

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NUMBER 24 OF 2007

[Being Industrial Relations Court Matter No 21 of 2005]

BETWEEN:

URBAN MKANDAWIRE.....APPELLANT

AND

COUNCIL FOR THE UNIVERSITY OF MALAWI.....RESPONDENT

CORAM: THE HON JUSTICE POTANI

Appellant, Present in Person

Mr. N. Mhura, Counsel for the Respondent

Mr. A. Ng'ambi, Court Clerk

### RULING

On May 30, 2014, the appellant took out an *ex parte* summons for leave to appeal out of time. The intended appeal relates to the decision of the Industrial Relations Court made on January 18, 2007. In view of the apparent delay in moving for the appeal, the court ordered the application to be heard *inter partes*.

The court duly convened to deal with the application *inter partes* as ordered. The appellant presented his arguments and submissions and the respondent made its response. When called upon to make his closing reply, the appellant



raised two points on the basis of which he said he was objecting counsel Mhura conducting the case for the respondent. In that regard, the first point raised by the appellant is that at the time he was dismissed by the respondent which dismissal led to the proceedings he brought before the Industrial Relations Court counsel Mhura was legal advisor of the Staff Welfare Committee and the appellant asked him for a legal opinion on the matter. It is therefore the contention of the appellant that Mr. Mhura has fore knowledge of the matter and therefore has an interest in the matter. The second point of objection raised by the appellant is when the matter was before the African Court counsel Mhura was Deputy Chief Secretary to the President/ Government and in that capacity he read all the documents about the case. Again it is the appellant's contention that such being the case counsel Mhura has an interest in the matter hence the objection to his conducting the matter for the respondent.

In responding to the points of objection advanced by the appellant, counsel Mhura, in the first place, noted and rightly so, that the matters raised by the appellant were factual requiring evidence under oath. He then wondered what weight would be accorded to such bare assertions. Having said that counsel conceded that indeed he held the two positions as alleged by the appellant but went on to state that that *per se* is not conclusive that he has an interest in the matter that would lead to the appellant being prejudiced. In elaborating this point, counsel Mhura explained the Staff Welfare Committee was there to protect the interests of staff including the appellant such that the advice he gave in his capacity as legal advisor was for the benefit of the appellant. With regard to the allegations that as Deputy Chief Secretary to the Government he saw all documents regarding the case when it was before the African Court, counsel Mhura asserted that he never saw any document pertaining to the case and did not even know that there was such a matter before that court saying such matters are handled by the Ministry of Justice in collaboration with the Ministry of Foreign Affairs.

What the court must decide on is whether the matters raised by the appellant make out a case sufficient enough for the court to bar counsel Mhura from conducting the case for the respondent.



Right at the outset, the court would wish to register its misgivings that the appellant brought up his points of objection at a very late stage, that is, well after he presented his case and a response thereto made by the respondent. The appropriate time to raise the points of objection would have been before any arguments were presented to the court. The case record shows that it was counsel Kaphale who initially was representing the respondent and counsel Mhura first appeared for the respondent on August 11, 2014. Surely it was at that point when the appellant should have raised his objection. He, however, proceeded to present his arguments and before counsel Mhura responded the matter was adjourned to the next day but on that day it never proceeded. It was later on August 14 when it proceeded. Still there was no objection from the appellant. Accordingly counsel Mhura proceeded to make his response and it was only when called up to make his closing reply that the appellant brought up his points of objection.

It may be argued that since the appellant is appearing without legal representation he might not have appreciated as to what was the appropriate time to raise his objection. Such an argument would not hold as the record of the case, especially the appellant's own affidavits filed in aid of his application for leave to appeal out of time, amply show that the appellant has always insisted to handle the case on his own without legal representation. Even when the court first convened for purposes of hearing the application for leave to appeal out of time on June 27, 2014, the court went its way out to ask the appellant if he needed legal representation. This the court did considering the history of the matter and the apparent complexity the case had graduated into. The appellant therefore only has himself to blame for the delay in raising the points of objection. The inclination of the court is that the delay by the appellant in raising his points of objection is reason enough to dismiss the objection without even considering the merits. In case this is an erroneous stand the court shall still proceed to consider the points of objection.

With regard to the allegation that as Deputy Chief Secretary to the Government he saw all documents regarding the case when it was before the African Court, while not disputing that he held such a position counsel Mhura has vehemently denied seeing the documents relating to the case or even knowing about it. It is trite law on burden of proof that he who alleges must

prove. The appellant in this case has not furnished any proof of such an allegation. That point of objection is therefore unsubstantiated and must accordingly be dismissed.


It admitted by counsel Mhura that he indeed gave legal advice/opinion to the appellant regarding his dismissal by the respondent which dismissal triggered these proceedings. It is the contention of counsel Mhura that the Staff Welfare Committee for which he was legal advisor was there to protect the interests of staff including the appellant such that the advice he gave was for the benefit of the appellant hence there can be no prejudice the appellant would suffer if the continues representing the respondent.

In its endeavours to deal with the matter at hand the court has sought the assistance of The Malawi Law Society Code of Ethics. There is no rule or cannon in the Code that specifically deals with the issue at hand. However, in the court's estimation, it does not augur well and would put the legal profession in bad light for counsel who at some point gave advice or legal opinion to party in a matter to later represent the adverse side/party in the same matter. Such kind of a scenario, in the considered view of the court has the potential of creating unnecessary tension, emotions and even embarrassment in the proceedings.

In the end result, the court would uphold the appellant's object to counsel Mhura conducting the case for the respondent on the ground that he on an earlier occasion gave legal advice/opinion to the appellant on issues relating to the same matter. As the court has indicated earlier, the appellant is squarely to blame for bringing up the objection after almost all arguments on the application for leave to appeal out of time had been presented and heard by the court. It should also be mentioned that the arguments the court has heard are not on the substantive issues relating to the case on which counsel Mhura gave legal advice/opinion. The hearing of the appellant's application shall therefore not start afresh. It is accordingly ordered that counsel Mhura should step aside from further representing the respondent in this matter and that he hands over the matter to other counsel within or without the firm under which the practices.

Unless the appellant give notice to the court and the respondent of his intention to present further submissions in reply to the respondent's response to his application for leave to appeal out of time, the matter stands adjourned for ruling on such an application on a date to be appointed.

Made this day of September 17, 2014, at Blantyre in the Republic of Malawi.



H.S.B. POTANI  
JUDGE