



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL No. 14 OF 2013
(being Industrial Relations Court Matter No. 743 of 2011)

Between:

ESTHER MBEWE
JONAS ALI
AND
ELECTRICITY SUPPLY COMMISSION
OF MALAWI LTD

1st APPELLANT
2nd APPELLANT

RESPONDENT

J U D G M E N T

The two appellants, Esther Mbeve and Jonas Ali, were engaged by Electricity Supply Commission of Malawi Ltd, the respondent, as meter readers for a specified period of two years, running from March 2009 to March 2011. At the end of the contract they were given termination letters and they were free to reapply for work. The appellants, who were desirous of renewing their contracts, bought application forms and reapplied for their positions. The appellants continued to work while they waited for results on whether or not their contracts would be renewed. The meter readers' positions were advertised, successful candidates were shortlisted and interviewed and successful candidates were offered the jobs. The two appellants were not shortlisted, were not interviewed and were not re-engaged as meter readers.

On 24th November, 2011 the appellants filed a statement of claim in the Industrial Relations Court alleging termination of contract of employment before due date for expiry without valid reasons. The relief that they sought was re-engagement or in the alternative compensation for unfair dismissal, being salary for

the remaining months to the end of contract and damages for breach of contract. On 13th December, 2011 the respondent filed a statement of reply denying the appellants' claims and reliefs sought and stating that the appellants had no mandate to work as meter readers for the respondent because their contract was not renewed.

The court of the Deputy Chairperson and panelist heard evidence from the two appellants and in opposition the respondent called two witnesses, a Zone Supervisor and an Assistant Human Resource Officer. The Industrial Relations Court in its judgment of 4th April, 2013 considered the status of the appellants and concluded that there was no second contract and that the appellants took a risk by continuing to work and contributed to their own situation when exhibit marked RP3 was clear that the contracts of the appellants had expired and that advertisements for new contracts would follow. The trial court concluded that the appellants were not employees of the respondent as they were on a fixed term contract which had expired. The lower court also found that since the appellants were paid when they continued to work for a period of 4 months after their contracts expired they were not entitled to any further award or to any compensation.

The appellants without obtaining leave to appeal out of time filed a notice of appeal on 4th July, 2013 appealing against the judgment on the following grounds:

- (1) That having found that the appellants had been made to work for four months into the new contract the same became a month to month contract requiring notice to terminate the same.
- (2) That having found that the appellants were allowed to work for four months in the new contract the court erred not to make a finding that a new fixed contract had been entered into requiring the appellants to serve the full term.
- (3) That in the alternative the appellants having found that the respondent was wrong to ask the appellants to work for four months compensation and damages should have been paid to the appellants for that wrong.
- (4) That the court erred to ignore the appellant's prayer for reinstatement into the new fixed contract having made a finding that the respondent were in the wrong and there being no evidence adduced against the prayer for reinstatement. The appellant seeks the following relief on appeal.
 - (a) That the order of the court be set aside in its entirety.

- (b) An order that the appellant's be re-instated or in the alternative be compensated for unfair dismissal on the grounds that their contracts were terminated before the expiry dates.
- (c) Further or other reliefs as may be just and equitable.

The appellants filed skeleton arguments in support of the appeal case. These arguments are not much different from what they submitted in the subordinate court during the trial. In that they are rely on section 28(3) of the Employment Act to assert that the appellants as meter readers/and or enforcement of payments, were fulfilling on a lasting basis the normal and permanent activity of the respondent of meter reading/enforcement of payments and that their contract should be deemed to be for an unspecified period of time. The appellants assert that the fact that their contracts were not renewed on expiry, they were dismissed without following procedure and no reasons being offered, the dismissal was unlawful and illegal and they are entitled to damages.

