IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL APPEAL CAUSE NO. 52 OF 2005

BETWEEN

D.E. MSOWOYA …….. APPELLANT

AND

ADMARC …….. RESPONDENT

CORAM : HON. JUSTICE R.R. MZIKAMANDA

: Unrepresented, Counsel for the Appellant
: D.L. Kalaya, Counsel for the Respondent
: R.S.D. Kahonge, Official Interpreter

JUDGMENT

This is an appeal against the order of assessment of compensation made by the Chairperson of the Industrial Relations Court in favour of the appellant. The order of assessment was made on 28th July, 2005 at Mzuzu. This followed a judgment of the Chairperson of 27th June, 2005. In that judgment the Chairperson found that the respondent had valid reason for dismissing the appellant from his employment but the respondent had failed to comply with the law by failing to afford the applicant the opportunity to be heard and defend himself before he was dismissed.

The background to the matter is that the appellant was at all material times an employee of the respondents as Area Marketing Supervisor for Mwanza. On November 19, 1999 the appellant's employment was terminated with immediate effect on grounds of misconduct and gross negligence. It was stated in his letter of termination of service that whilst serving as Area Marketing Supervisor for Mwanza, on his visitation to Kubalalika Unit Market the appellant issued cash for buying produce late in the evening (7.15 pm), outside the office without any lights, and refused to count the money being handed over to the Unit Market Officers on the pretext that he was in a hurry to visit other markets. Due to the action of the appellant the Unit Market Officer at Kubalalika failed to account for K25,000.00 cash. Management felt that the appellant was grossly negligent, and irresponsible, and possibly dishonest.

Upon hearing the appellant and the respondent the lower court found that the appellant was dismissed for misconduct involving dishonest, specifically shortage of K25,000.00 and gross negligence, but without a hearing thereby failing to comply with the procedure as demanded by Section 157 (2) of the Employment Act.

In assessing compensation for unfair termination of employment the court assessed the appellant's loss as being the equivalent of three months salary at his last pay of K11,157.30 per month, less 50% constituting the appellant's contributory faulty towards the termination.

It is to be noted that the letter of termination stated that the appellant was eligible to certain terminal dues being:

(a) Three months salary in lieu of notice.
(b) Three months house allowance amounting to K19,500.00.
(c) Gratuity amounting to K290,089.80 for the 26 years he served the respondent.
(d) A refund of his accumulated credit from the ADMARC Pension.

The grounds of appeal are that:

(a) The amount assessed by the Industrial Relations Court is lower than that provided for under Section 63 of the Employment Act of 2000 and:
(b) The lower court did not property interpret the provisions of section 63 of the Employment Act 2000 in coming up with the assessment.

The appellant seeks that this court finds that the amount assessed by the lower court is lower than the minimum provided for under Section 63(5) (d) of the Employment Act 2000 and that the lower court did not properly interpret Section 63 of the Employment Act when assessing compensation. The Appellant also seeks that compensation be re-assessed by the High Court and he seeks costs of the appeal.

I have considered the matters on court record from the lower court. I have also considered the judgment and the order of assessment by the lower court. The

arguments on appeal have also been illuminating. The main challenge is whether the Employment Act of 2000 which came into force on 1st September 2000 according to Government Notice No. 47 of 2000 applies in the present case. In *Japan International Co-operation Agency –vs- Varity P. Jere Civil Appeal No. 25 of 2002 (HC- Lilongwe) (Unreported)*, Nyirenda, J. as he then was observed that the general principle is that *Lex prospicit non respicit,* meaning that the law looks forward not backwards. In that case this Lordship considered whether the Employment Act 2000 had retrospective application. That case considered the counting of years of service for purposes of severance pay as per the severance pay provisions being Section 35(1) of the Employment Act 2000. His Lordship held that Section 35 (1) of the Employment Act 2000 had retrospective application. It is important to observe that Nyirenda, J. never said the entire Employment Act of 2000 had retrospective application although he did observe that Section 63 (4) and Section 63 (5) of the said Act made reference to past employment using the expression *"an employee who has served."* It is also to be noted that Nyirenda, J. was dealing with a case where employment continued until after the Employment Act 2000 had come into effect.

The present case presents a totally different scenario where employment commenced and was terminated before the Employment Act 2000 became operational. In my view in those circumstances the rights and obligations of the parties to the employment relationship must be governed by the law that existed at the time the employment was terminated. On November 19, 1999 when the appellant's employment was terminated the Employment Act of 2000 had not yet been enacted. In that regard I do not think it is the correct legal position that the

Employment Act of 2000 should apply to employment that was terminated before it was enacted. The present dispute arose before the Employment Act of 2000 became operational. In my view, the law that should govern such a relationship which ended before the Employment Act of 2000 must be that which existed at the time the dispute arose. The retrospective effect that Nyirenda, J. dealt with in the case of *Japan International Co-operation Agency v Varity P. Jere (Supra)* must be understood to relate to an employment relationship that arose in the context of the regime before the Employment Act of 2000 and continued after the Employment Act of 2000 came into effect before the employment relationship was terminated. In the *Japan International Co-operation Agency –vs- Verity P. Jere* case the respondent was employed by the appellant in 1978 and her services were terminated in February 2001. I am of the firm view that the Employment Act of 2000 would not apply in the present case where the employment of the appellant was terminated in 1999, well before the Employment Act of 2000 became operational. Reliance on any of the provisions of the Employment Act of 2000 in the present case would not be justified.

As regards the amount assessed by the lower court it seems that the lower court was determined to come up with a just and equitable compensation taking into account several factors including mitigation of loss, contributory fault and all other surrounding circumstances. Having assessed damages at the equivalent of three months salary the court then subtracted 50% constituting the contributory fault towards the termination.

It is not clear whether the three months salary is the same that appeared in the letter of termination as being in lieu of notice. There has been no mention in the order of assessment regarding the terminal dues stipulated in the letter of termination of service. Those dues must be paid to the appellant in full as stipulated less any outstanding debts the appellant may have had with the respondent. I doubt very much if the three months pay the Chairperson referred to was the notice pay. I have a conviction that it is not notice pay but merely a formula she used to get a just and equitable compensation over and above the dues stated in the Letter of November 19, 1999. It is with that understanding that I would let the award made by the lower court in its assessment order to stand.

The appellant asked for costs. In this matter from the Industrial Relations Court where costs do not feature I direct that each party pays its own costs.

MADE this …… day of …… in the year of …… at Mzuzu.

R.R. Mzikamanda

J U D G E