



IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
LILONGWE DISTRICT REGISTRY  
CIVIL CASE NUMBER 425 OF 2013

BETWEEN:

STONARD CHAPULUMUKA..... PLAINTIFF

-AND-

LIMBE LEAF TOBACCO COMPANY LIMITED..... DEFENDANT

---

CORAM: Honourable Justice Dr. C.J. Kachale, Judge

*Nkhono*, of Counsel for the Plaintiff

*Baza*, of Counsel for the Defendant

*Namagonya*, Court Reporter

*Choso*, Court Clerk/ Official Interpreter

---

**JUDGMENT**

On 8<sup>th</sup> March 2011 *Stonard Chapulumuka* who was then working as a Wages Clerk at Limbe Leaf Tobacco Company Limited (Limbe Leaf) was arrested by Kanengo Police Station on allegations of theft by servant. The following day he was released from custody on Police Bail. *Stonard* was subsequently charged before the Mkukula Magistrate Court alongside his colleague *Danny Lefani* (another Wages Clerk at Limbe Leaf); on 7<sup>th</sup> October 2011 the magistrate court acquitted *Stonard* and convicted *Danny* for the theft by servant charges.

Prior to the conclusion of his criminal trial, *Stonard Chapulumuka* had been summarily dismissed by Limbe Leaf effective from 11<sup>th</sup> April 2011 (after a disciplinary hearing arising from his conduct in the course of the audit investigation into the incident that resulted in the theft of over K100, 000 from the company). Following his acquittal by the court *Stonard* wrote Limbe Leaf to

claim reparations but was unsuccessful. He has brought the present action to claim damages for false imprisonment, defamation, malicious prosecution and unlawful dismissal.

*Stonard Chapulumuka* gave evidence in support of his claim and called no other witnesses. *Stonard* informed the court that he was suspended on 1<sup>st</sup> March 2011, pending audit investigations into a salary overpayment made to a seasonal worker. *Stonard* was later summoned to the office by the administration on 8<sup>th</sup> March 2011 with his colleague *Mr Lefani* to clarify on the anomalous payment. *Stonard* explained that he was responsible for processing the permanent staff payroll; his colleague, *Mr Lefani* handled the payroll for seasonal staff members. The irregular payment occurred in the temporary staff payroll. After questioning them, *Mr Lewanika* (the Audit Manager) placed a call to the Police, informing them of the said matter. Thereafter, on the instructions of *Mr Lewanika*, the plaintiff and *Mr Lefani* were escorted by Security Officers from The Administration Block; later on the Police came to fetch from there to the Kanengo Police Station.

*Stonard Chapulumuka* remained in custody from the 8<sup>th</sup> March 2011 to 9<sup>th</sup> March 2011 when he was released on police bail pending his trial. *Stonard* was thereafter summoned to a Disciplinary Hearing at Limbe Leaf premises which resulted in a summary dismissal. The plaintiff explained that he was given 7 days to appeal to the decision of the Disciplinary Board; however his appeal was unsuccessful. Documents from those proceedings were produced in evidence in the present action. *Stonard's* trial for theft by servant commenced on the 25<sup>th</sup> July 2011 and at the end he was acquitted by the trial magistrate.

At page 14 of the judgment transcript the magistrate made the following findings (among others):

"The evidence of PW2 [*Stonard Frackson*] is so clear that he drew the cash of overpayments and surrendered it to accounts office in the presence of both 1<sup>st</sup> and 2<sup>nd</sup> accused persons and the two did not refute receiving the money...."

Limbe Leaf also called in one witness in defence of the present action, *Mr Oliver Brightson Joseph Kalilani*, their Human Resource Manager (Operations). *Mr Kalilani* informed the court that *Mr Lewanika* is the Audit Manager for Limbe Leaf where the issue of salary overpayment was reported to the Audit Department. Furthermore, *Mr Lewanika* was responsible for the investigation

of the matter which confirmed the anomaly on the payroll. The Audit Report to that effect was produced in evidence by *Mr Kalilani*.

In cross examination *Mr Kalilani* informed the court that he was aware that the plaintiff was arrested by the Police on the 8<sup>th</sup> March 2011, following the above routine audit conducted in the Wages Department covering the period of April 2010 to December 2010. However *Mr Kalilani* denied that he was present at the time *Mr Lewanika* lodged/placed a call to the Police concerning the matter. He further told the court that the Audit Report was submitted to the Police. For the company Disciplinary Hearing *Mr Kalilani* explained that he charged the Plaintiff with other misconduct (as opposed to the actual theft) but his colleague, *Mr Lefani* was charged with theft.

*Mr Kalilani* confirmed that *Stonard Chapulumuka* was summoned for a Disciplinary Hearing scheduled for the 11<sup>th</sup> March; the Audit Report was never made available to the Plaintiff due to company policy. *Mr Kalilani* further explained in court that the overpaid employee *Mr Frackson* did not testify at the Disciplinary Hearing. Furthermore, *Mr Kalilani* testified that *Mr Lefani* was indeed the plaintiff's colleague who had confirmed in the presence of *Mr Lewanika* that he was the one who was responsible for the missing funds.

After conclusion of the hearing both parties elected to make written submissions; my court wishes to register its appreciation for the elaborate arguments presented through those write-ups. For the present decision it might not be possible to recite those discussions in detail; however the pertinent aspects of those submissions will be invoked in the course of determining the critical issues herein. In that vein this court has to determine whether the defendant is liable for the following:

- i. Unfair dismissal
- ii. False imprisonment
- iii. Malicious prosecution
- iv. Defamation

Additionally it will be necessary to decide whether the Defendant should be condemned to pay

- v. Exemplary damages
- vi. And costs of this action

## Was the plaintiff's dismissal unfair/unlawful?

The Employment Act does not define the term 'dismissal'; however it would ordinarily describe the cessation of an employment relationship by reason of the employer terminating the relationship without the consent of the employee. In such a scenario the employer would be liable for unlawful dismissal if he did not provide a valid reason for dismissing the employee or if the employer failed to follow the right procedure before effecting the dismissal. Section 59 of the Employment Act entitles an employer to terminate an employee's contract without notice or less notice than which the employee is entitled to according to statutory law ('summary dismissal').

The following grounds are provided as justification for a summary dismissal:

- a) where an employee is guilty of serious misconduct inconsistent with the fulfilment of the expressed or implied conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship;
- b) habitual or substantial neglect of his duties;
- c) lack of skill that the employee expressly or by implication holds himself to possess;
- d) wilful disobedience to lawful orders given by the employer; or
- e) Absence from work without permission of the employer and without reasonable excuse.

On the facts *Stonard Chapulumuka* was summarily dismissed from his employment by Limbe Leaf on 11<sup>th</sup> April 2011. Through written correspondence to *Stonard Chapulumuka* Limbe Leaf provided the reasons for his termination as:

- a) Dishonesty or disloyalty.
- b) False statements made by an employee in the course of employment.
- c) False evidence or intentional submission of wrong or misleading information verbally or in writing or the refusal to submit evidence in an investigation pertaining to matters of the employer.

From the above it can be said the reasons provided were in relation to the plaintiff's conduct during the course of his employment. The relevant statute does not exhaustively lay down what amounts to misconduct and the extent of

such misconduct. However in the case of **Wasili-v-Clan Transport Ltd Civil Cause No. 506 of 1981 (unreported)**, the court defined misconduct thus:

“It has been said time and again by the court that there is no fixed rule of law setting out the degree of misconduct which will justify dismissal. The general rule is that anything which is incompatible with the due or faithful discharge of his duty to his employer, the employer is justified in dismissing him, even though the incompatible thing is done outside the service.”

In the present case, *Mr Chapulumuka*’s nature of work required a high degree of trust. A reasonable man would expect the plaintiff to carry out his fiduciary duty and perform his duties to the best interests of the company. Any conduct incompatible with the faithful discharge of his employment to his employer is justification for dismissal. The plaintiff was expected to provide and submit useful evidence during an investigation pertaining matters of the employer. Despite his suggestion to the contrary even the trial magistrate (as quoted earlier in this decision) found that *Mr Chapulumuka* was at the least present when the overpaid employee surrendered the funds to the office.

This court finds as a fact that *Chapulumuka* never challenged the evidence of *Mr Frackson* at his trial in the magistrate court. It would thus be academic to suggest that *Mr Chapulumuka* never had an opportunity to challenge this piece of information which the employer used to find his written response to the audit enquiry as untruthful i.e. he claimed to know nothing at all about the entire transaction. Quite clearly as an employee entrusted with company resources *Mr Chapulumuka* owed a duty of loyalty and honesty in the course of his employment. This is undoubtedly what was expected of him. In **Hauya-v-Cold Storage Co Ltd [1994] MLR 92 (SCA)** the appellant was the Chief Internal Auditor for the respondent. It was discovered that a sum of money received from cash sales had not been banked and the money could not be accounted for. Several members of staff and the appellant were suspected.

The matter was reported to the police and after carrying out investigations, the appellant and two cashiers were arrested, charged and convicted of conspiracy to steal and theft. The appellant on appeal claimed the lower court had erred in his claim on unlawful dismissal. However the Supreme Court of Appeal upheld the decision and stated:

‘An employer is justified in summarily dismissing an employee where the employee conducts himself in a manner that is incompatible with the due and lawful performance of duty; however dismissal or suspension cannot be ante-dated.’

Having considered the evidence presented in the present case, this court is of the firm view that the dismissal of *Stonard Chapulumuka* from Limbe Leaf was justified within the remit of the Employment Act. Not only was there compliance with the due process requirements of a fair hearing, but the substantive reasons given for the decision to dismiss were quite sound. Thus Limbe Leaf cannot be held liable for wrongful or unlawful dismissal.

### **Is the defendant liable for false Imprisonment and malicious prosecution?**

As regards the claim for false imprisonment, the general rule is that any restraint, upon the personal liberty, not warranted by law is false imprisonment, see for example **Polera-v-Manica Freight Services (Mal) Ltd [1993] 16 (1) MLR**. However, for reasons that will be explained presently, this court is unable to conclude that *Stonard* can sustain such an action in the present circumstances: According to the case of **Iphani-v-Makandi Tea and Coffee Estate [2004] MLR 91**, at 100 'an arrest, if made on reasonable suspicion, is lawful notwithstanding that the suspected offence was not in fact committed'. In the present case the audit exercise carried out by Limbe Leaf internal auditors established that a significant sum of money had been lost through a possible fraudulent manipulation of the pay roll; in essence a Limbe Leaf seasonal worker had been deliberately overpaid and the refunded money never brought on charge by the pertinent Wages Clerk.

The evidence from the overpaid seasonal worker suggested that *Stonard* had played some role in that transaction (i.e. he approached the overpaid employee to advise him to withdraw the funds and surrender them at the Wages Section and had been present when the said money was surrendered). When the alleged theft was reported to the Police, *Stonard* was arrested alongside *Danny Lefani* (who was later convicted of the theft). Thus the acquittal notwithstanding, this court is satisfied that the company had reasonable grounds for suspecting that *Stonard* had been complicit in the fraudulent activities that resulted in the theft of its money. The said seasonal employee testified at *Stonard's* trial and from the criminal trial record the magistrate accepted such testimony as the truth.

This necessarily brings into consideration the question of malicious prosecution: The law states that in order for malicious prosecution to avail a

plaintiff of a remedy he must show that he was prosecuted by the defendant, that the prosecution was determined in his favour, that prosecution was without reasonable probable cause and the prosecution was malicious, see the case of **Lapukeni-v-Commercial Bank of Malawi** [1996] MLR 139 (HC). The onus is on the plaintiff to establish these essential elements; if therefore, his case fails to prove one of these elements, it must fail, **Nguza-v-Mzuzu City Council; Nthani-v-City Council** [1995] 1 MLR 161 (HC)

The plaintiff has cited the case of **Mithi and others-v-Reserve Bank of Malawi and another** [2006] 118 to support his case. However a sober reading and application of that decision to the present facts shows that in reality it would not be possible to sustain an allegation of malicious prosecution in these proceedings. In the first place, there is no evidence to show that Limbe Leaf simply gave directions to the Police to bring charges against *Mr Chapulumuka*: the evidence from the lower court record shows that having gathered the evidence the Police decided to prosecute the plaintiff alongside his colleague (*Danny Lefani*).

As earlier noted, there was in existence sufficient grounds to warrant such a decisions; this would distinguish this scenario from the one described in **Manda-v-Ethanol** [1993] 16 (2) MLR 572 where it was determined that malice could be imputed from the mere insistence on prosecution in the absence of any evidence against the plaintiff. Here we have seen that even the trial court found that *Mr Chapulumuka* was at the least present when the excess money was returned. It was quite a warranted prosecution; despite the acquittal the decision to charge him with the theft by servant cannot herein be faulted as being so malicious as to justify this limb of the claim.

### **Is the Defendant liable for Defamation?**

There are a number of authorities on the law on defamation: in **Khomba-v-Smallholder Farmers Fertiliser Revolving Fund** [1999] MLR 129 (HC) defamation was defined as the publication of a statement which tends to lower a person in the estimation of right- thinking members of society generally or

which tends to make them shun or avoid that person. The essentials of defamation generally are that the plaintiff must prove:

- (a) Uttering of defamatory words.
- (b) The words must refer to the plaintiff.
- (c) The words must be maliciously published.

In the present case, the plaintiff claims the following, firstly that the defendant referred to the plaintiff as a thief when he lodged/placed a call to the police which amounts to defamation and secondly, he was paraded from the administration block to the guard house on the other side of the defendants premises with a security escort which also amounts to defamation by conduct.

In order to succeed in defamation one must call admissible evidence to establish the essential elements of the tort. In these proceedings, *Stonard Chapulumuka* was the sole witness for his case. Furthermore during cross examination by the defence, the plaintiff failed to call in evidence of defamation. A case example of this can be seen in the case of **Khomba-v-Smallholder Farmer Fertiliser Revolving Fund [1999] MLR 129 (HC)** wherein the plaintiff was a lone witness and claimed the defendant had uttered words to his supervisors, police and colleagues which amounted to defamation. However in this case none of the people to whom the defamatory words were allegedly uttered came to give evidence; thus there was no proof of any publication of the said claim, as such it that claim should be dismissed as in **Khomba-v-SFFRF (above)**.

As regards defamation by conduct, the case of **Mtila and others-v-Stagecoach Malawi Ltd [1997] 1 MLR 97 (HC)** states conduct can amount to defamation. The question at issue is whether the plaintiff's claim that he was paraded from the Administration Block to the Guard House on the other side of the defendant's premises with a security escort amounts to defamation by conduct? How was the plaintiff (and his colleague) during the said escort/parade? In **Mtila and others v Stagecoach Malawi (above)** *Mtila* and his colleagues were further made to parade around the defendant's premises handcuffed and barefoot on the defendant's orders; they were later taken in a similar state to their homes. It would seem the entire episode was calculated to humiliate and embarrass the claimants; the court found such conduct to amount to defamation by mere conduct.

Whereas in the present case, there is no evidence that shows the plaintiff was barefoot and handcuffed when he was escorted from the Administration Block to the Guard House. Once a report had been made to the Police the steps taken by Limbe Leaf to secure the presence of the plaintiff and his colleague were quite legitimate; given the evidence on hand about the funds which Limbe Leaf had lost due to the conduct of its employees in the wages section it could hardly be reasonable to impugn their conduct in hindsight as being improper. It is important to note that in the present case, the defendant had a duty to report to the police because they had reasonable grounds to suppose that a crime had been committed. For a registered limited company, the duty to report any fraudulent activity is quite onerous.

### **CONCLUSION**

In closing, this court has found that *Mr Stonard Chapulumuka* has failed to prove any of his claims i.e. for unlawful dismissal, false imprisonment, malicious prosecution or defamation. All these claims are hereby dismissed for failure to call adequate or relevant evidence to establish the same.

The present action is therefore dismissed in its entirety with costs.

**Made in open court this 31<sup>st</sup> day of July 2018 at Lilongwe.**

**C.J.Kachale, PhD**  
**JUDGE**