IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3828 OF 2000

BETWEEN:

L. ALUFANDIKA.....PLAINTIFF

and

ENCOR PRODUCTS LIMITED.....DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Kainja, of Counsel for the Plaintiff
Nkuna, of Counsel for the Defendant
Chaika (Mrs), Official Interpreter

RULING

By Originating Summons based on Sections 31 of the Constitution and 35 of the Employment Act the plaintiff seeks a number of declarations and Orders consequent on the defendant's termination of his employment with it. The Originating Summons is duly supported by an affidavit to which are annexed exhibits "GDK1" to "GDK5". The defendant having acknowledged service of this Originating Summons filed and served an affidavit in opposition buttressed by exhibits "TZN1" and "TZN2." It subsequently followed this up with a supplementary affidavit in opposition carrying with it exhibits "TZN3" to "TZN5". It is then that I heard arguments from both sides on the matter.

The undisputed facts of the case are that the defendant company employed the plaintiff as from 18th September, 1985. Following that appointment the plaintiff worked with that company until 7th September, 2000 when he was declared redundant. By then his salary had risen to K4,100.00 per month from the initial K285.00 per month he had started work with. Obviously on termination of employment some payments between the contracting parties become due for settlement. In the case at hand, the parties are only at cross-purposes as regards one and only one

payment. It is that payment that has triggered this case and landed the parties in court.

Act No. 6 of 2000 is the new Employment Act which came into force on 1st September, 2000. It replaces the Employment Act of 1964, (Cap. 55:02) of the Laws of Malawi. At the time the plaintiff herein was terminated from his employment the law in force was that in the current Act which had then just been in operation for only one week.

At the center of the present dispute is Section 35 of this new Act. The said Section 35 addresses the question of severance allowance on termination of employment as is the case here. The law is coached in plain and unequivocal language, but in applying it to the facts of this case the plaintiff gets one result while the defendant gets a different result and they have completely failed to compromise on this. The question for consideration is who is right and who is wrong in the circumstances of this case.

Sub-Section (1) of Section 35 of the Employment Act provides that on termination of employment, an employee shall be entitled to be paid by the employer at the time of termination, a severance allowance as per the First Schedule. According to the said Schedule any employee who is terminated after serving for between one and four years, is entitled to severance allowance of the equivalent of two weeks wages for each completed year of continuous service. As regards any employee who is terminated after serving for at least ten years the rate of calculating the severance allowance due increases to double the rate mentioned earlier i.e. it rises to the equivalent of four weeks wages for each completed year of continuous service.

This far what has been paid to the plaintiff under the head severance allowance after a querry from him is a sum of K9,461.54 only. It represents that allowance paid at the rate of two weeks wages for each completed year of service for a period of five years from 1995 to 2000. The plaintiff feels cheated in this regard and claims that he was in fact supposed to be paid at the rate of four weeks' wages for a period of fifteen years from 1985 to 2000. In his calculation therefore the payment he so far managed to wrestle out of the defendant falls short of the legitimately due amount by K52,038.46 and, inter alia, that is the sum he seeks to recover.

From what has been deponed in the affidavits in opposition and from the contents of the various exhibits attached, it has been argued on behalf of the defendant company that pursuant to an agreement struck on 3rd June, 1998 between the company, as represented by a Director, and Members of Staff (including the plaintiff), the company subsequently paid long service awards to staff members. It is clear from exhibit "TZN1" that the long service awards covered all long serving employees, including the plaintiff, up to the end of 1994. The rate of payment of these awards was one week's pay for each completed year of work served by an employee for the first five years and for employees who had served beyond that period the rate then increased to two weeks pay for each of the additional years. "TZN1" further shows that as from 1st January, 1995 the concerns that had led to claims by employees for the awards in question would be taken care of by the revised pension contribution by the company from 5% to 10%. The same exhibit also made it plain that terms and conditions of service were not changing and that as regards pension, each employee would still be entitled to it from the date of his initial entry into the scheme.

In this matter the defendant company's argument was that the payments made under the 1998 agreement in respect of Long Service Awards should be taken to be severance allowance for the period up to the end of 1994. For this reason the defendant company feels that its obligation therefore remains one of paying severance allowance from 1995 to the date of termination only and no more and that in pressing for full severance allowance for fifteen years it is the plaintiff who is trying to defraud the company. I have heard learned Counsel for the two sides argue and counter argue on the subject and as I rule I bear all their arguments in mind although I will not repeat them here.

