MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NO. 24 OF 2012

(Being IRC Matter No. 449 of 2011)

BETWEEN:

SHIFA MEDICAL SERVICES ……..……..APPELLANTS

AND

THOMAS MWALA AND OTHERS……RESPONDENTS

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Chokotho, Counsel for the Appellants

Mr. Tandwe, Counsel for the Respondents

Mr. Mathanda, Court clerk

JUDGMENT

This is an appeal against the finding of the Industrial Relations Court [IRC] that the respondents were unfairly dismissed and the award of compensation/damages made in that respect.

The appellants are former employers of the respondents. Following the termination of the employment, the respondents lodged a complaint before the IRC. The IRC, through summary judgement process, found that the termination of the respondents' employment by the appellants amounted to unfair dismissal. Subsequently it proceeded to conduct an assessment of the compensation payable to the respondents and arrived at a total compensation award of K27, 651, 281.45.

As regards the finding of unfair dismissal, the appeal is premised on 5 grounds fashioned as follows:

1. ***The learned Deputy Chairperson of the IRC erred in law in determining the matter on an issue that was not pleaded by the parties namely whether an employer can terminate employees' contracts of employment on the basis of operational requirement by merely giving them notice.***
2. ***The Honourable Deputy Chairperson erred in holding that there were no consultations made before the Applicants' employment contracts were terminated.***
3. ***The Honourable Deputy Chairperson erred in disregarding the fact that there was never any proper service of the court process on the 2nd appellant.***

4. ***The Honourable Chairperson erred in determining the matter on a point of law when the matter raised serious factual disputes necessitating trial***
5. ***The Honourable Deputy Chairperson erred in holding in the circumstances that the respondents were unfairly dismissed.***

With respect to the award of compensation, there are 3 grounds of appeal viz:

1. ***The Honourable Court erred in law by failing to subject the awards of compensation to tax and as such over-compensated the Applicants.***
2. ***The Honourable Court erred in law by making awards of compensation up to the date of judgement and thus disregarding that the respective dates of expiry of contracts for the applicants.***
3. ***The Honourable Court erred in making awards to the Applicants that were excessive in the respective circumstances.***

At the hearing of the appeal, counsel on both sides proposed and the court agreed, that the determination of the appeal should proceed on the basis of the written submissions that were filed and that the parties be allowed to file further supplementary written submissions which they subsequently did. In that regard, what the court has are initial skeleton arguments filed by the parties on September 1, 2015, by the appellants and on September 2, 2015, by the respondents, supplementary skeleton arguments filed by the appellants on September 4, 2015, and

a response thereto filed on September 8, 2015. Further there are supplementary submissions by the appellants filed on June 1, 2017 and a response thereto filed on June 13, 2017.

It should be stated at the outset that the appeal against the compensation award is made in the alternative and this comes out clearly in the appellants' skeleton arguments filed on September 4, 2015, in paragraph 3 under the heading ***Excessive Compensation awards*** where the appellants state as follows:

Our arguments under this head are in the alternative, and without prejudice to the earlier argument that judgement should not have been entered on a point of law only in the unlikely event that the court upholds the judgement that was entered on point of law.

In the light of the above, it is only logical that this court should first consider the appeal against the finding of unfair dismissal and only move on to consider the appeal against the compensation awards should the finding on unfair dismissal be upheld. As mentioned earlier, there are 5 grounds of appeal as reproduced above on the finding of unfair dismissal. At this juncture, the court would be quick to observe that ground 5 of appeal is really what might be called an upshot of the 4 other grounds. It is not a standalone ground of appeal, so speak. Therefore in the determination of the appeal, the court will mainly focus on the first 4 grounds of appeal.

In pursuing ground 1 of the appeal, the contention of the appellants is that the issue whether an employer can terminate employees' contracts of employment on the basis of operational requirement by merely giving them notice on the basis of which the court arrived its finding that the respondents were unfairly dismissed was not before the court as it was not pleaded. It is the submission of the appellants that the pleadings herein show that the parties never pleaded on the issue regarding termination of employment on the basis of operational requirement by merely giving notice. Relying on a number of cases, among them **Dudha v North End Motors** 11 MLR 425 and **Tomlison v the London, Midland and Scottish Railway Company** [1944] All E.R. 537 counsel for the appellants has submitted that the position of the law is that the court cannot give judgement upon matters that are not pleaded as such the IRC in this case erred in giving judgement on the basis of a matter not pleaded.

The respondents do not agree that the issue whether an employer can terminate employees' contracts of employment on the basis of operational requirement by merely giving them notice was not pleaded by the parties. The respondents insist that it was pleaded and have drawn the court's attention to paragraph 5.4 of IRC Form 1 and the appellants defence attached to IRC Form 2 which according to the respondents show that the issue was raised or pleaded in the respondents claim and the appellants responded or pleaded back.

It has further been argued for the respondents that even if the matter was not pleaded, the IRC cannot be faulted for dealing with it in view of the provisions of section 71[1] of the Labour Relations Act and the decision on **Chirimba Garments Ltd v Nyaika** High Court Principal Registry Civil Appeal No. 58 of 2003 the import of which is that the procedure in the IRC is flexible and relaxed and not as rigorous and strict as in the ordinary courts. Counsel for the respondents has also drawn the attention of the court to Rule 25 [1] [k] of the Industrial Relations Court [Procedure] Rules which is as follows:

.....the Court may on application or of its own motion at any time—set aside any irregular step which has been taken by another party unless the party complaining of the irregular step has with knowledge of the irregularity taken any further step in the proceedings

It the submission of counsel that even if the issue at hand was not pleaded, the appellants took a further took a further step by filing affidavits and presenting arguments on the application for disposal of case on a point of law without complaining on the alleged want of pleading on the issue as such they cannot be heard to complain over alleged lack of pleading.

The court has taken time to look at and consider the pleadings the parties place before the IRC in the quest to resolve the contentious the issue whether an employer can terminate employees' contracts of employment on the basis of operational requirement by merely giving them notice was pleaded. In that regard the court has

given particular attention to paragraph 5.4 of the respondents IRC Form 1 in which the respondents pleaded as follows:

Prior to such dismissal, the 1st respondent issued a circular in which they justified the termination of the applicants' employment contracts on the basis of alleged operational requirements of an undertaking without following the required procedure in such circumstances. [Emphasis supplied]

In the court's considered estimation, the above averment by the respondents, especially the part the court has noted with emphasis, had raised the issue and indeed the appellants were put on the alert to it and that is why in the defence attached to IRC Form 2 in paragraphs 11 and 12 plead back by stating that the applicants [respondents] were informed of the operational insufficiency, given notice and paid accrued leave days. This response by the appellant cannot be anything but a bid to dispute that they did not follow procedure as alleged by the respondents. [Emphasis supplied] It is therefore the finding of this court that on the pleadings placed before the IRC, the question whether an employer can terminate employees' contracts of employment on the basis of operational requirement by merely giving them notice was pleaded as the IRC cannot be faulted for assuming jurisdiction over and making a determination on it. The court would also hasten to say that even if the issue had not been pleaded, in the spirit of section 71 of the Labour Relations Act, the case of **Chirimba Garments Ltd v Nyaika** and Rule 25[1][k] of the Industrial Relations

Court [Procedure] Rules alluded to earlier, the IRC could not be faulted in proceeding to deal with the issue as the appellants were able to file affidavits and present arguments on the application for disposal of case on a point of law without complaining on the alleged want of pleading on the issue. Surely if the appellants had cause to complain on the alleged want of pleading that was the opportune time to raise objections. In the end result ground 1 of the appeal is dismissed.

As the court moves on to consider the other grounds of appeal, the approach would be to first consider ground 3 and then deal with grounds 2 and 4 together as they appear to be closed linked. With regard to ground 3 of the appeal, this court is left wondering what the appellants seek to achieve by advancing such a ground. In so far as the court can discern, the 2nd appellant referred to in the ground of appeal is GMC Hospital & Research Centre who happened to have been the 2nd respondent in the proceedings before the IRC. The Notice of Appeal filed herein is only by the 1st respondent in the IRC being Shifa Medical Services. Why would then the appellants Shifa Medical Services want to complain about lack of proper service on GMC Hospital & Research Centre who have not appealed and is not a party to the appeal. The court would also wish to observe that in some documents filed by the the appellants in this appeal, GMC Hospital and Research Center is described as 2nd respondent. This only makes the court to be more inclined to the view that ground 3 of the appeal is misplaced. It must fall by the wayside.

As hinted earlier, in the considered the estimation of the court, grounds 2 and 3 are closed linked. This is the view of the court because the decision of the IRC complained of in ground 2 was arrived at through a summary judgement process that is only appropriate in cases where there is no serious dispute of facts and in ground 4, the appellants contend that the summary judgement process was not appropriate as the matter raised serious factual disputes necessitating a trial. The decision by the IRC complained of in ground 2 of appeal was that there were no consultations made before the applicants' [respondents in this appeal] employment contracts were terminated. Counsel for the respondents has drawn the attention of the court to the case of **Airtel Malawi Limited v Edward Komiha and 37 Others** MSCA Civil Appeal Cause No. 59 of 2013 in which what constitutes consultation was discussed as follows:

> ***It is our opinion therefore, in the circumstances, that the Judge should have equally directed his mind to the second limb of what amounts to consultation. We have in mind the case of Dr. Bakili Muluzi and Another v the state and Another [2008] MLR 68 wherein Potani J cited the case of Fletcher v Minister of Town and Country Planning [1947] 2 All E.R. 596 at page 500 where Morris J said.***
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> ***"The word consultation is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of determination. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. […] If a complaint is made of failure to consult, it will be for the court to examine***

the facts and the circumstances of the case and decided whether consultation was in fact held"

Potani j, also cited the case of Re Hanoman (Carl) [1999] 65 WLR 157, wherein the court said:

" However, modern trends indicate that the consultation process embraces more than just affording an opportunity to express views and receive advise. It involves meaningful participation and overall fairness and although it inevitably involves the exercise of discretion, inherent in that discretion is the obligation to act fairly and reasonably within the boundaries of the statute authorizing the exercise of discretion".

What can easily be extracted from the above quote is that whether or not there has been consultations depends on the facts of the case. What this means is that for a court to determine whether or not there was consultation, it must have all the relevant facts before it. In the present, the appellants contend that the court did not have all the relevant facts in that it proceeded to deal with the question on consultations through a summary process yet there are disputes. The respondents have counter argued that there were no factual disputes in the case as per the finding of the IRC itself when it said:

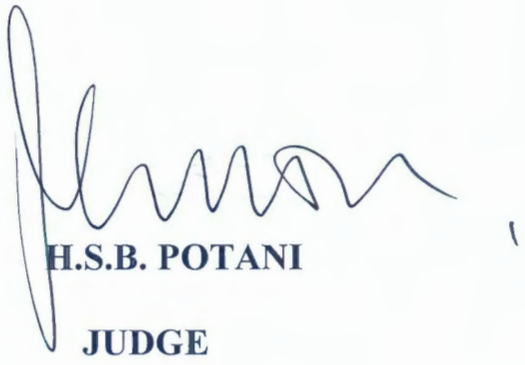
However, it seems to me that these issues are not quite relevant. In other words, those facts are hardly in dispute. It is quite clear that there were dismissals, or terminations, or redundancies whichever word one prefers to use. It is also, in my view, not contentious that there were operational requirements necessitating the course that the respondent took. At least there is no query raised on that issues. The issue is whether there were consultations.

It is the submission of counsel for the respondent that the court found that the issue "whether there were consultations" did not involve serious factual dispute to resolve. This submission, with respect, does not seem to be backed up by just quoted *dictum.* From its reading, the understanding of this court is that what the IRC found not to have factual dispute was the fact that there were terminations and that they were necessitated by operational requirements. The *dictum* does not state that there were no factual disputes on whether or not there were consultations. As against this, the appellants contend that there was need for the court to hear evidence in order to ascertain, among tohers, whether the circular the appellants issued in relation to the matter and the report they made to the Ministry of Labour, through the Blantyre District Labour Office amounted to consultations. It is the considered view of this court that the question whether or not there have been consultations being one depending on the facts of the case, the IRC in his case should have treaded carefully and conducted a trial to establish whether or not there were consultations more so in the light of the circular the appellants issued, the verbal discussions which the appellants allege had engaged respondents in and the involvement of the Ministry of Labour. In the end result this court would find and hold that the case ought not to have been disposed of through the summary process of disposal of case on a point of law and therefore to this extent the appeal should succeed. The effective

consequential remedial order in the circumstances is to refer back the matter to the IRC with a direction that it should conduct a trial with 60 days hereof.

On costs, within the spirit of section 72 of the Labour Relations Ac,t no order is made as to costs.

Made in Chambers this day of November 3, 2017, at Blantyre in the Republic of Malawi.



H.S.B. POTANI

JUDGE