IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 687 OF 2001

BETWEEN:

MARY KAUNDE.....PLAINTIFF

and

MALAWI TELECOMMUNICATIONS LTD.....DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr Kasambara, of Counsel for the Plaintiff

Mr Tsingano of Counsel for the Defendant

Mr Balakasi, Official Interpreter/Recording Officer

Kapanda, J.

RULING

Introduction

There are three separate Originating Summonses brought before this court. The Plaintiffs, who have taken out these Oringinating Summonses, are viz Armstrong Kamphoni, Mary Kaunde and Noah Chimpeni. The first two plaintiffs have taken out the said Originating Summons in Civil Cause Numbers 684 of 2001 and 687 of 2001 respectively, where they are seeking reliefs and/or declarations, against the Malawi Telecommunications Limited. The other Plaintiff, Noah Chimpeni has, by way of Originating Summons, commenced proceedings against Malawi Television (MTV) Ltd. These latter proceedings are in Civil Cause No. 695 of 2001. All the three Originating Summonses were issued on the 15th day of March 2001.

The Defendants, in all the three causes, filed their respective notices of intention to defend the proceedings so commenced by the Plaintiffs herein. Although the matters before me were taken out separately I will deal with them together because of the reasons that will become obvious later in this ruling. As a matter of fact the reasons for the findings of fact, in one cause, apply with equal force in respect of the other matters as well. It is for this reason that I have found it convenient to write one opinion and adopt same in connection with the other two matters.

The Plaintiffs have filed, and sworn, affidavits in support of their respective applications. On the other hand the Defendants have filed affidavits in opposition to the Plaintiffs' said

applications. The affidavits in opposition have been sworn by Counsel for the Defendants.

The Originating Summonses

In the Originating Summonses, issued on the said 15th of March 2001, the Plaintiffs are seeking this courts' determination on a number of

questions. Indeed, the Plaintiffs have sought the following reliefs and/or declarations:-

A. Armstrong Kamphoni -vs- Malawi Telecommunications Ltd

It is his prayer that this court should order:-

(1) That the Defendant, has wrongfully and unlawfully terminated the Plaintiffs' contract of employment;

(2) That the Plaintiff is entitled to compensation for the wrongful and unlawful termination;

(3) That the Plaintiff is entitled to be paid the sum of MK3,204,626.00 as underpayment for terminal benefits under the contract of employment;

(4) That the Defendant do pay 15% of the sum due to the Plaintiff as collection charges;

(5) That the Defendant be condemned to pay the costs of these proceedings.

B. Mary Kaunde -vs- Malawi Telecommunications Ltd

As regards Mary Kaunde it is being prayed by her that this court should make the following orders in respect of her action:-

(1) That the Defendant has wrongfully terminated the Plaintiff's contract of employment;

(2) That the Plaintiff is entitled to compensation for wrongful and unlawful termination of the contract of employment;

(3) That the Plaintiff is entitled to severance pay in addition to compensation for wrongful and unlawful termination of employment;

(4) That the Defendant be condemned to pay costs.

C. In respect of the case of Noah Chimpeni -vs- Malawi Television (MTV) Ltd it is on record that the Plaintiff wants this court to adjudge as follows:-

(1) That the Defendant wrongfully and unlawfully terminated the contract of employment between the Plaintiff and the Defendant;

(2) That the Plaintiff is entitled to compensation for the wrongful and unlawful termination of the contract of employment;

(3) That the Plaintiff is entitled to severance pay in addition to compensation for wrongful and unlawful termination of the employment;

(4) That the Defendant be condemned to pay costs;

(5) That the Plaintiff is entitled to repatriation package.

In all the Originating Summonses there is no indications as regards the provision under which the applications are brought. Even though the Plaintiffs have not indicated that their applications are brought under the Employment Act it has transpired, during arguments, that their applications are made under Act No. 16 of 1996 - The Employment Act. Indeed, the essence of the applications is that the Plaintiffs are relying on the provisions of the said Employment Act and that they want to enforce the remedies that are available to an employee, under the said Employment Act. These are remedies that are obtainable where an employees' rights and/or freedoms are breached by an employer.

Evidence

The evidence in all the three cases is by way of written statements sworn by the deponents. The deponents were not cross-examined on the matters of fact deponed to in their affidavits in support, and in opposition, to the applications herein.

