IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2721 OF 2001

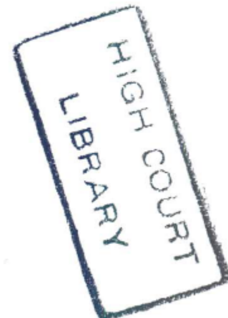
BETWEEN:

MALAWI TELECOMMUNICATION LIMITED................PLAINTIFF

AND

MALAWI POSTS AND
TELECOMMUNICATIONS WORKERS UNION..............DEFENDANT

CORAM: D F MWAUNGULU (JUDGE)
Katsala, Legal Practitioner for the Plaintiff
Nyimba, Legal Practitioner for the Defendant
Balakasi, Official Court Interpreter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Mwaungulu, J

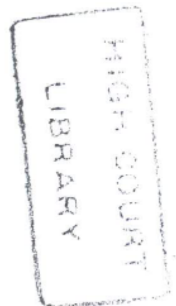
ORDER

Malawi Post and Telecommunications Workers Union raises a narrow but crucial issue to a complex injunction application. The Union moves this Court to decide that Malawi Telecommunications Limited's action is irregular because Malawi Telecommunications Limited, the employer, should, under sections 54 and 64 of the Labour Relation Act, have commenced the action in the Industrial Relation Court.

On the injunction, the Union raises four points under section 54 of the Labour Relations Act. First, the Union accuses the employer for violating sections 46 and 53 by not applying to the Industrial Relations Court. Secondly, the Union alleges the employer could only apply for an injunction if it demonstrates, and it never did, danger to life safety or health of a person. Thirdly, the Union accuses the employer for not

affording Union a reasonable opportunity to be heard on the injunction. Finally, the Union submits there are no good reasons to support the plaintiff's action in the High Court when the Industrial Relations Court has original jurisdiction on labour disputes.

Mr. Nyimba, the Union's legal practitioner, carefully thought through the motion. The supporting affidavit and arguments premiss on two decisions of this Court. This Court has to reconsider certain statements in these judgements and has, something not done fully in Kaunde v Malawi Telecommunications Ltd. and Mungoni v Registered Trustees of The Development of Malawi Traders Trust, to examine the constitutional provisions and various statutes made under the Constitution dealing with labour disputes, industrial or labour relations and employment in Malawi.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I should, to handle all legal issues the motion raises, present the events, not the detailed evidence, leading to the employer's application and the subsequent Union's motion to dismiss this action. It is unnecessary to give full details or the length of this dispute for the narrow point this motion raises. It suffices to say that the Union on 19th July 2001 declared a dispute and gave the employer seven days notice to strike. The dispute, in the letter titled "declaration of the dispute and notification of our intention to strike" the Union sent to the employer and the Principal Secretary for Labour, reads:

> "(I) The new conditions of service (Malawi Telecom Limited) be nullified and a mechanism be put in place to discuss new regulation in which all the stakeholders be involved (i.e., all directors, all controllers and the union) we shall comply with the provisions of the Communications Act No. 41 of 1998;
>
> (ii) If management feels it cannot be able to comply with the above requirements, management should lay off its employees and pay their retrenchments benefits from April 1997 to date based on the 1995 Malawi Post and Telecommunication conditions of service;
>
> (iii) In any event should management accept in writing to comply with either of the above requirements the dispute shall be resolved."

A paragraph indicates the effective date of the notice and the subsequent indefinite strike:

"The above s. all come to into effect from Monday the 23rd July 2001 to Tuesday the 31st July 2001. Should management fail to address this issue within the prescribed period, we shall go on an indefinite strike effective Wednesday the 1st of August 2001."

On 20th of July 2001, responding to the Union's letter of 19th July 2001, the Principal Secretary for Labour considered the strike premature because the Union never complied with dispute settlements procedures in sections 44 and 45 of the Labour Relations Act. The Principal Secretary thought that, under section 44 of the Labour Relations Act, the Union should have reported the dispute to the Principal Secretary to facilitate conciliation. He wrote the Union, being at a stage where a dispute was declared, to report to the Principal Secretary to appoint a conciliator.

Under section 43 (1), the parties are not obliged to report a dispute to the Principal Secretary to facilitate conciliation: "Any disputes, whether existing or eminent, *may* be reported to the Principal Secretary responsible for Labour by or on behalf of any of the parties to the dispute." Nothing in section 43 (1) suggests compulsory reporting. Section 44 (1), setting the conciliation procedure confirms this: - "If a dispute is reported to the Principal Secretary responsible for Labour..." The conciliation procedure begins if the parties or somebody else decides and actually reports the matter to the Principal Secretary. The Principal Secretary, himself or through others, can endeavour conciliation. His endeavors are subject section 44 (2). Reading sections 43 (1) and 44 (1) closely, however, the Principal Secretary cannot endeavor to conciliate if parties to the dispute or others have not reported the dispute to her.

Section 44 (2) should be read *sui generis*. It makes conciliation or endeavours to conciliation compulsory. It calls parties to disputes where one party is government, including any public authority or commercial enterprise where government has a controlling interest, to agree upon a conciliator. The Principal Secretary cannot appoint a conciliator. If parties cannot agree on a conciliator within seven days of the report of the dispute, the Industrial Relation Court, on application by the parties, can appoint an independent arbitrator. Even if the Union's letter is a notice to the Principal Secretary, since the dispute involved government

or a commercial enterprise where government has a controlling interest, the Principal Secretary should have allowed parties to agree on a conciliator failing which the Industrial Relations Court could have appointed an arbitrator.

The next event was an unsuccessful Malawi Congress of Trade Union mediation of 31st July 2001. The Malawi Congress of Trade Unions thought the employer's decision correct and invited the Union to call off the strike. The Malawi Telecommunications Limited's board considered the mediation outcome and resolved to stick to the earlier view. It encouraged continuing consultation with the Union. On 23rd August 2001 the Principal Secretary appointed a conciliator. The conciliator's meetings proved problematic because members sat in. On 21st September 2001 police arrested six workers at Kanjedza earth station for switching off the system. The 25th September 2001 meeting failed because the Union changed demands. The parties agreed for the Principal Secretary for Statutory Corporation. The Union changed mind. Meanwhile, the sitting in continued. The employer applied to this Court for an injunction.

On 1st October 2001 the employer issued a writ of summons. The employer seeks an injunction to restrain the defendant from unlawfully interfering with the trade and business contracts of the plaintiff and from inciting, inducing, procuring, persuading, assisting, encouraging, financing or facilitating in any manner whatsoever the plaintiff's employees to break several employment contracts by sitting in and striking. That day the employer applied for an *ex parte* interlocutory injunction. I spent time with counsel to come up with an *ex parte* order meeting the justice required.

In labour disputes interlocutory injunctions are problematic because granting the relief to stop a strike or a lock out might actually determine the matter. The employer will suffer considerably if the strike is not stopped and it turns out the employer was right in preventing the strike by the interlocutory injunction. Conversely, should the employee or employees' organization be correct an interlocutory injunction causes the employee or employee organization to lose the impetus the strike sets. The reasoning applies *mutatis mutandis* to an injunction to prevent a

lockout. If the lockout is not prevented, the employees will have lost out if it turns out that they were correct. If the lockout is prevented and it turns out that the employer was right he also will have suffered. The court should treat the employee's right to strike and the employer's right to lockout diligently and deliberately. *Ex parte* applications for injunctions are more problematic.

Courts generally, for good reasons, grant interlocutory injunctions *ex parte*. Such orders, always made for a brief period in cases like these, are, a part from everything else, intended to allow a court to decide correctly during an *inter partes* interlocutory hearing. The problem of the use of the power is pronounced in labour dispute ex parte applications. These considerations persuaded me to order a lull for only two days. At the *inter partes* hearing, the Union raised a preliminary objection.

To resolve the Union's objections is to answer three sets of question. Has the Industrial Relations Court got exclusive jurisdiction in labour disputes and employment matters? Has the Industrial Relations Court original jurisdiction in all labour disputes and employment cases? In all cases where the Industrial Relations Court has got common or concurrent jurisdiction what should the courts, including Industrial Relations Court, do when matters are before them?

The first question is important to the submission, which in my judgment must be correct, Mr. Katsala, the plaintiff's legal practitioner, makes about this Court's jurisdiction. Section 108 (1) provides:

> "There shall be the High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil and criminal proceedings under any law."

'Any civil ... proceeding under any law' must *ex hypothesi* include employment law and labour relations law and civil proceedings thereunder. Suggestions that an Act of Parliament, without amending the Constitution, would limit the power of the High Court must be unacceptable. On this courts plenipotentiary jurisdiction, it seems to me, there is agreement between Kapanda J and Chipeta J in the cited cases. The point does not only arise from the wording of section 108 (1). The contrary conclusion that the Industrial Relations Court has exclusive

jurisdiction in labour disputes and employment related issues is unjustified even on the reading of section 110 (2) creating the Industrial Relations Court:

> "There shall be an Industrial Relations Court, subordinate to the High Court, which shall have original jurisdiction over labour disputes and such other issues relating to employment and shall have composition and procedure as may be specified in an Act of Parliament."

That the Industrial Relations Court is subordinate to the High Court suggests, on the face of it, that the High Court has the same, if not greater, jurisdiction than the Industrial Relations Court. If the constitutional framers intended the Industrial Relations Court have exclusive jurisdiction to the exclusion of the High Court, the words 'unlimited,' 'exclusive' or words to the same effect would have been introduced in section 110 (2).

