IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 2175 OF 2003

BETWEEN

PEMBA CHABWERA **PLAINTIFF**

AND

MOUNT SOCHE HOTEL **DEFENDANT**

CORAM: HON. Justice Katsala
Saukira, of counsel for the plaintiff
Chalamanda, of counsel for the defendant
Chuma, official interpreter

JUDGMENT

Katsala J.,

By an originating summons issued on 8th September 2003 the plaintiff seeks from this court a declaration that he is entitled to be paid severance allowance or the difference between his pension withdrawal benefits and severance allowance, interest and costs of the action. In effect he is seeking the court's interpretation of section 35(1) of the Employment Act in respect of whether severance allowance is payable to an employee who resigns from his employment.

The facts of the case are not in dispute. The plaintiff was employed by the defendant in 1998. He remained so employed until 30th September 2002 when he resigned from his employment. During his employment the plaintiff was a member of the defendant's pension scheme.

Consequently, he could not continue with such membership and was withdrawn from the scheme. He was paid the sum of K12, 342.00 as his pension withdrawal benefits. He thought he was entitled to be paid severance allowance but the defendant refused saying he was not entitled since he had voluntarily resigned from his employment. According to his calculations he was supposed to be paid the sum of K57, 974.00 as severance allowance.

The issue for determination is whether severance allowance is payable under section 35(1) of the Employment Act where an employee resigns on his own volition. The parties filed skeleton arguments and also made oral submissions during the hearing of the originating summons.

Section 35 (1) of the Employment Act provides:

> "On termination of contract by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule."

The parties agree that severance allowance is only payable in two instances. Firstly, where the employment is terminated by mutual agreement between the employer and the employee. And secondly, where the employer unilaterally terminates the employment. What they do not agree on is whether an employee's resignation from employment constitutes a termination of the employment by mutual agreement.

The plaintiff has submitted that in termination of employment by resignation the employee makes an offer to terminate the employment which the employer may accept or reject. Where the employer accepts, as in the present case, then a situation reminiscent of agreement arises and mutuality may be inferred. The plaintiff further submits that since section 35 lays down situations where severance allowance is not payable which situations do not include resignation, then it means that it was the intention of the legislature to include resignation as one of the cases where the allowance is payable. He relies on the principle of interpretation which says "that which is not expressly excluded is included". He cited the case of *Blantyre Sports Club v. R. K. Banda et al*, civil cause number 61 of 2003 (unreported) in support of his argument.

The defendant, on the other hand, submitted that the plaintiff's resignation was a unilateral termination of the employment. The fact that the defendant accepted the resignation does not make it to be a mutual termination of the employment. A mutual agreement envisages a situation where both parties are in concurrence with the end result. It envisages where there is room for negotiation between the parties so that the end result is like a half way house between what the parties singularly want. The defendant urges the court to give the words in contention their natural meaning in order to reflect the true intentions of the legislature. The case of *Income Tax Commissioners v. Pemsel*, (1891) AC 534 was cited in support of this submission.

I have considered the issue and the submissions of the parties and have looked at the relevant provisions of the Employment Act and it is my view that there ought not to be any disagreements on this issue. I wish to express total agreement with what Nyirenda J. said in the case of *Japan International Co-operation Agency (JICA) v. V. P. Jere*, civil cause number 25 of 2002 (unreported), a case cited by the plaintiff. He said:

> "The spirit of Section 35(1) [of the Employment Act] is to provide a safeguard for employees whose services might abruptly be terminated by an employer. At common law as long as an employer has terminated an employment contract in compliance with the termination provisions, an employee has virtually no other remedy left. Such provisions often cause unfairness to employees who worked for an employer for a considerably long period. In most instances in Malawi contracts provided for one month notice or one month pay in lieu of notice. Such contractual arrangements were very common and they created extreme hardships for employees whose bargaining position was often weaker compared to that of their employers. Section 35(1) in effect compels employers to recognize the commitment and the valuable contribution which employees make to the work they do. Clearly the provision protects employees from being told to go with one month's pay after working for an employer for a considerable number of years. In the spirit of Section 31 (1) of the Constitution, Section 35(1) of the Employment Act 2000 is meant to protect employees who have long served their masters and puts a stop to exploitation."
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> In my view it is not within the spirit of the Act to protect employees from the abrupt termination of contracts of employment by themselves. And also it is not within the spirit

of the Act to protect employers from the abrupt termination of contracts by employees. If it were so then the employees as well would have been liable to pay severance allowance to their employers. In other words if an employee decides to terminate the employment out of his own will he cannot avail himself of the protection Nyirenda J talks about in the passage above. If we go by the judge's reasoning it is rather difficult to imagine how an employee who willingly resigns from his employment can be said to have been put in a situation of extreme hardship by his employers.

Further the words "mutual agreement" in section 35(1) in my understanding connote a consensus of intention between the employee and employer. There must be a meeting of the minds, as it were. The termination must be discussed and agreed upon by the parties. That is, neither party must dictate the termination. In most cases, if not all, where an employee tenders his resignation to his employer, he will have already made up his mind that he is leaving the employment, and dictates his intention on the employer. And usually there is nothing that the employer can do but to accept the resignation. In this respect the employer's acceptance of the resignation does not constitute mutuality. The termination is not by mutual agreement in the sense envisaged in the Act.

Now in the present case the plaintiff wrote a letter of resignation to the defendant. The defendant accepted the resignation, of course expressing regret. In my judgment the plaintiff unilaterally terminated the contract of employment. I do not see any trace of mutuality so as to make the defendant liable to pay severance allowance to the plaintiff. The plaintiff's action therefore fails and it is dismissed with costs.

Pronounced in chambers at Blantyre this 1st day of August 2006.

J KATSALA

JUDGE