I would like to point out that the affidavits in opposition, as rightly put by learned Counsel for the Plaintiffs, contain hearsay evidence. They are matters which are not within the personal knowledge of learned Counsels for the Defendants and/or the matters deponed to, by them, are matters which Counsels can not prove from their own knowledge. This is so because in the affidavits of learned Counsel for the Defendants it is conspicuously clear that the matters they are stating are based on information given to them by the Defendants. This type of evidence is not acceptable in a free standing action if such an action is brought to a court like this one. It is the general rule of evidence that, in a free standing actions, witnesses can testify only about events that they have actually observed, and of which they have firsthand knowledge. Illuminating authorities on this point are the case of The State -vs- The Commissioner General of Malawi Revenue Authority exparte Nazir Omar t/a Spider Corporation MISC. Civil Cause No. 3 of 2001 (unreported) and Order 41 rule 5 of the Rules of The Supreme Court. But this very same evidence, as correctly submitted by Mr Mhone of Counsel, could be admitted in proceedings before the Industrial Relations Court in terms of Section 71(2) of the Labour Relations Act which provides that:-

"The Industrial Relations Court shall not be bound by the rules of evidence in civil proceedings."

Indeed, pursuant to Section 71(3) of the said Labour Relations Act the Industrial Relations Court may receive hearsay evidence which is otherwise inadmissible in a court of law.

Issue For Determination

It has already been observed that the Plaintiffs want to enforce their rights, and obtain remedies, as provided for under the Employment Act. This is revealed in both the viva voce submissions and the skeleton arguments of learned Counsel for the Plaintiffs. The question that immediately comes to mind, and requires this court's adjudication, is whether or not the Plaintiffs have chosen the right forum by coming to the High Court

and seek the enforcement of their said rights, and obtain remedies under the said Employment Act. As a matter of fact Mr Mhone of Counsel raised this issue of the choice of forum during submissions in Noah Chimpeni's case. I wish to note that any finding on this issue raised herein will determine whether this court should adjudicate upon the matters raised in the Originating Summonses herein.

Law and Finding

It is common cause that the Plaintiffs are relying on the provisions of the Employment Act and are desirous of obtaining reliefs under the said Employment Act. It is clear in my mind that under the said Employment Act the tribunal that is competent to deal with complaints under the said Employment Act is the Industrial Relations Court. This is clear when one reads Section 3, together with Sections 7, 62, 63 and 64, of the Employment Act. Indeed, the said Employment Act has provided that the Industrial Relations Court is the Court that should entertain and hear applications for the enforcement of the fundamental rights provided for under the said Act No. 16 of 1996. Further, the tenor of the provisions of Section 64 as read with Section 65 of the Labour Relations Act is, in my view, a clear testimony of the fact that the High Court will hear labour related matters when such cases are brought before it on appeal, on a question of law or jurisdiction, from the Industrial Relations Court which has original jurisdiction to hear and determine all labour disputes. Furthermore, I adopt the reasoning of my learned brother judge, Honourable Justice Chipeta, in the case of Hyghten Lemani Mungoni -vs- The Registered Trustees of Development of Malawi Traders Trust (Dematt) Civil Cause No 686 of 2001, who opined that labour related disputes should first be taken before the Industrial Relations Court before being brought to the High Court.

It was argued by learned Counsel Kasambara that the High Court has original unlimited jurisdiction therefore it can hear and determine labour related disputes like the present ones. I wish to concede that indeed the High Court has such jurisdiction. However, it is trite knowledge that only those cases that can not be brought before a subordinate court, should be taken before the High Court. The Industrial Relations Court is a court subordinate to the High Court - Section 110 of the Republic of Malawi Constitution. If we allow that labour related cases should originate in the High Court that would mean that the High Court flood gates will be opened so wide and it will be inundated with endless labour related cases thereby suffocating it and making it fail to deliver justice on, and adjudicate upon, deserving cases that should rightfully be brought before the High Court. An instructive case authority on how the High Court should conduct itself if faced with the question that this court is dealing with is that of Beatrice Mungomo -vs- Brian Mungomo and Others Matrimonial Cause No. 6 of 1996 where Unyolo, J., as he then was, had this to say which is illuminating:-

"Next, learned Senior Counsel contended that this court is competent to hear the petition on the basis of Section 108 of the new Constitution of the Republic of Malawi, which provides that the High Court "shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law."---

It is to be observed, however, that although this is the position, the High Court has to look at the matter from a practical point of view. In my judgment, it would be both

inappropriate and wrong for the High Court to proceed and assume jurisdiction over proceedings which fall within the jurisdiction of a subordinate court simply because the High Court has, as we have just seen, unlimited original jurisdiction. Such an approach would create confusion, as parties would be left to their whims to bring proceedings willy-nilly in the High Court or in a subordinate court, as they pleased. This would also open the flood gates for trivial cases to come before the High Court. In short, the High Court should recognise the subordinate courts and decline jurisdiction in matters over which the subordinate courts have jurisdiction unless exceptional circumstances exist which necessitate or require its intervention, that is, the intervention of the High Court.

