



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1225 OF 2006**

BETWEEN:

FELIX CHIMOMBO.....PLAINTIFF

- AND -

UNIVERSAL INDUSTRIES.....DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Chipwanya, of Counsel for the plaintiff

Mr Chikaonda, of Counsel for the defendant

Mr Mchacha – Official Interpreter

ORDER

Manyungwa, J

This is the defendant's application to dismiss the plaintiff's action from this Court and remit the same to the Industrial Relations Court. The application is made pursuant to Section 64 of the Labour Relations Act and also under the inherent jurisdiction of this court. The application is supported by an affidavit sworn by Mr Mwiza Nkhata, of Counsel, on 22nd May, 2006 and also skeleton arguments. The plaintiff, through Mr Chipwanya, of Counsel, opposes the application and has to this effect filed skeleton arguments. I must also mention at the outset that this application first went to Assistant Registrar, His Honour Kishindo, who, correctly in view, declined to assume jurisdiction and ordered that it comes before a judge in Chambers, hence these proceedings before me. On 25th July, 2006, I heard the parties and reserved my ruling on the matter.

The defendant's argument, if the affidavit of Mwiza Jo Nkhata is anything to go by, is that since the plaintiff's claim herein is for compensation for alleged unfair dismissal, then the plaintiff's action is premised on a labour dispute and that therefore this is a matter fit for adjudication by the Industrial Relations Court (IRC) since under Labour Relations Act¹ the Industrial Relations Court has original and primary jurisdiction to hear labour disputes and that it is therefore improper to commence such actions in the High Court. The defendant further contended that the High Court has held on times without number that although the High Court has unlimited original jurisdiction it is the IRC that has jurisdiction over over labour disputes in the country and as such all labour matters must therefore, normally be commenced in the Industrial Relations Court and only brought to the High Court on appeal. On this footing therefore, Mr Chikaonda submitted that it is imperative and proper that that the present action be dismissed from this Registry and be remitted to the Industrial Relations Court with costs.

The plaintiff however opposes the application and Mr Chipwanya for the plaintiff submitted that the High Court having unlimited original jurisdiction the defendant's argument therefore that these proceedings should be dismissed from the High Court does not hold. Counsel further submitted that the defendant's application is misconceived and that there is no such principle or authority that provides that the Industrial Relations Court has what Mr Chikaonda coined as "Primary jurisdiction" over the High Court in labour disputes, and that there is no authority that categorises original jurisdiction as being primary and secondary jurisdiction. Counsel further submitted that the Labour Relations Act does not confer appellate jurisdiction on the High Court and he therefore argued that unless they use express words or there is a clear implication, statutes should not be read so as to take away jurisdiction of superior courts. Mr Chipwanya therefore contended that since the High Court has unlimited original jurisdiction, the jurisdiction to transfer proceedings to the Industrial Relations Court is discretionary which should be exercised judicially. Counsel argued that there must therefore be some ground to move the court to exercise such jurisdiction before it can be exercised, and that it is not enough to merely state that the dispute is labour in nature to warrant the exercise of judicial discretion. The plaintiff therefore prayed that the defendant's application be dismissed with costs and that the matter be allowed to proceed in this Registry.

THE LAW:

¹ Labour Relations Act, Number 16 of 1996

The jurisdiction of the High Court is provided for under Section 108 of the Constitution of the Republic of Malawi. The said provision is in the following terms:-

- S108(1) “There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.
- (2) The High Court shall have original jurisdiction to review any law and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

Section 110 of the Constitution establishes Subordinate Courts which include the Industrial Relations Court as follows:-

- S110(1) “There shall be such courts, subordinate to the High Court, as may be prescribed by an Act of Parliament which shall be presided over by professional magistrates and lay magistrates
- (2) 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 such composition and procedure as may be specified in an Act of Parliament”

Further Section 64 of the Labour Relations Act provides:

- S64 “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.”
- 65(1) “Subject to subsection (2) decisions of the Industrial Relations Court shall be final and binding
- (2) A decision of the Industrial Relations Court may be appealed to the High Court.”

It has been argued based on the above cited provisions that there is currently division in the decisions from High Court regarding the unlimited original jurisdiction of the High Court and the original jurisdiction of the Industrial Relations Court over labour related matters and other issues relating to employment. In ***Harry Bakasi V Sugar Corporation of Malawi***¹ Chipeta J Said

“Before getting further I need to mention that we have so far, in this court not yet adopted a uniform approach regarding the question of joint primary jurisdiction over labour related disputes between this court and the Industrial Relations Courts. There are cases where the issues have not been raised or considered and matters have been heard and disposed of in this court. There are also however cases where the issue of this competing jurisdiction has arisen and been debated and this court has at times gone to the extent of dismissing originating summons and directing that such matters start afresh in the Industrial Relation Court.

