THE MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
APPEAL CASE NUMBER 5 OF 2021
(Being IRC matter no. 300 of 2014)

BETWEEN

STANLEY BANDAWE & OTHERS .....APPLICANTS (APPELLANTS)

AND

BLANTYRE WATER BOARD.....RESPONDENT

CORAM: JUSTICE J. N'RIVA
Sudi and Fundo Lawyers , of counsel for the Applicants
Ms Nkangala, Court clerk

JUDGMENT

This matter is an appeal from the Industrial Relations Court (IRC) where the Applicants commenced an action against the Respondent seeking compensation for unfair dismissal. The Applicants who were working for the Respondent were dismissed after being involved in illegal water connections. The IRC delivered the judgment in favour of the Respondent after finding out that the Applicants were fairly dismissed.

Dissatisfied with the determination, the Applicants have appealed to this Court citing four grounds of appeal as follows:

1. The lower court erred in law and fact in holding that the Applicants had been heard by the Respondent before their dismissal.

2. The lower court erred in law and in fact in holding that the Respondent had a valid reason to dismiss the Applicants.

3. The lower court failed or did not consider the evidence of the Applicants in arriving at its decision.

4. The lower court's judgment is by all account against the weight of evidence.

According to Section 65(1) of the Labour Relations Act, decisions of the IRC are final and binding. Section 65(2) of the Labour Relations Act provides that appeals to the High Court from the IRC should only be on a question of law or jurisdiction. It has been stated that:

> A question of law by its very nature, demands a response that is arrived at by applying relevant legal principles to interpretation of the law. The resulting response must be capable of expression in terms of broad legal principles that transcend the confines of the particular set of circumstances or factual situations so as to be capable of application to diverse situations. If the response can only be applied to the circumstances, factual situation, evidence at hand or inference resulting therefrom, the question is more likely of fact. To put it even more simply, a question of fact involves an inquiry into whether something happened or will happen.[1]

The first ground of appeal alleges that the lower court erred in holding that the Applicants had been heard by the Respondent before their dismissal. The law is that an employer shall not dismiss an employee for misconduct unless the employer gives an employee an opportunity to defend herself on the allegations.[2]

In the court below, the Applicants submitted in the lower court that the Respondent's Human Resource Manager tendered in court several documents which included a purported complaint which was filed by an unknown concerned customer. However, the Applicants alleged that they were not given an opportunity to read the contents of the said complaint. Further that the Applicants were not given an opportunity to read the report of the investigations that were carried out by the Respondent. Lastly, the Applicants alleged that their witness

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[1] *Kamanga v Mota Engil* Civil Appeal number 163 of 2016 (High Court) (unreported)
[2] See section 57 (2) Employment Act and *Chakhaza v Portland Cement Company* [2008] MLLR 126.

was not allowed to attend the disciplinary hearing. This according to the Applicants did not amount to fair hearing.

The Respondents submitted that the Applicants were accorded an opportunity to be heard orally. The Applicants, according to the Respondent, did not dispute this fact. What the Applicants argued was that their witness was not heard at the hearing.[3] The lower court held that the Applicants were heard since the Respondent did conduct a disciplinary hearing. The judgment of the court below observed, further, that the appellants filed an internal appeal against the decision of the disciplinary hearing. The appeal upheld the decision of the disciplinary hearing.

This was a finding of fact based on the evidence that was adduced before the lower court. This being the case, no right of appeal can be made against the finding to this Court.

All in all, though this is a matter of fact and settled, this Court does not find anything unfair with regard to the lower court's finding that the Applicants were heard on the alleged charges leading to their dismissal, thus, fraudulent water connections. Perhaps, the appellants are questioning the quality or quantity of evidence as well as some procedural aspects of the disciplinary hearing. A disciplinary hearing should not be regarded as, or compared to a trial in a court of law. A disciplinary hearing should not be expected to be conducted just as a court of law. A disciplinary hearing is a workplace-based factual finding procedure which should be distinguished from a trial which are handled by personnel trained or learned in dispute adjudication. One could be heard on the issues of fairness but on on such technicalities of procedural and evidential rules. It would be impractical to prescribe the procedure or methods of giving evidence during the disciplinary hearing. Justice Chikopa in the High Court in *Illovo Sugar Company Ltd v Phiri* Civil Appeal No 60 of 2008 said there could no uniform way of hearing a matter or a party:[4] what matters is whether one was made sufficiently aware of the charge against him and was given a chance to put across their side of the story.

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[3] The question whether an employee has been heard may be a mixed question of fact and law. See Justice Tembo's ruling in *Eluby Masauli vs MSB* Civil cause no. 2 of 2017 [2018] being IRC matter no. 249 of 2009.

[4] One can be heard orally or through oral or written reports. One can cross-examine or not

I have decided the appeal based on the record. I have done so for the following reasons:

1. Appeals in the this jurisdiction are by the way of rehearing, by which is meant, reviewing the evidence and the court's decision with the aim to determine whether the lower court arrived at a correct decision. On appeal, the Courts deal with issues that were in the trial court *Mbvundula v Malito* [1968 - 1970] ALR Mal 146. See also *Produce Marketing Supplies Limited and Global Electrical and Agricultural Company Ltd v Packaging Industry (Malawi)* Ltd 11 MLR 104.

Tambala JA, in *Steve Chingwalu and DHL International Ltd v Redson Chabuka and Hastings Mangirani* [2007] MLR 382 (SCA) at 388, said

> an appeal to this court is by way of rehearing which basically means that the appellate court considers the whole of the evidence given in the court below and the whole course of the trial; it is as a general rule a rehearing on the documents including the record of the evidence.

My judgment is that a Court on appeal can proceed to deal with the appeal the way I have. Moreover, an appellant cannot argue that they were not heard. This is because, the appeal paperwork points out, or is supposed to point out the areas, where the trial court misapplied the law or misdirected itself on the evidence.

2. As shown above decisions of the IRC are appealable only on questions of law and jurisdiction. This appeal attacked the lower courts determination of the facts. Even if this Court were to deal with factual issues of appeal, it ought to be remembered that appeal courts are slow to interfere with the factual finding of the trial court unless there is some misdirection and misreception, as it were, of the evidence. Tambala JA, in *Steve Chingwalu and DHL International Ltd v Redson Chabuka and Hastings Mangirani* said:

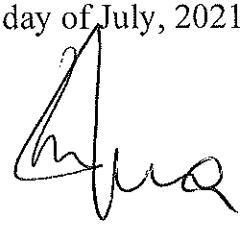
> The position of the law regarding appeals involving issues of fact is that this court is slow to interfere with findings of fact made by a tribunal properly mandated to make decisions on disputes of facts, unless there exists some misdirection or misreception of evidence or unless the decisions are of such a nature that, having regard to the evidence, no reasonable man could make such decisions: see *Wamwa v Kamwendo* 2 ALR (M) 565.

3. Finally, I believe that dealing with appeals this way would enhance the principle of the overriding objectives under the rules of procedure in this Court. The objective requires courts to deal with cases justly, speedily and to

have regard to substantive justice. We are enjoined to identify issues for determination at an early stage.

I make no order of costs.

Made in Chamber at Blantyre this 16th day of July, 2021.



J N'RIVA

JUDGE