

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL APPEAL CASE NO. 66 OF 2004**

(Also known as Civil Appeal No. 57 of 2005)

(Being Matter No. IRC 134 of 2000 from Industrial Relations Court, Blantyre)

BETWEEN:

**LUSTANIA (MALAWI) LIMITED .....APPELLANT**

**-and-**

**L.B. NKHWAZI ..... RESPONDENT**

**CORAM: HON DR ANSAH J.**

Nyimba, counsel for the appellant

Chumachiyenda, counsel for the respondent

Ben Luckson, Official Interpreter

Mrs Kasasi, typesetter

**JUDGMENT**

R.R. Mzikamanda J,

This is an appeal Lustania Malawi Limited against the decision of the Industrial Relations Court made on 12<sup>th</sup> October, 2004 that the respondent L. B. Nkhwazi had been deprived of some remuneration and retirement package from 1994 to 2000 when he retired and that the same be assessed and paid to him. The appeal was heard by Justice Dr Jane Ansah who was appointed Attorney General before she prepared the judgment in the matter. The matter was thus placed before me for the purpose of preparing judgment. I have read the judge's notes and the written skeletal arguments of file. I have before me the material on which I am able to prepare this judgment.

The amended memorandum of appeal is in 13 paragraphs. The grounds of appeal which are eight in number are placed under paragraph 13 of the amended memorandum of appeal. Paragraphs 1 to 12 of the amended memorandum of appeal are factual matters. The grounds of appeal are that

- (1) the learned chairperson of IRC erred in law when he failed to appreciate the principle in **Solomon vs Solomon** (1897) AC 22 in that the legal personality of Lusitanian in Malawi is different from Lusitania Ltd in Mozambique and that the two were two different legal personalities.
- (2) The learned chairperson of IRC erred in law when he transferred the obligations of paying the respondent a salary of US\$1,300 per month from Lusitania L'da in Mozambique to Lusitanian Limited in Malawi.
- (3) The learned chairperson of IRC erred in law that the special offer made between Lusitania L'da in Mozambique and the respondent applied to the appellant in that the appellant was not a party or privy to an offer and the appellant never made or signed any agreement with the respondent for salary of US\$ 1,300 per month in Malawi.
- (4) the learned chairperson of the IRC erred in law by including in his judgment matters that were not said by the respondent during the first hearing which hearing was done in the absence of the appellant and set aside, and which matters were not brought up during the hearing.
- (5) The learned chairperson of the IRC erred in law to order remuneration based on US\$1,300 per month and retirement package from 1996 to 2000 for the respondent in that the respondent had broken services between 1994 to 1996 and that the contract came to an end when its fulfillment became impossible to perform and also that the respondent failed to discharge the evidential burden of proving his case in a balance of probabilities that the appellant employed him on a salary of US\$1,300 per month.
- (6) The learned chairperson erred in law to hold the appellant liable to pay the US\$1,300 per month to the respondent in that the alleged salary was specifically to apply for the performance of work in Mozambique and not Malawi since 1996 the respondent never performed any work in Mozambique as per offer.
- (7) The learned chairperson erred in law determining an issue which may have been governed according to Mozambique law and the lower court did not have jurisdiction but the High Court has.
- (8) In all circumstances of the case the judgment of the IRC is against the weight of evidence and a failure of justice requiring the judgment to be reversed set aside and substituted with an order to pay terminal benefits of severance pay based on salary payable by appellant in Malawi.

The appeal is opposed. The appellant was represented by Legal wise, a legal firm while the respondent was represented by a trade unionist, Mr. George Chumachiyenda.

The facts of the case as established by the Industrial Relations Court are that the respondent was first employed by the appellants on 15<sup>th</sup> October, 1985 as a building supervisor. He supervised the construction of Kasungu Teachers' Training College, the construction of MANEB offices in Zomba, the construction of Malawi Housing Corporation houses in Blantyre and other projects in Mangochi. In 1994 the appellants won a contract in Mozambique to construct a hospital at Beira. The respondent was sent there as a site agent. The appellants prepared the respondent's travel documents from Malawi to Mozambique since the respondent did not possess a valid passport. In Beira his salary was US\$ 1,300 per month. The hospital project was abandoned as it was on the air route. The appellants then secured another project in Pemba on the other side of Mozambique. The respondent was asked to move to Pemba. He requested to pass through Malawi to see his family. His request was granted. He was told to report at Lusitania (Malawi) Ltd while in Malawi. He complied. While in Malawi he was told that Lusitania (Malawi) Limited has secured a big project and that his services would be required there for 52 weeks. Since the respondent had acquired a Mozambican passport it was necessary that immigration formalities be complied with. Lusitania (Malawi) Ltd wrote the following letter to immigration authorities on 3<sup>rd</sup> July 1996.