The framers in section 138 (1) employed such terminology about the National Compensation Tribunal. They never did that for the Industrial Relations Court. More importantly, 'original jurisdiction' in section 110 (2) and in provisions examined later do not introduce any magical meaning to the section. The words are used in a contradistinction to 'appellate jurisdiction.'The Industrial Relations Court is a court of first instances.

This concluding statement is important for the other point I make that it is not only the High Court which has jurisdiction on the same matters as the Industrial Relations Courts. Magistrate courts have jurisdiction in labour disputes and employment related issues. The Courts Act excludes from subordinate courts jurisdiction certain actions based on the nature of the law or subject matter. Labour law and Employment law have not been excluded. A part from jurisdiction based on the law and subject matter, magistrates can apply any law subject to the amount of the claim. Consequently, where the claim falls within the amounts, nothing in section 110 (2) exclude the jurisdiction of subordinate courts created under section 110 (1). The subordinate courts' jurisdiction in employment and labour issues relates to the amount of claim. In my judgement, like in England and Wales, the Industrial Relations Court shares jurisdiction with the High Court and subordinate Courts. This conclusion necessarily implies that there is no principle of

law to compel, as Kaunde v Malawi Telecommunications Ltd. and Mungoni v The Registered Trustees suggest, a litigant to commence all labour disputes and employment related cases in the Industrial Relations Court. Of course, there are remedies which, it appears, only the Industrial Relations Court can give. For that reason alone, it may be advisable, subject to costs, to commence proceedings in that court. The Industrial Relations Court does not have exclusive original jurisdiction, at least from the standpoint of the Constitution. Is the situation any different from the standpoint of the statutes?

The second question is whether the Industrial Relations Court has original jurisdiction in all labour disputes and employment related cases. Put differently, are there labour disputes and employment related issues outside the Industrial Relations Court's jurisdiction? This question is important to Mr. Katsala's suggestion that section 64 of the Labour Relations Act would be unconstitutional if, as Mr. Nyimba suggests, the legislature intended the Industrial Relations Court to handle all such matters. The Lord Chancellor, it may be useful to know, was, until recently (Industrial Tribunal Extension of Jurisdiction (England and Wales) Order 1994, Article 10), reluctant to transfer to employment tribunals, our Industrial Relations Court equivalents, jurisdiction over breaches of employment contracts. The question must be answered by interpreting section 64 of the Labour Relations Act.

Section 64 of the Labour Relations Act provides: -

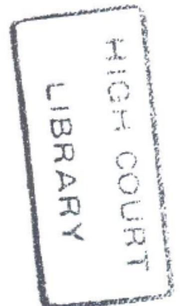
> "The Industrial Relations Court shall have original jurisdiction to hear and determine all labour disputes and disputes assigned to it under this Act or any other written law."

The expression 'original jurisdiction' no more than suggests that the Industrial Relations Court will have original, as opposed to appellate, jurisdiction. The section does not, however, provide that the Industrial Relations Court shall have original jurisdiction to hear and determine 'all labour disputes and disputes,' the rendition Mr. Nyimba and Mr. Katsala assign to the provision.

The section provides that the Industrial Relations Court will have original jurisdiction to hear and determine all labour and all disputes

'assigned to it under this Act and any other written law.' The word 'all' qualifies 'labour disputes' and 'disputes.' The word 'all' covers 'labour disputes' and 'disputes.' The words 'assigned to it under this Act or any other written law' qualify 'labour disputes' and 'disputes.' It is not that the Industrial Relations Court shall have original jurisdiction to hear and determine all disputes assigned to it under the Act and other written law besides jurisdiction to hear and determine all labour disputes. It is to the extent that this Act or any other written law has assigned labour disputes and disputes that the Industrial Relations Court has original jurisdiction to hear and determine those cases. The Industrial Relations Court, therefore, has only original jurisdiction over all matters the Labour Relations Act or any other written law assign. The Industrial Relations Court does not therefore have jurisdiction on all labour disputes and disputes.

The Industrial Relations Court's jurisdiction derives from the Labour Relations Act, the Constitution and the Employment Acts. The Constitution has not defined the expression 'labour dispute.' The word occurs once in the Constitution. The Labour Relations Act defines a dispute. Without the context, a definition by Parliament, in another context, may offer necessary guidance, though section 42 only defines 'dispute' only in relation to 'this Part.' Section 42 provides: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> "In this Part, 'dispute' means any dispute or difference between an employer or employers' organisation and employees or a trade union, as to the employment or non-employment, or the terms of employment, or the conditions of labour or the work done or to be done, of any person, or generally regarding the social or economic interests of employees."

Section 11 of the Constitution allows recourse to comparable foreign case law. The American National Labour Relations Act defines a labour dispute to include any controversy between employers and employees concerning terms, tenure, hours, wages, fringe benefits, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. Not all disputes, as <u>National Labour Relations Board v Longshoremen's Association</u>, Md., 332 F.2d, 992, points out, in which a labour organisation is involved is a labour dispute. A labour dispute primarily involves an employer or employer organisation

and employees or trade unions. The subject-matter of the dispute is wide. The parties are definite. The Constitution therefore creates the Industrial Relations Court and assigns to it jurisdiction, not exclusive, over labour disputes and employment related matters.

The Labour Relations Act assigns two disputes to the Industrial Relations Court. Section 8 of the Labour Relations Act covers part II provisions relating to freedoms of association. Sections 44, 45 and 54 cover disputes settlements under part V. Part II covers freedoms of association: rights of Trade Unions and Employers organization (section 5); protection of employees (section 6); and protection in respect of organizations (section 7). Section 8 covers remedies for violation:

> "(1) Any complaint of infringement of the rights or protection contained in this paragraph *may* be presented to the Industrial Relations Court;
>
> (2) Subject to subsection 3, the Industrial Relations Court shall make such orders as it deems necessary to secure to compliance with this part, including an order for reinstatement of an employee, the restoration of her or him of any benefit or advantage and an order for repayment of any compensation
>
> (3) Where an employee is dismissed contrary to section 6, reinstatement to be ordered is so requested by the employee as long with any remedy that the Industrial Relations Court deems appropriate, unless reinstatement is clearly not practicable."

Section 8 (1) of the Labour Relations Act is permissive. It does not state that the complaints or infringement shall be presented to the Court. If that was intended Parliament would have used clear words.

Part V deals with dispute settlements: reporting a dispute (section 43); conciliation procedure (section 44); unresolved dispute (section 45); strike out or lockout procedure(section 46); strike or lock out in essential services(section 47); status of collective agreements and employment contracts (section 48); civil immunity (section 49); right to return to work (section 50); temporary replacement labour (section 51); refusal to do strikers' work (section 52); peaceful picketing (section 53); and injunctions in respect of strike or lockout (section 54). Sections 44, 45

and 54 give Industrial Relations Court's jurisdiction on disputes as defined in section 42. The Labour Relation Act confers to the Industrial Relations Court parts II and V because the Act concerns labour and industrial relations and not terms of employment.

Except sections 44 dealing with the power of the Industrial Relations Court to appoint an arbitrator if parties cannot agree on a conciliator, sections 45 and 54, which confer the Industrial Relations Court's jurisdiction, do not obligate commencing proceedings in that court. Under section 45 (1), dealing with unresolved disputes about the interpretation or application of any statutory provisions or any provisions of a collective agreement or contract of employment or an essential service, parties to the dispute or the Principal Secretary may, they do not have to, apply to the Industrial Relations Court to resolve the dispute. *Ex hypothesi*, parties can go elsewhere. Under section 45 (2), dealing with unresolved disputes other than those in section 45 (1), parties can only refer to the Industrial Relations Court if they agree. They do not have to refer the matter to the Industrial Relations Court if they do not agree. Section 45 (3) is equally permissive.

Under section 54 (1), parties may, they do not have to, apply to the Industrial Relations Court for violations of sections 46 to 53. Section 54 (2) of the Labour Relations Act impliedly gives power, the Courts Act does not in relation to subordinate courts, to the Industrial Relations Court. The section should not be read as affecting the power of the High Court to grant injunctions in these matters. The section also restricts the Industrial Relations Court's power to grant ex parte injunctions in industrial dispute matters. The restrictions, subject to what I say later, pertain to that court alone. The Labour Relations Act therefore does not give the Industrial Relations Court jurisdiction over all labour disputes. It does not for that matter, may be to a limited extent, as the Constitution states, give the Industrial Relations Court jurisdiction over employment related matters. That is left to the Employment Act.

Does the Employment Act give the Industrial Relations Court jurisdiction over all employment related matters? The Act has eight parts: preliminary matters (Part 1); fundamental principles (Part II); Administration (Part III)freedom of association (Part III); Employment of

young people (Part IV); Contracts (Part V); Hours of work (Part VI); Wages (Part VII); Discipline and dismissal (Part VIII); and Miscellaneous provisions (Part IX). True to section 64 of the Labour Relations Act, which provides that jurisdiction on all labour disputes and disputes may be conferred by other written law, the Employment Act, passed after the Labour Relations Act, gives certain powers to the Industrial Relations Court. The Employment Act does not, however, give the Industrial Relations Court jurisdiction over all employment related cases. In Kaunde v Malawi Telecommunication Ltd., this Court said:

> "It is a common cause that the plaintiffs are relying on the provision of the Employment Act and are desirous of obtaining reliefs under the said Employment Act. It is also 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."

Nothing, in my judgement, in the Employment Act, the Labour Relations Act, which created the Industrial Relations Court and the Constitution suggests that the Industrial Relations Court is the competent, where that suggests that other courts are not, court to deal with the Employment Act matters. On the contrary the High Court and magistrate courts, in their original jurisdiction, are competent to handle Employment Act matters. When sections 3, 7, 62, 63, and 64 of the Act Kaunde v Malawi Telecommunications Ltd., refers to are read, it is clear the legislature never intended to limit the jurisdiction of courts other than the Industrial Relations Court in relation on matters under the Act.

