

# **IN THE HIGH COURT OF MALAWI**

## **LILONGWE DISTRICT REGISTRY**

### **CIVIL APPEAL NO. 6 OF 2003**

**BETWEEN:**

**PHARMANOVA .....APPELLANT**

**AND**

**MSUKU .....RESPONDENT**

**CORAM: Chombo, J**

Chayekha	:	Counsel for Appellant
P. Msuku	:	Respondent Unrepresented
Njirayafa	:	Court Official
Jalasi	:	Court Reporter

### **JUDGMENT**

Before me is an appeal emanating from the decision of the Industrial Court Chairman. Four grounds of appeal were submitted but counsel proceeded to argue grounds 1, 2 and 4.

The back ground of the matter is that the Respondent was employed by the Appellant as a van salesman. He rose to the position of sales manager for Central & Northern Regions. During this period there were a number of shortages. The Respondent went on sick leave for some months. After he came back he was informed that his services were terminated on health grounds and operational necessity. The

Respondent sued the Appellant and the Chairman of the Industrial Court found that the said termination was unlawful.

The Respondent was awarded severance allowance, wages for 1<sup>st</sup> to 13<sup>th</sup> November 2000, overtime, leave, half pay for three months, subsistence allowance, up keep, transport allowances and refund on over deduction on house lease. The Appellant now appeals against the ruling of the Chairman of the Industrial Court.

The Appellant asked the court to quash the finding by the Chairman of the Industrial Court that the termination of the Respondent's employment was unlawful. Counsel argued that in making this finding the Chairman disregarded other important material evidence. Evidence was given that the Appellant Company had suffered stock losses.

A brief review of the circumstances that led to the termination of the Respondent's termination is necessary.

The Respondent became a senior staff member from 31<sup>st</sup> July 1996 as evidenced by **APP. EX 2** letter addressed to him by the Appellant's Personnel and Administration Manager. After assuming the senior position there were clearly some problems at the Lilongwe premises. Such problems prompted the Respondent to take up some remedial steps. One of such steps, which the Group Vice Chairman immediately resisted and stopped, was customer stock checks. He had discovered during this one time check that company property had been supplied by some high ranking manager and that stocks had been supplied at prices lower than the agreed prices. He immediately came to the conclusion that this was the reason for the unaccounted for shortage in the warehouse. He reported the matter to the Marketing Manager with a few other observations that he had made. One such observation was that his colleague called Kuntiya had complained that particular products were missing from the warehouse and the van salesman for that zone had noted the particular customer was not buying from him. This letter was written on 18<sup>th</sup> June 1999 and was exhibited and marked as **APP EX 5** but

no response was made by the Marketing Manager to whom it was addressed nor by the Personnel Manager to whom it was copied.

The second remedial step that the Respondent took was to change the warehouse keys upon noticing mysterious disappearance of stocks from the warehouse. Earlier a spare key of the warehouse had been given to what the Respondent called SADM Management. This is marked as **APP EX 8** and is dated 15<sup>th</sup> September 1999. Both letters contain some serious matters and one would have expected that they would receive immediate attention. I have gone through all the exhibits on file and do not find any responses to these documents by management of Pharmanova.

The questions that any reasonable person would ask are:

- (a) Can it be said that the Respondent was the sole person responsible for the shortages that are now being attributed to him.
- (b) If indeed management was serious about the issue of the shortages why is it that measures were not taken to correct the situation as proposed by the Respondent.
- (c) How would the Appellant account for the stocks supplied to some of their customers by management team? How did these stocks leave the warehouse? Were they properly accounted for? Why would a company of this magnitude allow other people other than the warehouse manager/supervisor deal with all deliveries without proper accountability? It was interesting that instead of the Respondent being commended for these discoveries he got reprimanded by the Group Vice Chairman and told not to visit the beneficiaries of this dubious sale.
- (d) It is established by the said **APP EX 5** and **APP EX 8** that the spare key to the warehouse was being kept by SADM Management, what assurance is there that these did not help themselves from the warehouse