MO2334/LKHP/em

J8

Immigration Officer  
P.O. Box 331  
BLANTYRE

Dear Sir

This is to certify that Mr. L .B. Nkhwazi holder of Mozambique passport No. MO026933 is an employee of Lusitania Limited in Beira, a branch of Lusitania Limited here in Malawi

Lusitania Limited Malawi has some work to be done in the next 52 weeks, by Mr. Nkhwazi, and we would appreciate if his stay in the country could be extended

Yours faithfully  
For: LUSITANIA LIMITED

Lewis K.H. Pirie  
CHIEF ACCOUNTANT

The letter was on a headed paper of Lusitania Limited Building and Civil engineering Contractors whose head office was Johnstone Road, P.O. Box 996, Blantyre, Malawi and first branch at Rua Pedro Alvares Cabral, Caixa Postal 450, Beira, Mozambique

and second branch at 1.5km R. das Estancias, Caixa Postal 2471, Maputo-Mozambique

While in Malawi the respondent's salary was reduced from US\$1,300 to K6,000 and then raised again to K12,000.00. The respondent protested against the unilateral salary reduction but he was not attended to. In the course of time the respondent was no longer interested to go to Pemba and he made this clear. What followed was a recommendation that he should retire on medical grounds. The lower court found that Lusitania (Malawi) Limited and Lusitania L'da Mozambique were one and the same company contrary to the argument by the appellants that the two companies were separate entities. The lower court also found that the respondent worked for the appellants for a continuous period at least from 1994 after he got his terminal benefits for the period 1991 to 1993. the court also found that it was not the case the respondent had while in Mozambique abandoned his employment and joined Sofala Construction Company as was argued by the appellants. The lower court also found that it was an unfair labour practice contrary to section 31 of our constitution for the appellants to have unilaterally reduced the salary of the respondent from US\$1,300 to MK6,000. the court found that the respondent was entitled to US\$1,300 and that he should be deemed to have retired at the remuneration of US\$1,300 in 2000. he was also entitled to a retirement package from 1994 to 2000.

Now appeals from the Industrial Relations Court to this court are governed by section 65 of the Labour Relations Act. According to section 65(1) of the decisions of the Industrial Relations Court shall be final and binding. An appeal against a decision of the Industrial Relations Court would only lie to the High Court on a question of law or jurisdiction (see section 65 of the Act.) This means that factual questions are resolved with finality in the Industrial Relations Court and the High Court would not entertain any appeal that is designed to challenge the findings of fact as established by the lower court save and limited only to questions of law on whose basis the finding of fact was made. As was observed in **Mzuzu City Assembly vs. MEM Kaunda** Civil Appeal No. 37 of 2003

*“The position with finding of fact in the Industrial Relation court as to whether they can be set aside is even stricter especially in the light of informality and relaxed rules of evidence in civil procedure. This court is however mindful of a situation of questions of mixed fact and law. It seems to me that where the question is one of mixed fact and law on a matter coming from the Industrial Relations Court on appeal to the High Court the High Court should be in a position to hear that appeal provided always that the High Court shall remain mindful of the need to address legal aspects of the matter”.*

It is important to note that this court will not entertain an appeal based on a factual question merely because the question has been labeled as one of law. It will be a question of law if the issue or issues raised are of law and not factual.

The appellants argue on the first ground of appeal that Lusitania (Malawi) Limited is a different legal entity from Lusitania Limited of Mozambique.

The argue that the Chairman's notion that Lusitania Malawi and Lusitania Mozambique are sister companies is alien to establish principles of company law and of separate corporate personality. The following dictum of Lord Mac Naughten in **Solomon vs Solomon** (1897) ac 22 at p. 51 was cited in support, namely that:

*“the company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them”.*

Also cited in support of the argument that Lusitania Malawi Ltd is different from Lusitania Mozambique Ltd is the case of **Banda vs. Cilcon** MLR 21 which held that a company and its subsidiary are different legal entities. The chairman devoted a lot of time and effort to illustrate that Lusitania Malawi Ltd and Lusitania Mozambique are one and the same company. Among the reasons is that both letterhead “LUSITANIA LIMITED BUILDING & CIVIL ENGINEERING CONTRACTORS” with headquarters in Blantyre Malawi and branches in Beira and Maputo in Mozambique. A branch of a company is different from a subsidiary of a company. A branch of a company really means the same company having established itself another office. A subsidiary corporation is one which another corporation called the parent corporation owns at least a majority of the shares and thus has control. A branch of a company is an offshoot or extension also called a subdivision of that company. A branch is another unit of business located at a different location from the main office or headquarters. To the extent that the case of **Banda vs. Cilcon Ltd** 14 MLR 21 relates to a subsidiary it must be distinguished from the present case which relates to a branch. Indeed even in the letter to the Immigration Officer on 3<sup>rd</sup> July 1996 the chief Accountant referred to the respondent as “an employee of Lusitania Limited in Beira a branch of Lusitania Limited here in Malawi”. Further a letter marked AEXD08 and dated 2<sup>nd</sup> April, 1995 from Lusitania L'da, Caixa Postal 450 Beira, Mozambique was addressed “to LUSITANIA – MALAWI H/O ATTN MR V MOREIRA/O.VV. CUSTODI and it stated thus:

“AS AGREED THIS SERVES TO CONFIRM THE OFFER TO MR LONDON ON A CONTRACT TO WORK FOR LUSITANIA IN NORTH MOZAMBIQUE FOR THE AMOUNT OF US\$1,300 PER MONTH (ONE THOUSAND THREE HUNDRED AMERICAN DOLLARS PLUS THIRTEEN CHEQUE AND ACCOMMODATION ONLY).

A FORMAL CONTRACT TO BE ISSUED TO HIM IN MALAWI

CARWI MANUEL LAP”

Then employees of Lusitania Malawi Ltd would be sent to work with Lusitania L'da Mozambique and vice versa. In short the holding of the Chairman regarding the relationship between the two companies must be upheld. The first ground of appeal must fail.

The essence of the second and third ground of appeal is that what was payable in Mozambique was not payable in Malawi as obligation of one company could not be transferred to another. The discussion above relating to the first ground of appeal should pretty much dispose of these grounds of appeal. The letter of 2<sup>nd</sup> April 1995 by Carwi Manuel Lapa to Lusitania Ltd Headquarters in Malawi should put this matter to rest when it says in the final paragraph "A FORMAL CONTRACT TO BE ISSUED TO HIM IN MALAWI". That must have meant that the formal contract for US\$1,300 would be issued by Lusitania Ltd Headquarters in Malawi. There is no merit in grounds 2 and 3 of the appeal and they must be dismissed.

As to ground 4 of the appeal the appellant argues that the court record reveals that the respondent never said in the presence of the appellants that he was transferred to Mozambique from Malawi and he never said that as he was going to Mozambique he was getting US\$1,300 per month. Thus by including these matters in its judgment the court erred. It is legally not acceptable that a presiding judicial officer should introduce factual issues that were not raised in evidence. I have taken the trouble of checking the record. I notice at page 6 of the typed record the respondent said in response to cross-examination that:

*"I was transferred to Mozambique by Lusitania".*

This the respondent must have said in the presence of the appellant because it was counsel for the appellant who was cross-examining him. Indeed even as regards the US\$1,300 matter the record shows that the respondent said on same date he was cross-examined and as he gave his evidence in chief that:

*"But as I was in Malawi they said that there was another project for MHC for 52 weeks. That was when Mr Pirie wrote Immigration to extend my stay ....."  
That time my salary was US\$1,300*

*Then later on they started paying me less money. I confronted Mr. Lapa who sent me to Malawi."*

The statement on page 5 of the judgment is that

*"the applicant said that when he went to Mozambique, his salary was US\$ 1,300 per month.*

Looking at these statements perhaps what the appellant should complain about is the manner of paraphrasing the evidence on the part of the chairman. I do not see

any new matter being introduced into the judgment which matter was not in evidence. The fourth ground of appeal has not been made out.

What this means is that all the grounds of appeal herein have not been made out and this appeal must fail in its entirety. The judgment of the lower court is upheld. Each party will bear own costs.

**PRONOUNCED** in open court this 23<sup>RD</sup> day of March 2007 at Blantyre.

R.R. Mzikamanda  
**JUDGE**