IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL APPEAL NUMBER 103 OF 2015

(Being Matter Number IRC 485/486 of 2012)

BETWEEN:

PREMIUM TAMA TOBACCO LIMITED----------APPELLANT

AND

FRANK MAMBALA AND FOUR OTHERS----------RESPONDENTS

AND

KANENGO TOBACCO PROCESSORS LIMITED---2ND APPELLANT

AND

PATRICK MPHONGOZIDANA AND ANOTHER—6TH APPELLANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Kilembe, for the Appellants

Chembezi, for the Respondents

Itai, Court Interpreter

JUDGMENT

This is an appeal by the appellants against the judgment of the Industrial Relations Court delivered in Lilongwe on 7th November 2014. There are three grounds of appeal namely:

1. That the Honourable Deputy Chairperson erred in law in finding that the appellants were unlawfully dismissed by reason of redundancy.
2. That the Honourable Deputy Chairperson erred in law in finding that the respondent did not discharge its duty to carry out effective consultations.
3. That the Honourable Deputy Chairperson erred in law in declaring that the applicants were entitled to a second car lease.

The appellants also pray for costs of this appeal.

The respondents oppose this appeal. In a nutshell, the respondents say that the Honourable Deputy Chairperson made a proper finding in law in ruling that the applicants were unfairly dismissed and that the respondents did not discharge their duty to carry out effective consultations. That it was also a proper finding that Frank Mambala and Henry Gwazayani were entitled to a second car lease. That the respondents' case should therefore be dismissed and respondents should be condemned in costs of this appeal.

As I have already stated in some of the cases I have decided on appeal, decisions of the Industrial Relations Court are generally arrived at through consensus by the three member panelists. In this case before me, I have noted that the decision of the court was unanimous. It is therefore not appropriate for counsel on appeal to be referring to the decision of the Deputy Chairperson as if she had sat alone. Counsel should be referring to the decision of the Industrial Relations Court or else the two member panelists will feel marginalized and insignificant. The Deputy Chairperson may also feel targeted yet she just delivered a decision of the majority including herself.

It is also imperative to state here that appeals from the Industrial Relations Court to the High Court are only on matters of law or jurisdiction as per section 65(2) of the Labour Relations Act. Before I could therefore proceed with this appeal, I had to first satisfy myself as to whether grounds 1 to 3 fall within the scope of section 65(2) of the Labour Relations Act. In doing that, I have not lost sight of the fact that in employment disputes, there is a very thin line between matters of law and matters of fact. The appellate court has therefore to be extremely vigilant when drawing that line. Having closely looked at the grounds of appeal in this case, I have decided to approach grounds 1 and 2 being the ones which really raise

matters of law. As for ground 3, it will really depend on the outcome of these other grounds.

This appeal is anchored on the law and I would approach it by first looking at section 57 of the Employment Act. This section has been relied on by the appellants because it showcases the position of the law in Malawi since the coming into force of the employment Act in the year 2000. It also displays the position of the Law in Malawi with regards to the applicability of the International Labour Organisation (ILO) Conventions in particular Convention 158 on Termination of Employment. But both Section 57 and ILO Convention 158 have to be read with section 211(2) of the Constitution of Malawi which deals with the status of International Law such as ILO Conventions herein.

There has been a lot said in this appeal on the evidence of MrYacinto Chikapa, the appellants' Human Resources and Administrative Manager who had given very detailed testimony with regards to the processes that were followed by the appellants before terminating the employment of the respondents based on operational requirements in particular, financial reasons. There has also been a lot said by both sides as to whether the three expatriates employed after the termination of the respondents' employment were engaged by the appellants or their regional office. I however found all this effort on these issues as a futile exercise in as far as this appeal is concerned. All these were factual issues and the findings of the Industrial Relations Court on these matters are final. It is thus against the spirit of section 65(2) of the Labour Relations Act to reopen these issues on appeal. I have therefore completely divorced my mind towards these issues. My focus shall therefore only be on the law and the law only. In looking at the position of the law as it stands, I have been greatly assisted by the case of ***First Merchant Bank Limited and Eisenhower Mkaka and 13 Others*** MSCA Civil Appeal No 53 of 2013. This landmark case has changed the legal landscape in the field of termination of employment based on operational reasons.

Going through the decision of the Industrial Relations Court, it is clear that the lower court found that the appellants did not discharge their duty to carry out effective consultations. The appellant did not provide adequate opportunity for feedback from its staff and the criteria that was used to identify positions that will be affected was not communicated to the respondents. The court also found that

immediately after the respondents were retrenched three people were appointed Alex Mackay, Steve Bragg and Michal Maloney. The court further found that Premium Tobacco Africa Holdings Limited, Premium TAMA Tobacco Limited and Kanengo Tobacco Processors Limited are all related companies. The court was of the view that these appointments did not reconcile well with the issue that the company was experiencing financial difficulties looking at the period redundancies on 16th August 2012 and appointment on 25th September 2012. Let me hasten to say that the foregoing findings by the Industrial Relations Court are all based on matters of fact. Thus this court will therefore not attempt to unpack them as the decision on these matters are final since the issues were based on factual situations. The only point of interest by this court is whether as per our employment law, the appellants were under duty to consult the respondents before terminating their employment. In order to come up with a well informed decision, this will require me to further interrogate the position of the law in Malawi taking into account the decision of the Malawi Supreme Court of Appeal in the ***FMB Limited and Mkaka and Others*** case.

It is settled as trite law that section 57 of the Employment Act 2000 deals with termination of employment. It is thus plain from the reading of section 57 that whereas a valid reason for termination of employment is required in every instance of termination, when it comes to the obligation to extend an opportunity to be heard, this does not cover the situation of a termination based on operational requirements.

Let me confess here that before the decision of the MSCA in the ***FMB Limited and Eisenhower Mkaka and Others*** case, the courts in Malawi had taken the view that although section 57 of the Employment Act is silent when it comes to termination on operational requirements, ILO Convention 158 on termination of employment has always come in aid to fill the gap since this convention was ratified by Malawi in October 1986. Thus employers have always been held liable for unfair termination where they did not consult their employees. The ***Mkaka*** case has however put the law on the right perspective that as a matter of law in a ***genuine*** case of retrenchment based on operational requirements the employer in this case the appellants would have no obligation to consult the employees (respondents), or to otherwise accord them a right to be heard when terminating their employment.

My understanding of the decision in the ***Mkaka*** case is that the position of the law is applicable where there is ***genuine*** retrenchment. In other words, there should be valid reasons for the termination of the employment.

Having heard the evidence in this case, the Industrial Relations Court came to a conclusion that the appointment of the three expatriates immediately after retrenching the respondents did not reconcile well with the issue that the appellants were experiencing financial difficulties. In other words, the Industrial Relations Court had doubted the genuineness of the reasons for retrenching the respondents. I would therefore agree with counsel for the respondents here that the **Mkaka** case does not apply to this case whole sale since there were no genuine reasons for retrenching the respondents.Therefore although I do respect and feel bound by the decision of the MSCA in the ***Mkaka*** case, but the present case can be distinguished on the basis that the appellants did not have a genuine reason for retrenching the respondents as found by the lower court, which decision is final as it is based on factual findings of the lower court.

This appeal is therefore dismissed. Each party to meet its own costs.

DELIVERED THIS DAY OF JULY 2016 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE