IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1491 OF 2001

In The Matter of S35 of The Employment Act (No.6 of 2000)

BETWEEN:

ABRAHIM MAKALANI.....PLAINTIFF

-and-

NATIONAL BANK OF MALAWI.....DEFENDANT

CORAM: HON. JUSTICE A.C. CHIPETA

Mr Chisale, of Counsel for the Plaintiff

Mrs Mitole, of Counsel for the Defendant

Mrs Moyo, Official Interpreter

RULING

The matter herein commended by Originating Summons. It relates to the end of an Employment/Employee relationship between the parties in the year 2000. Among other things the bone of contention is a Severance Allowance in the sum of K2,886,376.10 which the plaintiff claims the defendant is under obligation to pay him following this termination of relationship. The parties have exchanged a number of affidavits on the matter and hearing was to start when a preliminary issue arose. This is a ruling on the said preliminary issue.

Both parties acknowledge that this matter primarily falls under the jurisdiction of the Industrial Relations Court. This is quite clear from S35(8) as read with the definition of "Court" under S3 of the Employment Act. It never went there. The plaintiff confesses that having failed to satisfy certain preliminary requirements he ended up falling out of time for commencing his action in that court. He then decided to instead just bring the matter straight to the High Court on account of Section 108(1) of the Constitution which, inter alia, grants this court unlimited original jurisdiction to hear and determine civil cases. He added that the other reason for taking this move the complexity of the matter. He believes

he is before the correct forum and that his complaint can be determined here.

By way of comparison it was argued that in the United Kingdom the Industrial Tribunal enjoys concurrent jurisdiction with their courts in like matters and that the employee therefore has a choice which court to go to in order to lodge his matter. It was thus argued that in the absence of clear provision. We could learn from this practice and proceed with this action in the High Court.

On its part the defendant argued that the plaintiff has brought the action in the wrong forum. While conceding that indeed under S108 of the Constitution the High Court has unlimited original jurisdiction in civil matters, in respect of labour disputes like this, it was the argument of Mrs Mitole, of Counsel for the defendant, that the High Court does not have original jurisdiction. Following the references she made to S35(8) and S64(2) of the Employment Act as well as S65(2) of the Labour Relations Act and Rule 27 of the JRC(.....)Rules. She was of the definite opinion that in such matters the High Court is an appellate court once the said matters have been commenced in the Industrial Relations Court. It was thus he said that the plaintiff does not have any choice which court to convince his action in and that he could therefore not just bring his matter to the High Court as a matter of choice. She in particular observed here that appeals from the Industrial Relations Court have to be in line with OXXXIII of the Subordinate Courts Rules under the Courts Act, which deal with appeals from Subordinate Courts to the High Court. At this point she openly contended that it was wrong, and actually said it was alleged, for the plaintiff to bring other action to the High Court at first instance as he has done. Her prayer was that this court should find that it has no jurisdiction over this labour dispute, and more efficiency on the point of severance pay.

I must commend both Counsels for voluntarily raising the healthy debate of jurisdiction as a preliminary issue in the case. The way forward in this case, if it exists, clearly dependent on whether this court has power to hear this matter as a court of first instance or wit. It would be idle to commence hearing and go deep into arguments if in the end there is risk that just on this one question the entire exercise might turn out to be a futile. It is best therefore that as learned Counsel have exposed this apparent stumbling block, that I deal with it decisively before the parties can expand any more energy on the substantive prayers.

Let me also observe here that whereas the advent of the Industrial Relations Court is a welcome expansion of our judicial system, it cannot be denied that its arrival at the scene has brought some uncertainty among us all as to which cases belong where. It is therefore only through test cases like the present, which force us to take more than just a superficial look at this development in our law, that we will be able to iron out our status of uncertainty, and show the way forward for future cases. I think it is somehow fortunate that this is not the first case of its type to commence in the High Court. There have, in the past few months, been cases in which like complaints have been lodged in this court at first instance. Where however the question of jurisdiction has not been canvassed either

by the plaintiff's side or by the defendant's side, nor indeed referred to by the court. I tend to believe that from such cases there is little we can gain by way of guidance as clearly the court's mind will not have been tested on this important question. There are, however, cases where the question of jurisdiction was duly tabled or otherwise considered and where the court then came up with solid decisions on the issue at hand.

Foremost in my mind in this regard is my own decision of 4th May, 2001 in Civil Cause No. 686 of 2001 Highten Lemani Mungoni -vs The Registered Trustees of Development of Malawi Traders Trust (unreported). In that case where, inter alia, the plaintiff was claiming severance pay for termination of employment, I was of the clear view and I so held that labour diputes per Section 110(2) of the Constitution, even in the light of the unlimited original jurisdiction of the High Court under Section 108(1) of the Constitution, should not procedurally be brought to the High Court as a court of first instance in place of the Industrial Relations Court. I however find further encouragement of this view from the eloquent decision of my learned brother Hon. Justice Kapanda in Civil Cause No. 684 of 2001 Armstrong Kamphoni -vs- Malawi Telecommunications Ltd (unreported) where in lucid detail he examined and analysed various provisions in the Employment Act, 2000 and the Labour Relations Act, as well as the import of the judgment of Hon. Unyolo, J. (as he then was) in the case of Beatrice Mungomo -vs- Brian Mungomo and Others Matrimonial. Cause No. 6 of 1996 (unreported) on the significance of S108 of the Constitution on "unlimited original jurisdiction."

I have after listening entertaining the arguments in this case on this question examined the provisions cited afresh. I have failed to find cause to retract from my earlier stand. With this revisit to the provisions it strikes me more clearly than before that the plaintiff has initiated his case in an appellate court and that his claim ought therefore not to be heard here at this stage. I do recall that a last resort request in this case was that should I hold that this court has no jurisdiction, I should give consideration to ordering a transfer of the proceedings to the Industrial Relations Court. I have considerable misgivings about transferring proceedings which I hold to have been defectively commenced. The correct order, I believe, is to dismiss the Originating Summons, which I do with costs.

Made in Chambers this 31st day of August, 2001 at Blantyre.

A.C. Chipeta

JUDGE