The appellants contend that they were employees of the respondents as they were under a contract of employment. It is submitted that the appellants were not part of the statutory exclusions or independent contractors for the reason that the appellants fit the three tests of determining an employee in that they are alleged to have been first under the control of the respondent as to what and what manner they did, secondly they were fully integrated into the employer's organization in that they had identity cards, stationery which identified them with the respondent and that they were paid remuneration and that all the other provisions were consistent with a contract of employment. In support of their arguments the appellants rely on the cases of *Chiwembu and Others v Dairy Board Malawi Ltd* (2008) MLR 145; *Stevenson and Harrison Ltd v Macdonald and Evans* [1952] ITLR 101; *Ready Mixed Concreted Ltd v Minister of Pensions and National Insurance* [1982] 2 QB 497; *Musukwa v Smallholder Farmers Fertilizer Revolving Fund of Malawi*, IRC Matter No. 281 of 2010 and *Wiltshire County Council v NATFHE* (1978) IR LR. The appellants pray that the court finds the respondent liable for their claims and that appropriate damages be awarded.

Apart from failing to attend the appeal hearing the respondent neither filed a response to the notice of appeal response to the notice of appeal nor skeleton arguments. The appeal proceeded as an undefended petition.

The Labour Relations Act gives the High Court appellate jurisdiction over labour matters and decisions of the Industrial Relations court. In terms of section 65(1) of the Labour Relations Act decisions of the Industrial Relations Court are final and binding except where there are still issues to be determined of law and/ or jurisdiction. Sections 65(1) and (2) of the Labour Relation Act provides that the appellate court is restricted to consider the questions of law or jurisdiction which the appeal may raise as the decision of the IRC on matters of fact is final and binding. This position was affirmed by the case of *Magalasi v National Bank of Malawi* [2008] MLLR 45. Therefore when considering the grounds of appeal the court has to be satisfied that it relates to matters of law or jurisdiction: section 65(2) of the Labour Relation Act.

In regard to the first ground of appeal this court agrees with the finding of the Industrial Relations Court that there was no evidence of a new contract which would have bound the parties. The period of four months which they worked after the termination of the two years contract was contrary to contents of exhibit marked RP3, as the respondent had placed in motion a clear recruitment procedure for engaging meter readers which was also known to the appellants. The first ground of appeal lacks merit and is dismissed.

The second ground of appeal is related to the first ground of appeal. This ground of appeal is also dismissed for lack of merits as it has already been pointed out that based on the available evidence the Industrial Relations Court correctly found that the appellants did not sign a second contract but only signed service re-application forms. The appellants' fixed term contract having expired and not renewed the Industrial Relations Court correctly found that the appellants' work for four months did not amount to a new fixed term contract which would have required them to serve a full term.

In regard to ground of appeal number three, this court upholds the decision of the lower court that they are not entitled to compensation for working four months on the grounds that the appellants were paid for this period of work and secondly because the appellants' "contributed to their situation because they knew that their contract had expired, and they knew that they had re-applied and were waiting for result[s]". This ground of appeal was thoroughly addressed by the Industrial Relations Court, it is only proper that this court should dismiss it for lack of merits.

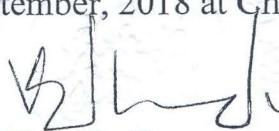
The fourth ground of appeal is also dismissed for being conceptually misconceived. The Industrial Relations Court having correctly made a finding that the appellants were on a fixed term contract, whose terms did not create an employment relationship and that the respondents did not renew that contract upon its expiry it implies that there was no new fixed contract which the appellant can be talking about. Accordingly, in the absence of a new fixed contract or any contract for that matter it is misconceived for the appellants to seek re-instatement. To what position or work would they really be re-instated to if they have not been re-engaged or they are not employees of the respondent?

In summary then, all the four grounds of appeal as well as the reliefs sought are dismissed for lack of merits.

This being a labour matter, the court makes no order as regards to costs.

Any aggrieved party retains the liberty to appeal against this judgment.

Delivered this 7th day of September, 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Mr. Lemuche
Defendant
Mr. Chitatu & Ms. Million

Counsel for the Appellants
Absent / Unrepresented
Court Clerks