In these circumstances it would be unimaginable that the Appellant would even begin to suggest or want to make court believe that the

Respondent was indeed responsible for the alleged shortages. The Respondent made queries about shortages in the Lilongwe warehouse and demanded explanations from the Respondent as shown by **APP EX 13** of 16<sup>th</sup> November, 1999 and **APP EX 14** of 3<sup>rd</sup> December, 1999. There are clearly follow-ups of the Respondents' letters but instead of addressing the pertinent and crucial issues raised by the Respondent the Appellant are seeking explanations from the Respondent. This does not seem to be reasonable at all. The Appellant submitted that the decision of the Chairman of the Industrial Court cannot and must not be given any merit. It is no wonder that even in their letter terminating the Respondent's services the Appellant's did not base such termination on the alleged shortages. If the Respondent's services were terminated due to the alleged shortages then the letter of termination should have specifically stated the same. It can only be assumed what was the main ground of terminating the service is what was stated in the said letter. I have no doubt that the issue of the shortage only come as an after thought.

According to the court record the Appellant made a submission that:

***"Some time in November the Respondent went on sick leave. After recovery he wanted to take up his position but the Appellant informed him that his services were terminated on health grounds and operational necessity"***

The impression that one gets from this narration is that the Respondent's services were terminated as a result of the Respondent's sickness. The Respondent applied for sick leave for 8 months and it was approved. It would seem from the record however that the Respondent only stayed away for just over 5 months. When he returned a medical report certifying that he was fit to resume work was also submitted and was tendered in court as **APP EX 19(a)**. In May 2000 the Respondent was allowed to resume work and he worked up to November 2000 month and when he found that he was not paid. When he made enquiries he was informed by the Personnel Manager that his services were

terminated. During the period between May and November 2000 a number of things happened. He claimed substance allowance for the 8<sup>th</sup> – 11<sup>th</sup> May because he was on duty in Blantyre **[APP EX 22]**; he asked for refund for over deductions on house loan and leave grant for the month of April; his medical report and inquired as to why he was still being paid half his salary when he had submitted a medical report. His employer, instead of responding to these issues wrote the Respondent asking him to explain about certain shortages. In October he was finally paid his full salary and the following month his services were terminated. As observed by the lower court it is amazing that the services of the Respondent were only terminated after he returned from the prolonged sick leave and certified fit and to work by a medical doctor. At a time when the Respondent had asked for retirement on medical grounds the Appellant did not respond to the application but was willing to sign leave forms and release the Respondent on leave. Any reasonable person would conclude that if the said letter was written at the time of the Respondent proceeding on sick leave or whilst the Respondent was on the leave it would have been justifiable. The Appellant's letter gives one of the reason for the said termination to be operational grounds; I have yet to understand how the operations of the Appellant were affected so many months after the Respondent had returned to work. Counsel is on record as having said that "we submit that the termination would be in line with section 57(2) of the Employment Act so the chairman erred in not considering the relevant evidence and in taking a narrow view in considering what 557(2) would mean. The law is clear where an employee has been conducting himself in a manner that affects the trustworthiness of the employee – an employer is entitled to terminate because an employment relationship is built on confidence and if the confidence is eroded such relationship cannot be "insisted on".

This submission by counsel seems to introduce a completely different ground for the said termination than what was stated in the letter of termination to the Respondent. Section 43 of the Constitution provides that "Every person shall have the right to lawful and procedure fair administrative action which is justifiable, in relation to reasons given.

The supreme Court of Appeal, in the case of Dr B.S. Chawani -vs- The Attorney General MSCA NO. 18 of 2000, per Tambala JA, held that:

***"The purpose of section 43 is clearly to ensure transparency in decision making where the decision is likely to infringe the rights, freedoms interests or legitimate expectations of others. The section also was intended to enable persons affected by administrative actions to have adequate opportunity to defend themselves***

where his her rights, freedoms, legitimate expectations or interests are affected or threatened."

