with the action as if it had begun by writ. My view is that the plaintiff wrongly commenced this action. He might have wished a quick disposal of the matter but in doing so, he erroneously used wrong form of commencement. On that point alone, I would be entitled to dismiss the plaintiff's action.

However, I will proceed to examine the merits of the plaintiff's action. I have been invited to consider the elements of a contract namely, offer, acceptance, consideration and an intention to create a legally binding relationship. There is reference to advert in a local newspaper. The plaintiff has not exhibited such an advert or let alone a copy of the letter he wrote in response to the advert. His argument is that the defendant should be asked to produce office file to confirm existence of an advert for the post of Stock Controller. Unless we want to change the law, the burden of proving an allegation lies on the maker thereof. The defendant is under no obligation to prove that it did not advertise for such a post. The duty is on the plaintiff to confirm to the court that the defendant actually placed such an advert.

I also wish to observe that the defendant offered the plaintiff the job of Export/Stock Clerk with detailed package and job description. The plaintiff says that he was enticed to sign for the offer of employment because there was a misrepresentation that the so called error in designation of the post would be corrected. Again, the court is left with a lot of doubts as to the truth of this allegation. With all the modern technology available in the offices, could the

defendant not have issued a proper letter promptly to correct the error? My finding is that the plaintiff was offered and he accepted the post of Export/Cost Clerk and not Controller. The issue that he opted to report for duties because he had already resigned from his previous employment does not make any sense to me. The defendant has come out clearly in the affidavit in opposition exposing that the plaintiff was not material for simple duties of a clerk and what more would there be for such a person to qualify for a senior position of controller? Unfortunately, I do not find anything favourable for the plaintiff regarding his claims. I dismiss the plaintiff's action with costs.

MADE in chambers this 25th day of February 2005 at Blantyre.

Chimasula Phiri
JUDGE