Section 3, the interpretation section, provides that, in the Employment Act, 'court' means the Industrial Relations Court established under section 110 (2)of the Constitution. Sections 7, 62, 63 and 64 of the Employment Act are sections conferring the court, the Industrial Relations Court, the jurisdiction under the Act. Section 7, concerning remedies for Part II infringements, provides:

> "*Where* a complaint alleging infringement of rights contained in this Part has

> been proved, the Court shall make such order as it deems necessary to ensure compliance with the provisions in this Part, including an order for reinstatement of an employee, the restoration to him of a benefit or advantage and an order for payment of compensation."

Part II creates and confirms several fundamental rights; forced labour (Section 4); antidiscrimination (Section 5); and equal pay (section 6). One cannot however read in section 7 that only the Industrial Relations Court can handle Part II violations. The Constitution creates these rights and gives general jurisdiction to courts to oversee enforcement and fulfilment. Section 46 (2) of the constitution, concerning enforcement of rights, gives the citizen a right to apply to a competent court. It does not follow, however, that other courts are incompetent because under section 7 of the Employment Act the Industrial Relations Court has jurisdiction on the same matters. There must, in my judgement, be clear wording in section 7 of the Employment Act to oust other courts' constitutional jurisdiction. In my judgment, for the principles stated the Industrial Relations Court is one among many to handle violations of fundamental rights. Section 7 only confers jurisdiction to the Industrial Relations Court. It does not exclude other courts' jurisdictions.

Sections 62, 63 and 64 of the Employment Act Kaunde v Malawi Telecommunication Ltd. mentions concern a statutory right, unfair dismissal: the sections do not cover the common law right for damages for unlawful or wrongful dismissal. There were problems with the concepts in Kaunde v Malawi Telecommunications Ltd. The matter was subsumed either from submissions or from misunderstanding that the Act applied generally to matters the action raised. Fortunately, the Court's judgement detailed the matters the action raised. In all instances the action was not for unfair dismissal, the statutory right under sections 62, 63 and 64. The plaintiffs claimed damages for unlawful and wrongful dismissal at common law.

Under section 58 a dismissal is 'unfair if it is not in conformity with section 57 or is a constructive dismissal pursuant to section 60.' Under Section 57 the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking (1); The employment of an employee

shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity (2); the following reasons do not constitute valid reasons for dismissal or for the imposition of disciplinary action, (a) an employee's race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities, (b) an employee's exercise of any of the rights specified in part II of the Labour Relations Act, © an employee's temporary absence from work because of sickness injury, (d) an employee's exercise or proposed exercise of the right to remove himself from a work situation which he reasonably believes presents an imminent or serious danger to life or health, (e) an employee's participation or proposed participation in industrial action which takes place in conformity with the provisions of Part V of the Labour Relation Act, (f) an employee's refusal to do any work normally done by an employee who is engaged in industrial action, or (g) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of laws, regulations or collective agreements.

Section 60 defines constructive dismissal:

> "An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship."

Section 62 lays the procedure for unfair dismissal complaints. Under section 62 (1), the employee may, within three months of termination, complain to the district labour office about the unfair dismissal. Section 62 (2) requires the district labour officer to settle the matter within one month of reference. If, under the section the District Labour Officer fails, the matter *may* be, not that it should, referred to the Industrial Relations Court under sections 64 (2) and 64 (3). Section 64 (3) provides:

> "Notwithstanding the provisions of subsections (1) and (2), any person alleging a violation of a provision of this Act *may* where not otherwise specified, present

> his complaint to the Court for relief and where a time limit has been set for the presentation of a complaint by a complainant and the District Labour Officer chooses not to institute a prosecution, the limit shall be further extended for one month."

Section 64 (1) provides:

> "Any person having a question, difference or dispute as to the rights or liabilities of any person, employer or employee under this Act or a contract or employment may bring the matter to the attention of a labour officer who shall attempt to resolve the matter."

Finally there is section 63 which provides for remedies for unfair dismissal.

There is a difference between the statutory right of unfair dismissal and unlawful and wrongful dismissal at common law. An employee can sue the employer for damages purely for breach of contracts, for breach of terms concerning termination. At common law the employee's damages are the amounts she is entitled to up to when the notice should have been given. The plaintiff, as happened in Kaunde v Malawi Telecommunication Ltd., could claim other benefits under the contract. The contract governs these. Nothing in the Employment Act, even the Labour Relations Act, gives the Industrial Relations Court jurisdiction over actions based purely on breach of a contract. Matters based purely on breach of a contract are governed by the general law of contracts administered by the High Court and magistrate courts. In England and Wales the Lord Chancellor was very reluctant to allow Employment tribunals to handle matters based on breach of a contract of employment. He has done so recently (Industrial Tribunals Extensions of Jurisdiction (England and Wales) Order, 1994, Article 10) but only for amounts for up to the county court judges' jurisdiction. Matters purely contractual, therefore, such as terminal entitlement benefits etc., are not in the Industrial Relations Court's jurisdiction.