As to what would amount to exceptional circumstances, that should, in the final analysis, depend on the facts of the particular case; things like if the case were shown to be too complicated for the subordinate court, or that the cost of having the case tried in such courts would be unduly excessive, or that the trial of the case would inevitably be delayed if undertaken in such subordinate court, may amount to exceptional circumstances which might justify the intervention of the High Court to exercise original jurisdiction. The examples here are not exhaustive---

I have considered Section 41(2) of the Constitution which gives every person in this country the right to have access to any court of law. With respect, I don't think that in saying the petitioner should bring her petition before a subordinate court, she is thereby being denied this right, since, as I have shown, there are competent lower courts with powers and jurisdiction over this type of cases. Indeed, this court would still be available later on in the event of an appeal. In short, I am unable to find any exceptional circumstances in the instant case such as would justify the intervention of this court---" (emphasis supplied by me)

It has not been demonstrated, and I am not satisfied if there was such an attempt, that there are sufficient reasons, or exceptional circumstances, for bringing these proceedings in the High Court. There are no good reasons to support the Plaintiffs' choice of the High Court, as a forum in which they should commence these proceedings, when the Employment Act clearly states that an application for the enforcement of the remedies under the said Employment Act shall be brought before the Industrial Relations Court. The fact that the High Court has unlimited original jurisdiction must not be allowed to detract us from the clear provisions of Section 3 of the Employment Act, as read with Section 64 of the Labour Relations Act, which categorically states that the Industrial Relations Court is the court that shall deal with labour related matters and that the said Industrial Relations Court shall have the original jurisdiction to hear and determine all such labour related disputes. (See also Section 110(2) of the Republic of Malawi Constitution).

Finally I wish to observe that the choice of the court before which to commence labour related proceedings is an important one because it has a bearing on the question of

recovery of costs as well as on the rules of procedure and evidence. In this regard Section 71(2) and 72 of the Labour Relations Act are pertinent. It is, therefore, my view that since no costs are recoverable in the Industrial Relations Court, except in certain specified circumstances, it would be an abuse of process if a person is permitted to commence labour related proceedings in the High Court where costs of proceedings are, almost invariably, recoverable with a view to recovering those costs. In fact the Plaintiffs are costs of these labour related proceedings. Further, as earlier alluded to above, in the proceedings before the Industrial Relations Court the rules of evidence are flexible in that hearsay evidence is admissible. Now I do not think that it will be proper, and/or in the interest of justice, for this court to proceed with the hearing of these cases, which are brought under the Employment Act, and thereby deny the Defendants the opportunity to use hearsay evidence when same would have been allowed in the Industrial Relations Court. Moreover, I am of the opinion that to allow labour related proceedings to be commenced in the High Court would entail curtailing the forums that would be available to a party. In particular if these proceedings were to originate in the Industrial Relations Court the parties will have a right of appeal to the High Court and then another appeal to the Supreme Court whilst if these very same proceedings are commenced in the High Court a party will only have one right of appeal, that is, to the Supreme Court.

It is therefore my order, for the reasons discussed above, that these proceedings should be taken before the Industrial Relations Court. If any of the parties is not satisfied with the decision of the Industrial Relations Court such party will be at liberty to appeal to the High Court. Indeed, if there is such an appeal that is when the High Court will have jurisdiction to hear these labour related matters.

Costs

In view of the fact there is no adverse order made against the Plaintiffs in respect of their substantive applications, and due regard being had to the fact that ordinarily there would have been no order as to costs if these proceedings were brought before the appropriate court, I make no order as to costs of, and occasioned by, these proceedings before me. Each party shall bear its own costs. It is so ordered.

Pronounced in Chambers this 18th day of May 2001 at Principal Registry, Blantyre.

F.E. Kapanda

JUDGE