



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 29 OF 2015
(BEING MATTER NO. IRC 133 OF 2014)**



BETWEEN:

MALAWI POSTS CORPORATION APPELLANT

-AND-

FEXTER E. KAMBILIYA RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chakwawa, of Counsel, for the Appellant

Mr. Chirwa, of Counsel, for the Respondent

Ms. Annie Mpasu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The background facts in the present appeal case are of the simplest. On 9th August 2012, the Appellant put up an internal advertisement for the position of a Systems Administrator at Grade 5. The Respondent applied for the position, was shortlisted and attended interviews. On 2nd October 2012, the Respondent received written communication that he was successful in the interviews and he was offered the position. However, the position was down-graded from M5 to M6 without any explanation other than that management had so directed.

The Respondent raised a query in writing through letters dated 28th March 2013 and 3rd February 2014 to which he did not get satisfactory responses. He then brought a case against the Appellant in the Industrial Relations Court (lower court) claiming that he be offered the M5 Grade that he had applied for, that he be paid the arrears that he would have earned if he had been placed in M5 Grade and that he be compensated for unfair labour practices.



In its judgement, the lower court found that the reviewing of the position from M5 Grade to M6 Grade 6 after it had already been advertised amounted to an unfair labour practice. The lower court then ordered the Appellant to pay the Respondent, in arrears, the benefits that he would have enjoyed had he been placed at M5 Grade.

The Appellant is dissatisfied with the whole judgement of the lower court and it has put forward the following six grounds of appeal:

- “1.8.1 The judgment is a nullity for lack of a proper Coram(sic) as the case was decided without panelists the same having raised several factual disputes that the court decided upon;*
- 1.8.2 The court erred in law by holding that reviewing a job position and putting it at a lower grade after it has already been advertised amounts to unfair labour practice;*
- 1.8.3 The court erred in law by treating a job advertisement as an offer for the purposes of creating a contract of employment;*
- 1.8.4 The court erred in law in ignoring the fact that by accepting a lower grade, the Respondent was estopped from challenging the Respondent's decision in offering him a lower grade;*
- 1.8.5 The court's order for the Appellant to pay the Respondent in arrears the benefits the Respondent would have enjoyed had he been placed at Grade 5 was beyond the Court's jurisdiction the same being a remedy akin to an order for specific performance;*
- 1.8.6 The court has no jurisdiction to give equitable remedies and to that effect the court erred in law by ordering that the Respondent should enjoy the benefits attached to Grade 5 as the same is akin to an order for specific performance which is an equitable remedy”*

I wish to deal with the issue of quorum first because if the Appellant's submissions pertaining to this issue are sustained, then it would not be necessary in my view to consider the other grounds of appeal: they would fall off automatically.

The Appellant's first ground of appeal is premised on section 67 of Labour Relations Act (Act). The section is couched in the following terms:

“(1) Subject to subsection (3), a sitting of the Industrial Relations Court shall be constituted by the presence of the Chairperson or the Deputy Chairperson and one member from the employees' panel and one member from the employers' panel, as chosen by the Chairperson.

- (2) *Subject to subsection (3), the decision of a majority of the members in a sitting shall be the decision of the Industrial Relations Court.*
- (3) *Where the dispute involves only a question of law, a sitting of the Industrial Relations Court may be constituted by the presence of the Chairperson or Deputy Chairperson sitting alone.*
- (4) *Every decision, including any dissenting opinion, shall be issued to the parties within twenty-one days of the closing of the final sitting on the matter."*

Counsel Chakwana contended that the matter before the lower court raised several factual disputes that the lower court decided upon. It might not be out of place to set out the relevant part of the Appellant's Skeleton Arguments:

"4.1.1 As we be noticed from the court record, the court below heard evidence to assess and determine some factual issues. The witnesses testified on how the dispute herein arose. By parading witnesses what the court conducted was a full trial. Furthermore, by parading witnesses herein the lower court undoubtedly wanted to isolate facts from mere allegations. That is why its judgment at page 1 paragraph 2 and page 2 paragraph 1 the court summarized the facts as given by the respondent's witness. The facts surrounding advertisement, down grading of the grade of the position, extending offer and acceptance of the lower grade by the Applicant could only be determined by hearing evidence. The dispute herein therefore comprised both legal and factual questions"

Counsel Chakwawa contended that, in so far as the matter raised factual disputes, the case should have been decided with panelists. As the case was decided without panelists, he concluded that the judgment is a nullity for lack of a proper quorum.

To buttress his submission, Counsel Chakwawa cited the cases of **Phiri v. Shire Bus Lines Ltd, (2008) MLLR, 259** and **Gustino v. Auction Holdings Ltd, IRC Matter No. 206 of 2004, Principal Registry, (unreported)**. In **Phiri v. Shire Bus Lines Ltd**, supra, the appellant brought an action in the lower court against the respondent, his former employer. The ground of appeal was that because the decision in the lower court was made by the chairman sitting alone and not by a quorum constituted pursuant to s. 67(1) of the Act, the decision was not a valid reason. In allowing the appeal, the High Court held that the lower court was clearly not quorate as the case involved questions of law and facts and the lower court was, therefore, incompetent to hear and decide on the matter. The decision of the lower court was declared a nullity and of no legal effect. The High Court further held that that the violation of the quorum requirement was in breach of substantial provisions of the law: *"provisions that go to the very root and establishment of the IRC. They could not be wished away in the name of*

achieving substantial justice. To do so would be to allow the IRC to proceed without due regard to the law.”

Gustino v. Auction Holdings Ltd, supra, was cited as authority for the proposition that where there is need for facts to be assessed by hearing evidence then the matter must go for full hearing before the lower court sitting with member panelists.

On his part, Counsel Chirwa contended that the appeal raises only questions of law. The contention was put in the following terms:

“The law is very clear. Where the matter raises only questions of law the Chairperson or Deputy Chairperson can sit alone. The record of the court below is very clear. There is no dispute of the facts. The parties were both agreed on the facts. It is wondered what several issues of fact the appellants is referring to. The first ground of appeal therefore has no merit and has to be dismissed”

I have considered the submissions by both Counsel and I am inclined to agree with Counsel Chakwawa that the matter before the lower court raised questions of both fact and law. In terms of the Minutes of Pre-hearing Conference dated 28th August 2014 (Minutes), the following issues remained in dispute:

- a) *Whether the Respondent was at liberty to down grade the position from M5 to M6.*
- b) *Whether the Respondent told the Applicant that the position had been down graded from M5 to M6.*
- c) *Whether the Applicant was offered the position of M% and thereafter withdrawn.*
- d) *Whether the Applicant was automatically given the position by virtue of attending the interview.” – [Emphasis by underlining supplied]*

According to s.67 of the Act, the only time the Chairperson or the Deputy Chairperson can sit alone is if the decision is on a point of law only. In the present case, I have considered the issues in dispute as agreed by the parties and embodied in the Minutes and it is clear to me that issues in paragraphs b) and c) of the Minutes undoubtedly raise questions of fact. These are issues that have to be determined not just by the Chairperson or the Deputy Chairperson sitting alone but by a quorum constituted pursuant to s. 67(1) of the Act which requires the presence of the Chairperson or his/her Deputy and one member from the employees’ panel and one member from the employers’ panel.

In light of the foregoing and by reason thereof, the appeal succeeds on the ground pertaining to lack of quorum and, accordingly, the matter has to be re-listed for re-hearing before a properly quorate lower court (the Chairperson or the Deputy Chairperson sitting with member panelists) within 60 days from this date.

On costs, the Court would exercise its discretion by ordering each party to bear its own costs incidental to this appeal.

Pronounced in Court this 15th day of July 2016 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE