IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 20 OF 2012

SHOPRITE TRADING LIMITED.....APPELLANTS

AND

JOKINGS CEMENT AND OTHERS.....RESPONDENTS

Coram: Hon. Justice M L Kamwambe
Gondwe of counsel for the Appellants
Mtambo of counsel for the Respondent
Manda....Official Interpreter

JUDGMENT

Kamwambe J

This is an appeal from the decision of the Industrial Relations Court which awarded compensation for unfair dismissal in favour of the employees who were plaintiffs in the lower court proceedings and are now Respondents herein. The Respondents were working as shop managers for the Appellant and were dismissed for selling expired goods. The lower court found that the Appellant had no valid reason for dismissing the Respondents and that the Respondents were not accorded a fair hearing to defend themselves in an impartial environment.

The grounds of appeal are as follows:

1. The lower court erred in holding that the dismissal was unfair by virtue of section 57 of the Employment Act, for want of substantive and procedural fairness and justice.

2. The lower court erred in holding that the Appellant had no satisfactory reason for effecting the termination of the Respondents' employment.

3. The lower court erred in holding that the Respondents were entitled to compensation for unfair dismissal when the Respondents had not claimed for the same in their statement of claim.

4. The lower court erred in awarding the Respondents the lost salaries and benefits from the date of dismissal 11th December, 2004 up to the date of judgment without taking into account the principle of mitigation of loss.

5. The lower court erred by to justify the basis of the award for the Respondent.

6. The decision of the lower court was against the weight of the evidence.

7. The decision of the lower court erred in holding that the Respondents were entitled to compensation when there was no claim for it.

The first issue is whether or not the dismissal was unfair in accordance with section 57 of the Employment Act. I bring out Section 57(1) and (2) as follows:

1. *The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on operational requirements of the undertakings.*

2. *The employment of an employee shall not be terminated for reasons to do with his capacity or conduct before the employee is provided an opportunity to defend himself*

against the allegations made, unless the employer cannot be reasonably expected to provide the opportunity.

An appeal from the Industrial Relations Court to the High Court must be on a point of law and not fact as espoused in Section 65 of the Labour Relations Act. It states as follows:

> *(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 on a question of law or jurisdiction within thirty days of the decision being rendered.*

The Respondents are of the view that consideration at this stage of whether or not valid reasons were accorded justifying the termination is consideration of facts, as such, not eligible to be considered under the above mentioned section. I do agree with this stand. If the issue is that the lower court failed to apply properly the law to the facts I would have no problem with the appellant's approach. Section 57 of the Employment Act should not be complicated. Its plain language should guide us and I believe it is comprehensive enough. Termination will be said to be unfair under this section if no valid reason is given for such termination and that the employee is not accorded the right to be heard in a fair manner. These grounds of dismissal deal with substantive and procedural fairness respectively. They are grounds based on factual evidence as to what prevailed to move the employer to terminate the employee's employment and therefore not amenable to an appeal process in the High Court.

In my analysis of the lower court's record I find that the lower court did not err to find that the Appellant failed to give valid reason for the dismissal. I cannot also comprehend how the Appellant convinced itself that the carton of expired margarine

was bought at the till of the Appellant's shop in the absence of a receipt for it. The one who was supposed to complain about being sold expired product did not appear in court to be questioned where he bought the product if he bought it at all. It is quite coincidence that the guard of the employer came across the carton of the expired margarine in Ndirande and brought it back to the office without details of the buyer or any proper explanation to the satisfaction of the lower court. His actions on the face of it, seem to be suspect. The absence of the invisible and mystical purchaser destroys the foundation under which the respondents could validly be dismissed. Absence of the purchaser even at the time of the office hearing makes the hearing unreliable as the Respondents could not ask him questions. Lastly but not least, even if it has not featured in the lower court's record, one would wonder why all the four Respondents should be dismissed for one carton of expired margarine as if there was evidence of the four to have colluded or connived to sell expired margarine if it was so sold indeed. Simply put, there was no proof of misconduct committed.

Under Section 61 (1) of the Employment Act the burden of proving the reason for the dismissal lies on the employer. It reads:

> *In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to provide the reason for dismissal and if the employer fails to do so, there shall be a conclusive presumption that the dismissal was unfair.* (My underlining)

When this section is read with section 57 we may safely conclude that the parliamentarian was deliberately protecting the employer who is in a weaker bargaining position and that the employer no longer enjoys the liberty to dismiss an employee at his pleasure without consequences. The courts are implored to search for a reason, and for that matter, a valid reason for dismissal which will avoid punishment of paying compensation. (See also **Mahome v Malawi Housing Corporation** Civil Cause No. 3687 of 2000).