I have taken ample time to study all the documents presented before me. I have equally given lengthy and sober consideration to the arguments advanced by both sides. I have next tried to match all these against the material Section 35(1) herein and its First Schedule. I am in the end, all in all, convinced that the defendant company, in this case, is simply seeking to evade its obligations under the new Act.

It is plain from the repealed Employment Act, 1964, which was the law in operation at the time of the agreement for and payment of Long Service Awards that the concept or even the reality of severance Allowance was nowhere catered for. There is no way therefore it can be logically or legally argued that in agreeing to and paying Long Service Awards the

defendant company was coincidentally dealing with the subject of the then non-existent severance allowance.

I equally cannot comprehend argument that somehow the defendant should be taken to have been complying in advance with payment of an allowance that was going to be payable under a law yet to be enacted. Besides, even if it was possible to comply with legislation in advance, which it is not, the rates and periods applicable in the case of Long Service Awards differ quite markedly from the rates and periods covered under the schedule Section 35(1) refers to. It then bogs the mind how with such disparities the one payment can be said to be in lieu of the other.

Further than this, besides the fact that in the employment law applicable in Malawi there was then no severance allowance payable under the relevant Act at the time of the Long Service Awards herein, Section 35(1) of the Employment Act, 2000 makes it clear that this allowance is payable on termination of employment. The agreement regarding Long Service Awards was clearly suggestive of the fact that by so receiving the Awards, employees were not having their services terminated and starting employment afresh. Even if Section 35(1) had existed then, in the absence of termination of service, severance allowance could not have become due and payable. On the other hand, however, exhibit "TZN1" also indicates that the Awards were addressing some anomaly in the pension scheme, which anomaly from 1st January, 1995 henceforth was going to be resolved by the employer's increased contribution to the pension scheme. If that payment was resolving this particular problem, I do not see how it could now be available to accommodate severance allowance which is a different phenomenon altogether for pension.

The fair thing to say here is that when the defendant company was terminating the employment of the plaintiff, under a law that was only one week old in force, it was under obligation to pay him severance allowance in respect of his entire period of continuous service. It is obvious that at the material time the defendant was actually ignorant of the fact that a new obligation had thus come its way. It is indeed so confessed in paragraph 7 of the first affidavit in opposition, and this explains the fact that even the first K9,461.54 was only paid more than a month after the termination and only after a demand had been made. The impression one gets from the scenario in this case is that since the new law sort of brings about a burden the defendant was not aware of before, as far as possible therefore, the defendant is trying its best to avoid paying any more money than it has so

far already done to the plaintiff, hence the attempts to explain this allowance away through reference to Long Service Awards and the attempts to reduce its period of liability. I see no merit in the arguments of the defendant company and accordingly dismiss the same as being worthless. The period over which this allowance is due and payable is fifteen years and the applicable rate is four weeks wages for each completed year of service. Of course with the existing part-payment the defendant company has only an outstanding balance of K52,038.46 to pay under this head, and this sum cannot just be wished away.

Severance allowance under Section 53(1) of the employment Act, 2000 is payable within seven days of the termination of employment. In this case termination occurred on 7th September, 2000 and so the deadline for its payment was 14th September, 2000 as indeed argued by the plaintiff in this case. Indicators per exhibit "GDK3" are to the effect that even the part-payment of K9,461.54 was paid something like one month after the expiry of this deadline. The K52,038.46 just pronounced to be outstanding is in fact now a little more than six months overdue. I cannot agree more with the plaintiff that the resistance the defendant has demonstrated against this statutorily payable allowance and the consequent in ordinate delay in payment of the same not only amount to an infringement of the plaintiff's right to fair labour practices under Section 31 of the Constitution of the Republic of Malawi, but also qualify the plaintiff to an order for interest on this severely delayed severance allowance.

The plaintiff's case is to my mind fully made out as outlined in his Originating Summons. I accordingly declare as follows:-

(i) that the defendant has infringed the plaintiff's right to fair labour practice under Section 31 of the Constitution, and

(ii) that the defendant is in breach of a statutory duty under Section 35(1) of the Employment Act, 2000 in failing to pay him full severance allowance this far.

I further order as follows:-

(i) that the defendant pay to the plaintiff the full outstanding severance allowance in the sum of

K52,038.46, being 4 weeks salary for every completed year of service for 15 years after taking into account the K9,461.54 already paid herein.

(ii) that the defendant also do pay to the plaintiff interest at bank lending rate from 14th September, 2000 on the outstanding amount, the day it was last due for payment, and

(iii) that the defendant stand condemned in the costs of this action.

Pronounced in Chambers this 23rd day of March, 2001 at Blantyre.

A.C. Chipeta
JUDGE