***Effectively. A person would be able to present a good and effective defence to an administrative action when he knows the reason supporting the action."***

The Respondent letter of termination discloses one reason and the Appellant alleges other grounds as the basis of the termination. There clearly is no transparency and there would be no way for the Respondent to defend himself effectively because the actual reason were not disclosed to him. This would be abuse of position as an employer. I cannot but agree with the chairman of the Industrial Court, that indeed the termination was unlawful and I uphold the lower court's decision on this head.

The Appellant contended that the chairman erred in finding that the Respondent was staying in house and paying K8,000.00 as rent. I have looked at the whole evidence on record and, with due respect do not find this particular head proved. In fact apart from the allegation made by the Respondent there is no documentary proof of the same. The Chairman decided to take judicial notice of the escalating rentals. The Appellant has successfully argued the circumstances where courts can take judicial notice of particular matters and this definitely does not fall in that category. A specific

claim must be specifically proved. In the absence of any prove about the rentals the court was wrong in finding that for the Respondent. Accordingly I quash the decision of the lower court.

The 4<sup>th</sup> and final ground of appeal is on repatriation allowance. It was argued by the Appellant that the contract of the Respondent did not provide for that and that in the alternative if the Respondent is to be repatriated then it must be to his place of employment and in the Respondent case of was Blantyre. The Appellant did provide transport to the Respondent for Blantyre therefore the Appellant must be taken to have discharged their responsibility. The Respondent adduced to the effect that he was actually told to get quotations for the said repatriation. Not only was the Respondent asked to bring quotations but it was the practice of the Appellant to provide repatriation costs. The Respondent gave evidence of other employees in the company who had benefited from this privilege. This evidence has not been disputed by the Appellant and I take it that though the conditions of service do not provide but the Appellant chose to provide the same to its employees. In fact the Appellant did provide repatriation costs for the Respondent to Blantyre, for reasons known to themselves. The Respondent has actually been given K20,000.00 by the Appellant towards the same. The Respondent's only query is that he was given money to go to Blantyre and not Nkhata-Bay his home as indicated in all his records of employment. The Respondent has proved that there is a practice, despite the provisions of the Employment Act and the conditions of service, by the Appellant of providing repatriations costs to its employees. It has not been shown whether the repatriation costs are to the place of original employment or home of the employee. In the absence of any evidence to the contrary by the Appellant I find that I must uphold the finding of the Lower Court in this respect. The Appellants sought to rely on the ruling of **Kapanda, J** in the case of **Liquidator, Import and Export (MW) Ltd -vs- J.L. Kankwangwa and others** Principal Registry Civil Appeal case No. 52 of 2003 (unreported) wherein the court was asked to determine, among other issues, whether the respondents were entitled by law to be repatriated to their home districts regardless of the circumstances and/or place of recruitment. **Justice Kapanda** in that case stated

that his decision was based on the consideration that the company was in liquidation. He therefore ruled that:

***"in the circumstances of this case, and in the light of what this court has said constitutes fair labour practices fairness should have entitled repatriating the respondents to their respective places of recruitment or home origin, whichever is nearer."***

The Respondent gave evidence, which evidence has not been disputed by the Appellant that he was recruited from Mzuzu and not Blantyre. The Appellant should therefore have repatriated him to Mzuzu as opposed to Blantyre. The Respondent is asking for repatriation only to his home, Nkhata-Bay and not Mzuzu. Nkhata-Bay is nearer to Lilongwe than Mzuzu and, in line with the ruling of ***Kapanda, J***, I uphold the Chairman's ruling for the repatriation of the Respondent to his home Nkhata-Bay and not Blantyre.

The Chairman had ruled that whatever repatriation costs will be given to the Respondent K20,000.00 already given to him should be subtracted from the said sum; and I so order.

The Appellant's appeal must therefore fail in respect of all other grounds except the issue of the unproved rentals. I award costs to the Respondent.

**Made** in open Court this 21<sup>st</sup> July, 2004.

E. Chombo  
**JUDGE**