Concerning termination, the employee still has her rights under the contract. Where the employer breached the contract when terminating the employee's services, the employee is entitled to damages which only regular courts give. This raises the possibility, not introduced in Kaunde v Malawi Telecommunications Ltd., but possible under our law

since the Employment Act came into force, that the employee has two remedies: her common law remedy for damages for unlawful or wrongful dismissal and her statutory remedy for compensation for unfair dismissal (Janciuk v Winerite Limited [1998] IRLR 63; and Raspin v United News Shops EAT 1186/96.

The Employment Act has two implications. First, a lawful termination can be unfair dismissal under the Act. Conversely, an unlawful termination may be a fair dismissal under the statute. Secondly, the Act has implications on damages and awards. This duality means an employee can recover common law damages for unlawful dismissal in ordinary courts and statutory awards for unfair dismissal under the Act. Scottish and English Court s differ on the double compensation prospect. Scottish courts, unlike English courts, do not allow for common law damages for wrongful or unlawful termination to the unfair dismissal compensation award (Addison v Babcock FATA Ltd., [1987] 2 All ER 784 rejecting the Scottish view in Finnie v Top Hat Frozen Foods, [1985] IRLR 173). Malawian courts invariably follow English courts. There might be good reasons for both options. This lengthy discourse is for the important point I make following this Court's decision in Kaunde v Malawi Telecommunications Ltd. and Mungoni v The Registered Trustees of Development of Malawi Traders Trust. In my judgment the Employment Act gives the Industrial Relations Court jurisdictions over fundamental rights (Part II) and unfair dismissal (Part VIII). The Employment Act never gives the Industrial Relations Court jurisdiction over all employment matters. Specifically, on termination of employment, the Industrial Relations Court, under the Employment Act, only has jurisdiction on unfair dismissals. Much of the employment contract is outside the Industrial Relations Court's jurisdiction and governed by general contract law which ordinary courts apply.

Moreover, sections 62 (3) conferring jurisdiction on the Industrial Relations Court provides that the matter *may*, not should, be referred to the Industrial Relations Court if the labour officer fails to settle the matter. Under section 64 (3) a person alleging violation of provisions of the Act *may*, not shall, present her complaint to the Industrial Relations Court.

The separation between rights under the contract and statute is

pronounced in section 64, a saving provision. Under section 64 (1), concerning conciliation by a labour officer, disputes that a labour officer can, if brought to him, try to assist are those under 'this Act or *a contract of employment.'* Under section 64 (3), dealing with the Industrial Relations Court jurisdiction, a person alleging violation of 'provisions of this Act' may present her complainant to the Industrial Relations Court. There is no reference to a *'contract of employment'* as in section 64 (1).

On the second question, therefore under our law, the Industrial Relations Court does not have original jurisdiction on all labour disputes or disputes or employment related matters. Since the law confers the Industrial Relations Court's jurisdiction, the Constitution, the Labour Relations Act itself and the Employment Act give limited jurisdiction to the Industrial Relations Court. The High Court and magistrate courts have general powers on matters the Industrial Relations Court has jurisdiction on.

It is significant that the Employment Act in part II and part VIII covers employees' rights. Sections 57 to 63 concern employees' rights. The Employment Act and the Labour Relations Act do not address the employer's rights in the Industrial Relations Court where the employer alleges the employee's breaches of a contract. The assumption is that the employer who claims breach of the employment contract can recourse regular courts. Nothing in the Employment Act requires the employer recourse the Industrial Relations Court except, of course, in the only circumstance in section 64 (3) that the employer claims violation of the Act. Even section 64 (3) is permissive. The person alleging violation of the Act is not obliged to go to the Industrial Relations Court. She can go elsewhere. There is nothing in section 64 (3) that ousts the jurisdiction of this Court or other courts. Ultimately a person alleging violation of the Act may find it expedient to go to the Industrial Relations Court because that court is cheaper and quicker.

The final question therefore should be considered. I must answer this question because Mr. Nyimba, before reading Likaku v Likaku suggested that, notwithstanding this Court's jurisdiction, this Court should dismiss the action because the Industrial Relations Court also has jurisdiction. There appears to be conflicting decisions of this Court on

the matter. Mungomo v Mungomo, the earlier decision, suggests this Court should dismiss the action in the circumstances. Mungoni v Registered Trustees of the Development of Malawi Traders Trust, although Chipeta, J., never cited Mungomo v Mungomo is to the same effect. Chipeta, J., thought that the plaintiff should have commenced the matter in the Industrial Relations Court and dismissed the summons. In Kaunde v Malawi Telecommunications Ltd., Kapanda, J., followed Mungomo v Mungomo and Mungoni v The Registered Trustees of the Development of Malawi Traders Trust. The consequences of the reasoning in Kaunde v Malawi Telecommunications Ltd. is unclear. The judge ordered the proceedings be taken before the Industrial Relations Court. It is unclear whether he, following Mungomo v Mungomo, dismissed the case. Just as the order is unclear on whether the Court transferred the case. More however suggests that the Court dismissed the matter. The costs were not left to the transferee court. Whatever happened is unimportant.

It appears to this Court that the legal practitioners never introduced Likaku v Likaku, where this Court considered Mungomo v Mungomo. It is useful therefore to consider Kaunde v Malawi Telecommunications Ltd., the latest case, because until the Supreme Court resolves the question, the position in Likaku v Likaku, with which both counsel agree, that this Court cannot dismiss an action where it has jurisdiction simply because a lower court has jurisdiction is correct in principle and in law. This Court must in the circumstances, rather than dismiss the action, transfer, either of its own motion or application by the parties, the proceedings.

The first point Kaunde v Malawi Telecommunications Ltd., following Mungomo v Mungomo, makes is that the plaintiff has to satisfy this Court that there are exceptional circumstances for commencing proceedings here. It is difficult to think why there should be such proof if, as we see shortly, and as demonstrated earlier, the court has jurisdiction. If this Court has jurisdiction, and this should be sufficient reason, it is unnecessary to require a litigant to demonstrate why she invokes that jurisdiction. Where this court lacks jurisdiction the plaintiff does not have to give reasons; lack of jurisdiction is reason enough. Where the court has jurisdiction, to require the litigant to demonstrate reasons may result

in multiplicity of applications dealing with the very question whether there are exceptional circumstances in one case or the other justifying the commencement of proceedings in this court. There is the very question when should the demonstration be. Should it be as the action is commenced, before the action is commenced or after the action is commenced? This involves the court in unnecessary and distended applications.

At page 11 the court said:

> "There are no good reasons to support the plaintiff's 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 remedies under the said 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 the Employment Act as read with section 64 of the Labour Relations Act, which categorically states that the Industrial Relations Court shall have the original jurisdiction to hear and determine all such labour related disputes."

Section 110 (2) of the Constitution is given to aid the assertion. The Labour Relations Act, the Employment Act and the Constitution, as demonstrated, do not support this conclusion.

It is said that this Court has no original jurisdiction because the Labour Relations Act provides for an appeal from the Industrial Relations Court to this Court. The existence of a right to appeal to this Court is not decisive on this Court's original jurisdiction. This Court's appellate jurisdiction is statutory. It is not constitutional. This Court and subordinate courts overlap jurisdiction despite that this Court has appellate jurisdiction over subordinate courts. The Act must clearly show that it strips this Court of its unlimited jurisdiction. The right of appeal from another court is inconclusive. In my judgment, there is nothing to oust the original jurisdiction of this Court in the very matters in which a subordinate court has also jurisdiction. The original jurisdiction of this Court is not undermined by the number of appeals afforded a litigant. The Constitution provides for a right of appeal. It does not determine how many appeals there should be. A litigant has only one right of appeal on matters originating from this Court. It makes no difference that this is an employment matter. The Labour Relations Act is premised on reduced

appellate proceedings. Consequently, some Industrial Relations Court's decisions are final.

In Mungomo v Mungomo and Kaunde v Malawi Telecommunications Ltd., this Court gives two reasons for reluctance to entertain matters where lower courts have jurisdiction. First, is fear of inundation in this Court. The High Court should not see inundation from its side only. This Court must consider both sides. Inundation in this Court must be avoided. It is equally important to avoid inundation in the lower court. A rule proscribing commencing actions in this Court for inundation affects the citizen's right to a speedy trial. Where the lower court is inundated, it is, in my judgement, within the litigants right to commence actions in this Court which shares jurisdiction with the lower court. Inundation or opening flood gate is, in my judgement, a limited argument.

Secondly, the defendant in Kaunde v Malawi Telecommunications Ltd. contended that commencing proceedings in this Court should be avoided for costs. The Industrial Relations Court does not normally award costs. Litigation costs are reasons why litigants avoid coming to this Court. Fundamentally, the Employment Act promotes good industrial relations through expedited, cheaper and mediated processes. Counsel should advise clients on litigation costs. That duty is pronounced in matters litigants commence in this Court. This Court orders costs on a subordinate scale. If the plaintiffs, upon good advice from counsel, continue the action here notwithstanding costs, this Court, in case she wins, should order costs on the subordinate scale. This approach however overlooks the successful defendant's costs. Difficulties arise with unrepresented litigants. In such situations the court, for the duty to parties, should appropriately advise the parties of cost implications and probably invoke the transfer powers. On the other hand defence counsel should apply to transfer proceedings because of cost prospects on her client.

Consequently, an inbuilt mechanism forestalls litigants' cost implications. The mechanism might not act reasonably and fairly in all circumstances. It is quite another thing, however, to dismiss the action or to refuse jurisdiction because of inundation, costs or expedience. The

European Court of Human Rights in Klass and others, 6th September, 1978, series A, No. 28, reenforces Likaku v Likaku. In Klass and others the European Court on Human Rights confirmed the well established principle in the cases that once a case is duly referred to it, the court is endowed with full jurisdiction and may take cognaisance of all questions of fact or of law arising in the proceedings. There the European Court of Human Rights followed its decisions in De Ilde, Ooms and Versyp of 18th June 1971, Series A, No. 12, pp 29-30; the Belgian Linguistic case of 9th February 1967, series A, No. 5, pp 18; the Handycide judgment of 7th December 1976, series A, No. 20 pp 20 and the case of Ireland v United Kingdom of 18th January 1978, series A, No. 25, pp 63. A matter, properly instituted before a court with jurisdiction is, in my judgment, duly before that court. That court has full jurisdiction and should take cognaisance of all questions of fact or law emanating from those proceedings subject, of course, to the power to transfer mentioned in Likaku v Likaku. When considering transferring, either of its own motion or on application, this Court, no doubt, must regard litigation costs, inundation in the lower and the upper court, the complexity of the matter and the stage of the proceedings.

In this matter I carefully consider the claim the employer lodged. The action is two pronged. First, the action relates to the employer's contractual rights. The Industrial Relations Court under the Labour Relations Act and the Employment Act has no jurisdiction over contracts. The High Court and magistrate courts have. The employer sues for breach of a contract of employment. This Court, not the Industrial Relations Court, has jurisdiction. The Union can put the golden rule defence, namely, the breaches further a strike. This cannot bar this Court's and other courts' overall jurisdiction on breach of a contract.

On the law now, only the employee can sue for unfair dismissal in the Industrial Relations Court. The Employment Act and the Labour Relations Act do not give the employer congruent rights in the Industrial Relations Court to sue the employee for unlawful or wrongful termination, which there could be in any strike. Consequently, the employer can properly sue in this Court or a magistrate court, where the latter has jurisdiction.

Secondly, the plaintiff's action is in torts. A man cannot induce another to break a contract with another. It is a tort to induce another to breach a contract with another. The Industrial Relations Court has no jurisdiction over torts in the employment place. Once the action has been properly commenced in this Court, the employees can put defences such as the golden rule or immunity. These defences never oust this Court's jurisdiction. The High Court, not the Industrial Relations Court, has jurisdiction.

This Court and the Industrial Relations Court share jurisdiction in matters where the latter has jurisdiction.For the most parts the Labour Relations Act and the Employment Act use the word 'may' in conferring rights to litigants. These words can only be permissive. "'May,'" said Cotton, L.J., in the Court of Appeal in Re Baker, Nichols v Baker (1890) 44 Ch. D. 262, 269, "can never do more than give a power." Unless they use express words or there is clear implication, statutes should not be read as to take away the jurisdiction of superior courts (R v Moreley (1760) 2 Burr 1040 at 1042; Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260, [1959] 3 All ER 1, HL; Customs and Excise Corms v Cure ans Deeley Ltd QB 340, [1961] 3 All ER 641; Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 at 170, [1969] 1 All ER 208 at 213, HL, per Lord Reid; Pountney v Griffiths [1976] AC 314 at 331, 334 [1975] 2 All ER 881 at 884, 886, 887, HL, per Lord Edmund-Davies). Moreover statutory provisions conferring jurisdiction to inferior courts must be construed strictly (R v Bird, ex parte NeedsU [1898] 2 QB 340; R v Board of Education [1911] AC 179). This Court cannot dismiss the action just because the Industrial Relations Court has concurrent jurisdiction.

This Court can transfer the case to the Industrial Relations Court. The plaintiff however seeks an injunction. The parties do not want damages. The employees and the employer want to continue the employment, on better and negotiated terms, of course. One reason for choosing this Court is, unlike the Industrial Relations Court, the absence of limitations on *ex parte* interlocutory injunctions for industrial action by employees (a strike) or employers (lockout). Of course courts regard the limitation in section 54 (2) of the Labour Relations Act (per Ackner, J., in Biscuits (UK) Ltd. v Fall, [1979] IRLR 110. This matter's complexity and

urgency make some transfer undesirable. The transfer is however possible if the Industrial Relations Court has jurisdiction on the plaintiff's action. The Industrial Relations Court has no jurisdiction in torts or claims by the employer for breach of a contract. Only this Court, in view of the injunction application, has jurisdiction. The matter is properly before this Court.

I dismiss the motion with costs. I will hear the interlocutory injunction application.

Made Open Court this 16th Day of October 2001.

D F Mwaungulu
JUDGE