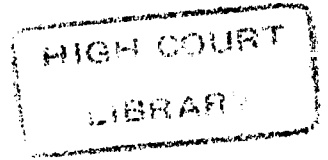




**REPUBLIC OF MALAWI**  
**MALAWI JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL DIVISION**  
**LAND CAUSE NO. 570 OF 2016**



**BETWEEN**

**GREY KANSUNGWI & OTHERS.....APPELLANTS**

**-and-**

**ALLIANCE ONE TOBACCO LIMITED..... RESPONDENT**

**Honourable Mr. Justice D.T.K. Madise**

Mr. Salima Counsel for the Plaintiff

Mr. Njovu Counsel for the Respondents

Mr. Manda Official Court Interpreter

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**Madise, J**

**JUDGEMENT**

## **1.0 Introduction**

1.1 The Appellants commenced two separate proceedings in the Industrial Relations Court to wit matter No. 245 of 2011 Grey Kansungwi and others vs Alliance One Tobacco (MW) Limited. In this matter the Appellants sued for unfair dismissal. In the second matter No. 388 of 2011 Nation Mandlopa and 108 others vs. Alliance one Tobacco (MW) Limited the Appellants demanded pension benefit and annual bonuses.

1.2 Both matters were finally consolidated by an order of court. The matter went for trial in in the Industrial Relations Court and the lower court delivered its judgement on 27 January 2014 dismissing the Appellants action. Being unsatisfied with that decision they now appeal to this court. It is trite law that appeals in the High Court are by way of rehearing of all the evidence, the law applied and the reasons for the decision.

## **2.0 Grounds of Appeal**

- (1) The lower court erred in law in failing to find that the Appellant were unfairly/unlawfully dismissed.
- (2) The lower court below erred in law in failing to find that there was discrimination against the Appellants on the payment of employer's pension contribution.
- (3) The lower court below erred in law in holding that the Respondent withheld the Appellant's pension contribution not on the basis of Clause 7.7 of the pension fund rules or any other rules but it was aimed at offsetting against alleged losses incurred by the Respondent as a result of the strike.
- (4) The lower court below erred in holding that by not electing to enforce claimed 7.7 mentioned above and the pension fund rules the Respondent

had waved their contractual right to use the said rules as justification for refusing to pay employers pension contribution to the Appellant.

### **3.0 Relief Sought in the Appeal**

- (1) That the decision of the lower court be reversed in total.
- (2) The Appellants pray that they be awarded costs of the appeal.

### **4.0 The Brief Facts**

4.1 The Appellants were employed by the Respondent until the year 2011 when they were all summarily dismissed for taking part in an alleged illegal strike on 18 January 2011. The Appellant denied taking part in any strike. After they were dismissed, the appellants were only paid their pension contribution.

4.2 The Respondents' pension contribution was withheld because in the Pension Trust Deed there was a condition which provided that the employer's pension contribution was not payable where an employee was summarily dismissed. From the evidence the Appellants contended that they were not part of the pension trust because they were never involved in its set up and did not receive a copy of the Deed.

4.3 The Appellants told the court below that they were discriminated against as others who had been summarily dismissed before this incident were paid pension contribution from the Respondent. No evidence to substantiate this allegation was produced. However the Respondent did admit that others might have indeed received this contribution. In conclusion the Appellants stated that their dismissal was unfair and unlawful.

4.4 The Respondent stated in response that negotiations to have the permission fund dissolved failed and this led to the downing of tools by the Appellants on 18

January 2011. The Appellants were informed to return to work by 11 am but they refused. The Appellant were then suspended on 19<sup>th</sup> January 2011.

4.5 Before disciplinary hearings could commence the Appellant obtained an injunction from the High Court dated 24 January 2011 stopping the Respondent from holding disciplinary hearings. The injunction was vacated on 18 February 2011. There after disciplinary hearings commenced and 108 employees were dismissed. After they had appealed internally 60 employees remained dismissed.

## **5.0 The Law**

5.1 The burden and standard of proof in civil matters is this. In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities.

5.2 Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other must carry the day. As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

*If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not*

## Section 2 Labour Relations Act

*A Strike is defined as concerted action resulting in a cessation of work, a refusal to work or to continue to work by the employees that is designed to or does limit the production or services.*

## Section 44 Labour Relation Act

*Where the parties fail to reach an agreement within 21 days after reference to the Principal Secretary for labour, and after the employees have given 7 days notice to the employer and the Principal Secretary labour, of the impending strike in accordance with section 46 (3).*

## Section 50 (1) Labour Relations Act

*An Employee who participates in a strike in conformity with the Act has a right to return to his employees after the end of the strike and the employer must within a reasonable period reinstate such employee in the employment that he or she held immediately prior to the strike unless material changes to the employer's operations have resulted in the abolition of such employment.*

## Section 57(1) Employment Act

*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 employees or based on the operational requirement of the undertaking.*

Section 57(2) Employment Act provided the right to be heard or defend oneself against the allegations made unless the employer cannot reasonably be expected to provide the opportunity.

## Section 59 Employment Act

*An employer is entitled to dismiss summarily an employee on the following grounds*

- (a) Serious misconduct inconsistent with the fulfilment of the expresses or implied condition of a contract of employment such that it would be unreasonable to require the employer to continue the employment relationship.*
- (b) Habitual or substantial neglect of duties.*
- (c) Lack of skill the employee expressly or by implications holds ....to possess.*
- (d) .... disobedience of lawful order given by the employer.*
- (e) Absence from work without permission or without reasonable cause.*

## **6.0 The Findings**

6.1 The court below found as a fact that the Appellants and other went on strike on 18 January 2011. The Industrial Relations Court below also found as a fact that the said strike did not confirm with the provisions of the Labour Relation Act and therefore was illegal. The court below found as a fact that the summary dismissal of the Appellants was fair and lawful as it conformed with the Employment Act.

6.2 I have looked at the evidence that was before the lower court and the law. I find nothing wrong with the decision of the court below on these findings of fact. This appeal was ill-conceived. However, I disagree with the Industrial Relations Court on the interpretation of Clause 7.7 of the Trust Deed.

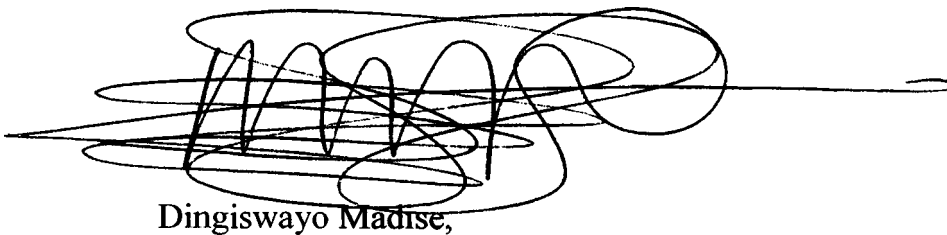
6.3 In my considered view that clause fails to pass the constitutional test of fair labour practices. You cannot pay out every one else who is dismissed except those who are dismissed summarily. This is disinclination of the highest order and can not be allowed to prevail in this Court. Additionally the respondent has admitted

that others who were summarily dismissed received the employer's pension contribution. I now wonder why the Appellants must not benefit.

6.4 I therefore find that clause 7.7 of the Trust Deed is not in tandem with the Constitution on fair labour practices. I therefore order that the Respondent pay out the Employers pension contribution to the Appellants effective when it became due with interest within 14 days.

The rest of the appeal is dismissed. Each party to pay their own costs.

Pronounced in open Court at Blantyre in the Republic on 23<sup>rd</sup> May, 2018.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dingiswayo Madise,

**Judge**