**IN THE HIGH COURT OF MALAWI**

MZUZU DISTRICT REGISTRY

CIVIL CAUSE NO. 101 OF 2011

Being IRC matter No. 35 of 2010, Mzuzu Registry

BETWEEN

ELLIAS MPHANDE.....APPELLANT

AND

THE RGISTERED TRUSTEES OF SMALLHOLDER FARMERS FERTILIZER REVOLVING FUND..... DEFENDANT

**CORAM:** **Honourable Justice T.R. Ligowe**

W. Chiwaya, Counsel for the Appellant

L. Mwantisi, Counsel for the Respondent

F. Luwe, Official Interpreter

R. Luhanga, Recording Officer and Court Reporter

## JUDGMENT

Ligowe J,

1 In its judgment on 31st January 2011, the Industrial Relations Court found that the appellant in the present matter had been unfairly dismissed and had to be compensated. His compensation was assessed to be his salary for six months, K270 378. He had also sought notice pay, severance allowance and pension benefits about which the court held:-

> "The applicant also sought notice pay. However the respondent suggests that he already paid the applicant the pay at his dismissal. The claim is therefore not sustainable. The same is the case with pension. The claimant has no justification

to claim pension. On the evidence before us the applicant was paid his contribution at the time of the dismissal. The applicant also sought severance pay. However, on the evidence before us, the applicant worked in the permanent employment for less than a year. Severance pay is not awardable to a person who has worked for less than a year."

2 Dissatisfied with the assessment of compensation by the lower court, the appellant appealed to this court on grounds (as amended at the hearing) that:-

(a) The lower court erred in holding that the appellant had already been given his pension funds and notice pay when this was not the case and there was no evidence before the lower court of such payment.

(b) The learned Deputy Chairperson erred in holding that the appellant would only get six months' salary as compensation disregarding case law that an employee unfairly and unlawfully dismissed be given entitlements for the remainder of his contract (up to the date of his mandatory retirement) as compensation.

(c) The order on assessment was against the law and the weight of evidence.

He seeks that order to be quashed and substituted with another awarding pension, severance allowance, one month notice pay and compensation for unlawful dismissal and costs of the action here and below.

3 In arguing against the appeal counsel for the respondent raised an issue of procedure at the end, which I think I have to say something about at the very beginning. Counsel stated that the appellant did not file the notice of appeal in the Industrial Relations Court as indicated by the fact that the respondent did not have the record of appeal at the time of hearing.

4 It is a second time the issue is raised. The hearing of the appeal failed on 14th May 2014 because the respondent had not been afforded the record of appeal. In his ruling Justice

Kapindu went a long way explaining the procedure of bringing appeals to the High Court from the subordinate courts. The learned Judge found that the appellant was not to blame for failure of service of the record of appeal on the respondent as it is the duty of the Registrar in the High Court. The Procedure is provided for under Order XXXIII of the Subordinate Courts Rules and Order 21 of the Courts (High Court) (Civil Procedure Rules), 2017. I do not need to repeat it. I can only emphasize that the overriding objective of procedural rules is to enable the court deal with matters justly and as promptly as possible. This case has delayed because of failure to adhere to procedure. The rules have to be obeyed all the time.

5 I see no reason to dismiss the appeal on this point however, as it is not the appellant's fault for the respondent to have no copy of the record of appeal and besides, the respondent ably presented itself at the hearing nevertheless.

6 The appellant's argument on the first ground of appeal has not been very clear to this court. In the letter terminating his service with the respondent, dated 29th March 2010, it had been stated among others that he would be paid one month's salary notice pay and pension contributions in accordance with rules governing Old Mutual Pension Scheme. In the skeleton arguments for this appeal, he appears to say that the same were not actually paid as the respondent provided no proof of the payment during trial and on the hearing for the assessment of compensation. On the other hand he appears to say that he was only paid pension for the period he actually worked but it should have been up to his retirement at the age of 60.

7 From the reading of the order appealed against, the payment of these two were among the reliefs he sought. I have read the record of the proceedings at trial and assessment of compensation in the lower court. It is on assessment of compensation that he specifically mentioned of seeking the two payments. He had not explained though that the payments had not actually been made to him despite the commitment in the letter of 29th March

2010. In view of this the Industrial Relations Court cannot be faulted for arriving at the decision.

8 If the argument is that the pension should have been calculated for the period up to his retirement age at 60, it will be dealt with together with the second ground.