In ***Paul Chimenya V Old Mutual Life Assurance Company (MW) Limited***² the court also made similar observations. I must state however, with the greatest respect, that I do not find justifiable reason for this divergence of opinion on the matter. Whilst it is undoubted and agreed that this court has unlimited original jurisdiction as conferred on it by Section 108 (1) of the Republican Constitution in both criminal and civil proceedings and any other law, the Industrial Relations Court was, in my view, specifically created to deal with labour related matters and it is therefore sensible, at least in this respect, that labour related matters should first be brought to the Industrial Relations Court before they come to this court. In this scheme of arrangement therefore, the High Court despite having unlimited original jurisdiction would come in as an appellate court and not a court of first instance. This in my humble opinion, is what the framers of the Constitution intended, for they could not provide for a separate and specialised court in the name of the Industrial Relations Court having original jurisdiction over labour related matters and such other issues relating to employment when there is already a High Court with unlimited original jurisdiction. Clearly, in my judgement, the Industrial Relations court was deliberately created to be the first port of call. Even if one were to disagree with this reasoning which

¹ ***Harry Bakasi V Sugar Corporation of Malawi*** Civil Number 559 of 2000 (unreported)

² ***Paul Chimenya V Old Mutual Life Assurance CO (MW) Limited*** Civil Cause Number 2259 of 2002 (unreported)

I reckon is not without fault, a practical approach to this dilemma when this court is faced with the issue of competing original jurisdiction of this court and the Industrial Relations Court, would still make the Industrial Relations Court, a court of first instance. As was stated by Unyolo J, as he then was in *Beatrice Mungomo V Brian Mungomo and Others*¹ which was also followed with approval by Kapanda J, in *Armstrong Kamphoni V Malawi Telecommunications*²

“Next, learned senior counsel contended that this court is competent to hear the petition on the basis of Section 108 of the constitution of the Republic of Malawi which provides that the High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. The Section is very clear and I would agree with learned counsel that with such extensive jurisdiction and powers conferred upon it by the Constitution, which is the Supreme law of the land, the High Court is competent to hear divorce petitions even in cases involving customary marriage as in the present case. It is to be observed, however, that although this is the position, the High Court has to look at the matter from a practical point of view. In my judgement, it would both be inappropriate and wrong for the High Court to proceed to assume jurisdiction over proceedings which fall within the jurisdiction of a subordinate court simply because the High Court has, as we have just seen, unlimited original jurisdiction. Such an approach would create confusion, as parties would be left to their whims to bring proceedings willy – nilly in the High Court or subordinate court as they please ...In short, the High Court should recognise the subordinate courts and decline jurisdiction in matters over which the subordinate courts have jurisdiction .”

As can clearly be seen, this is the most practicable way, in my view, of dealing with the issue of competing jurisdiction between the High Court and the Industrial Relations Court for which, I am fully convinced, is the way to go. And I am not alone in holding that view, my learned brother judges have also held a similar view perhaps with a lot of conviction. In *Lawson Harry Bakasi V Sucoma*³ Chipeta, J recommended that these matters should be transferred to the Industrial Relations Court. In *Liquidator for Import and*

¹ *Beatrice Mungomo V Brian Mungomo* Matrimonial Civil Cause No. 6 of 1996 (unreported)

² *Armstrong Kamphoni V Malawi Telemmunications* Civil Cause No. 12 of 1999

³ *Lawson Harry Bakasi V Sucoma* (supra)

*Export (MW) Ltd V J L Kamkwangwa*¹ Kapanda J refused to make an order for costs stating that each party would pay its own costs after all the Industrial Relations Court would not have made an order for costs. And in *Blantyre Sports Club V R.K. Banda & Mkangula*² Justice Chimasula – Phiri stressed that where the law clearly provides for an institution and procedures to be followed the same must be adhered to. In *Hygten Lemani V Registered Trustees of Development of Malawi Traders Trust (DEMATT)*³ my learned brother Chipeta J was of the opinion that labour related disputed should first be taken before the Industrial Relations Court before being brought to the High Court. See also *Mary Kaunde V MTL* (supra) and *Keith Banda V Finca Malawi*⁴.

In the instant case however, I wish to note that the application to transfer the proceeding to the Industrial Relations Court was only made by the defendant when the plaintiff had applied for summary judgement to be entered against the defendant. Thus in my view, it would be unfair to order that the matter be transferred to the Industrial Relations Court, when the plaintiff has already taken a few steps in prosecuting these proceedings.

In these circumstances, I decline to order that the matter be transferred to the Industrial Relations Court, and instead the proceedings shall be heard in this court. It is so ordered.

I further order that each party pays its own costs.

Pronounced in Chambers at Principal Registry this 18th day of March, 2008.

Joseph S. Manyungwa
JUDGE

¹ *Liquidator for Import & Export (MW) Ltd V Kamkwangwa* Civil Cause 52/2003

² *Blantyre Sports Club V R.K. Banda & Mkangula* Civil Cause No. 61/2003

³ *Hygten Lemani V Registered Trustees of Development of Malawi Traders Trust*

⁴ *Keith Banda V Finca Malawi* Civil Cause No. 3182 of 2001