Let me take advantage of stating that any principle of common law that contradicts statute law, like the Employment Act, is ineffective to the extent of its departure. The Parliamentarian made various statute laws related to employment deliberately to suppress some oppressive common law practices. It was clearly stated in **Norton Tool Co. Ltd v Tewson** [1973] All ER 183 that the common law rules and authorities on wrongful dismissal were irrelevant in relation to unfair dismissal which was an entirely new cause of action created by the 1971 Act. To rely on common law in certain instances as this, would be living in the past and we should refuse to be drawn into the past.

My exposition above clearly covers ground numbers 1, 2 and 6 which is speaking of the lower court's decision being against the weight of evidence.

The court is not satisfied that the Respondent has brought to court points of law to canvass these grounds of appeal, as such, these grounds of appeal fail.

Ground number 3 is whether the lower court erred in awarding compensation when the respondents did not claim it. This ground is akin to ground number 7 and they will be dealt with together. The first port of call is section 63 (1) (c) which is couched in this manner:

> *If the court finds that an employee's complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies,*
>
> *(4) an award of compensation.*

This section on its own is a procedural one as it tells us simple steps to be undertaken in award of compensation. Firstly, there should be a mere complaint of unfair dismissal, followed by the court making a finding in favour of the employee, and lastly, the court to award compensation or any other remedy. This section in

itself is the authority for awarding compensation without even looking at the statement of claim.

Further, section 71 (2) of the Labour Relations Act clearly provides that the Industrial Relations Court shall not be bound by the rules of evidence in civil proceedings. If read together with section 71 (1), you conclude that rules of procedure in the Industrial Relations Court likewise need not follow the rigidity in civil proceedings. The noble purpose for this is to satisfy the needs of informality, economy and dispatch in proceedings of the Industrial Relations Court.

The case of **Kankhwangwa and Others v Liquidator of Import and Export (Mw) Ltd** [2008] MLR 26 came out clear as well that strict rules of pleadings do not apply in the Industrial Court and that it is enough that the defendant appreciates what the plaintiff seeks from that court.

In conclusion on this matter, since substantial justice should be seen to be done in industrial disputes without undue regard to technicalities, this ground also fails accordingly.

Ground of appeal number 4 is whether the lower court erred in awarding the Respondents the lost salaries and benefits from the date of dismissal 11 December, 2004 up to the date of judgment without taking into account the principle of mitigation of loss. Section 63 (4) of the Employment Act states thus:

> *"An award of compensation shall be such amount as the court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer*

and the extent, if any, to which the employee caused or contributed to the dismissal."

The lower court was on the right footing by getting evidence of how the Respondents struggled to get other employment and how they lived their lives thereafter. The 1st Respondent became employed and received a salary of K13,567.00 whereas at the Appellant paid him K48,000.00 plus K16,000.00 car allowance. The loss here was obviously mitigated and the lower court should have considered it. Mitigation of loss is a sound and acceptable principle which a court of law should not ignore on assessment of compensation.

On ground number 5 about the lower court failing to justify the basis of the award, I would think that the very section 63 (1) is the basis of awarding compensation, that is, upon making a finding of unfair dismissal and no more. However, the lower court has a duty to show or to justify how it arrived at the compensation figure by referring to heads of compensation. This applies both at common law and to statute law so that there is meaning to the compensation figure and avoid lazy courts just plucking a figure in the air. This would be unacceptable. The question is what heads do we consider when computing compensation in unfair dismissal cases? I have found the case of **Norton Tool Co. Ltd v Tewson** [1973] 1 All ER 183 in which Sir John Donaldson instructively held that the employee's loss fell to be considered under the following heads:

a) his immediate loss of wages,

b) the manner of his dismissal,

c) his future loss of wages, and

d) his loss of protection in respect of unfair dismissal or dismissal by reason of redundancy.

You may also refer to the case of **Adda International Ltd v Curcio** [1976] 3 All ER 620.I have noted that the lower court did not consider the heads as above but only focused on severance pay,

which of course is payable. I also do not think that notice pay was taken into consideration. The Registrar may wish to consider it alongside accrued annual leave days and daily overtime claim. I therefore refer this matter to the Registrar to re-assess the quantum of compensation for each Respondent.

Pronounced in open Court this 17th day of June, 2016 at Chichiri, Blantyre.

M L Kamwambe
JUDGE