9 The appellant bases his argument for the second ground of appeal on the Supreme Court of Appeal decision in *Chawani v. Attorney General* [2008] MLLR 1. The Court held that considering the remarkable success which Dr Chawani had achieved during his career in the civil service and considering the period of time which remained before he attained the age of mandatory retirement, Government could not properly terminate his contract of employment earlier than the time when he would have attained mandatory retirement. He was therefore entitled to damages covering the period between the date of wrongful termination to the date of his mandatory retirement.

10 As submitted by counsel for the respondent the *Chawani case* is actually distinguishable from the present case. In the present case the appellant was 37 years old at the time he was dismissed from his employment and he had only served from December 2009 to March 2010 on permanent basis. No reasonable court can say about him as with Dr Chawani that he achieved remarkable success in his career and he remained with a few years to retirement that his employment could not properly be terminated before attaining mandatory retirement.

11 In any case it is not the principle in *Chawani v. Attorney General* (op cit) that damages for wrongful termination of employment have always to cover the period up to mandatory retirement. The Case of *Chawani v. Attorney General* was decided before the Employment Act, 2000 came into force and the damages were awarded on the basis of common law in the light of section 43 of the Constitution and section 27(1) of the Public Service Act. After analysing relevant case authorities at common law including *Lavarack*

*v. Woods of Colchester Ltd.* [1967] 1 QB 278, *Gunton v. Richmond Borough Council* [1980] WLR 714 and *Hill v. CA Parsons & Co. Ltd* [1972] Ch 305 the court came up with the principle at page 11 that:-

> "As regards the measure of damages, an employee who is wrongfully dismissed gets damages which cover the period which he would have served, if he had been given proper notice."

12 It was after noting a change to the common law position in view of section 43 of the Constitution and section 27(1) of the Public Service Act and the particular circumstances of Dr Chawani that the court awarded him damages for the period up to the point he would attain mandatory retirement.

13 The Industrial Relations Court was therefore right to follow *Kachinjika v. Portland Cement Company* [2008] MLLR 161 and *Kambuwa v. Malawi Institute of Management* [2000-2001] MLR 190 in holding that the compensation needed not cover for the period up to the appellant's mandatory retirement at 60.

14 Under section 63(4) of the Employment Act, 2000, the award of compensation has to be such amount as the court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal. In arriving at six months' salary for compensation, the lower court also considered that the appellant had not mitigated his loss by way of looking for alternative employment. The appellant contends, that was not in order as there was no such consideration in *Chawani v. Attorney General* (op cit) and *Stanbic Bank v. Mtukula* [2008] MLLR 54. With due respect, as earlier noted, it was before the Employment Act, 2000 came into force that the Chawani case was decided. But still, at common law, in measuring damages for wrongful dismissal consideration had to be taken whether the dismissed employee had taken reasonable steps to minimise his

loss, like any innocent party following a breach of contract.[1] The issue in the case of *Stanbic Bank v. Mtukula* was not what to consider when applying section 63(4) of the Employment Act, 2000, but whether the terms "wages" or "pay" in the Act are sufficiently broad to cover allowances and other benefits such as official car allowance, garden allowance, electricity, water and telephone allowances, a night guard and security alarm system.

15 It is actually a settled principle that for the amount of compensation under section 63(4) of the Employment Act, 2000 to be just and equitable the general contractual principles of mitigation have to apply. See *Kachinjika v. Portland Cement Company* [2008] MLLR 161, Blantyre Newspapers Ltd v. Charles Simango, IRC Appeal No. 6 of 2011 (High Court) (Principal Registry) (unreported), *Mining Supplies Longwall Ltd v. Baker* [1988] ICR 676, [1988] IRLR 417 and Tamara Lewis, *"Employment Law, An Adviser's Handbook,"* 5th Edition, Legal Action Group 2003.

16 There is therefore no reason to fault the lower court for the approach it took. The appeal is dismissed and I make no order for costs.

17 Made in open court this 26th day of March 2018.

T.R. Ligowe

**JUDGE**

[1]Chitty on Contracts, Vol II, Specific Contracts, 28th Edition, para. 39-179