REPUBLIC OF MALAWI

IN THE INDUSTRIAL RELATIONS COURT

BLANTYRE REGISTRY

MATTER NUMBER IRC 352 OF 2019

BETWEEN:

DAVID TANDWE……..APPLICANT

-AND-

ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED (ESCOM).....RESPONDENT

CORUM: PETER M.E KANDULU, DEPUTY CHAIRPERSON

F. Tandwe, Counsel for the Applicant

C. Banda, Counsel for the Respondent

K. Kakhobwe, Court Clerk

RULING TO DISPOSE OF MATTER ON A POINT OF LAW

Introduction

This is a ruling on a motion to dispose of a matter on a point of law. The motion is dismissed. The reasons for the dismissal are that there are facts that are disputed by the Respondent. The Matter should come for a substantive hearing where all the parties shall be required to adduce evidence to prove their case.

Brief Facts

The applicant filed a notice of motion to dispose of the matter on a point of law on 23rd August 2023. The applicant filed an affidavit in support of the motion. The respondent opposes the motion to dispose of the matter on a point of law. The Respondent filed an affidavit in support of opposition to the motion.

The motion seeks the court to declare that the disciplinary process that the respondent instituted against the applicant was a charade which was only aimed at effecting a decision to dismiss the applicant which the respondent had already reached at the time; a declaration that the purported dismissal of the applicant from employment comprised in the Respondent's letter dated the 25th day of February 2019 is invalid and unfair for purporting to dismiss the applicant from employment without there being a proper basis for so doing and for failing to disclose a legally valid reason for such dismissal in the circumstances; and Order that pursuant to the declarations in clauses (i) and (ii) hereof and in the circumstances, the applicant is entitled at law to an order of reinstatement or re-engagement and/or by way of remuneration or entitlements up to the time the applicant would ordinarily have reached his retirement age under the Resident's conditions of Service as the court may deem just and equitable.

As stated early the motion is supported by an affidavit sworn in by David Tandwe the applicant in this matter. The affidavit states that the Respondent employed him on or around 19th April 2000 for an unspecified period of time in the position of Network Administrator, that he dedicated himself to the work required of him and he upgraded himself academically. He attained additional qualifications such as a BSC Honours Degree in Computing and Information Systems and a Master's in Business Administration International Business.

He rose within the Respondent organization to the position of Senior Systems Officer (Development) Grade P1 and then to the position of Senior Manager ICT, Grade M2, on 12th September 2018, however, he was suspended from his job by the Respondent through the Director of Human Resource and Administration, Mr Dafter Namandwa, on the allegation of conflict of interest and lack of cooperation with investigators into an alleged leakage of a letter which he authored, a copy of the letter of suspension was exhibited.

That before he was even invited to a disciplinary hearing, the Respondent had already started looking for someone to replace him in the position he was in, a copy of the minutes of the Respondent's Board Meeting held on the 13th of December 2018 was exhibited.

He was thereafter invited to a disciplinary hearing which was held on the 15th February 2019. A copy of the letter inviting him to the disciplinary hearing was exhibited.

It must be noted that the disciplinary charge sheet outlined two accusations against him, (a) Non-disclosure of conflict of interest which compromises professional ethics; (b) Making use of the [Respondent's] property for personal gain or purpose, ignoring tender, financial, stores and purchasing regulations and other procedures in the procurement, storage and distribution of stocks throughout the Corporation.

The said two charges were particularized in four points: (a) that he facilitated an irregular award to ICT Networks whose Managing Director and part-owner is his brother; (b) that he did not disclose to his supervisor, the Chief Executive Officer, that Lester Tandwe was his brother; (c) that after the award of the contract, he headed the team that went for a Factory Acceptance Test for the ITC materials that were to be supplied and were supplied by ICT Networks; and (d) that he certified invoices issued by ICT Networks when he was allegedly fully aware that he was related to the Managing Director.

That he responded to the allegations in writing denying all the charges raised against him and giving a thorough side to his story on the matter, a copy of his response to the charges leveled against him was exhibited.

Following the hearing, the Respondent summarily dismissed him from employment although the letter did not specify the grounds on which they had reached that decision as is supposed to be the case, a copy of the letter dismissing him from employment is exhibited.

That his employment with the Respondent was governed by a set of conditions of service whose copy was exhibited which also guided the disciplinary process. The allegation that he committed the misconduct of non-disclosure of conflict of interest with respect to the contract that was awarded to ICT Networks which is a company co-owned by his brother, Lester Tandwe, was factually incorrect because at the bid opening meeting for the said contract he recused himself and declared that he was related to part-owner of one of the bidders, ICT Networks and minuted his recusal a copy of the minutes for the bid opening on which he recorded his recusal was exhibited.

The Respondent then went to evaluate the bids without his involvement and awarded the contract to ICT Networks well aware of his declaration of his conflict of interest which he made at the bid opening. The minutes at the bid opening are always forwarded to the Chief Executive Officer and Senior Management through the Internal Procurement Committee.

Having declared his conflict of interest in writing at the bid opening, he does not think he was obliged to declare his conflict of interest again with respect to the same contract. With respect to the trip that was organized for Factory Inspection, the issue of conflict of interest with respect to ICT Networks was already recorded as already stated hereinabove.

In any case, the nature of his position and the nature of the project necessitated that he be involved in the exercise. Surely, Management would not have allowed him to go on this trip if his involvement was a problem. The project was directly within his portfolio. In any case, he was the only Manager in his department.

That at the disciplinary hearing, the Respondent did not produce any invoice that he allegedly authorized and that issue was not as far as he can recall properly argued. Further, the Respondent failed to provide such evidence even though he had requested for the same in writing before the disciplinary hearing a copy of his email in which the request was made was exhibited.

That it is clear to him that the Respondent used the disciplinary process against him just to get rid of him. The Respondent did not have any basis in substance to dismiss him. This is evidenced by the fact that the Respondent had for some time been investigating him one issue after the other although all of them did in truth implicate him and were thus not pursued further.

The Respondent opposed the motion and filed an affidavit sworn in by Counsel C Banda and skeleton arguments in support of their opposition.

Both the Applicant and the Respondent requested the court to give them 14 days to submit their final written submissions. It is only Counsel for the Respondent who filed the final written submission at the expiry of the requested period. Counsel for the Applicant despite the request to have 14 days to submit his final written submission, he never submitted the same at the expiry of the 14 days. The court is mindful that counsel for the applicant is the mover of the court to dispose of the matter on point of law, and he has filed an amended motion premising and specifying the law under which the motion is based. The court shall proceed to writing its ruling based on the motion and submission as filed by counsel for the Respondent.

Since the final written submission of Counsel for the Respondent is on the court file, the court shall not labour to reproduce the contents of the final written submission suffice to mention that the court shall have recourse to the same when determining this matter.

Issues for Determination

Whether or not the matter should be disposed of on a point of law.

The Law on Disposal of Matter on a Point of Law

Rule 16 (1) of the Industrial Relations Court (Procedure) Rules 1999 provides for an interlocutory application or other application incidental to any proceedings pending before the Court in respect of which no procedure has been provided for by the Act or by these Rules shall be brought by a party on notice of motion which shall, as near as possible, be in the form set out in IRC Form 3.

The Industrial Relations Court (Procedure) Rules do provide guidance for provision for the summary determination of a matter on a question of law see ***Finance Bank of Malawi Ltd v Hanks****;* Civil Cause No. 108 of 1989 and ***Sympathy Katengeza Chisale v Willie Mphoka Phiri****;* Commercial Case No. 29 of 2009 states that it is a requirement that the question of law to be determined by the court should be stated or formulated in clear, careful and precise terms so that there should be no difficulty or obscurity, still less any ambiguity, about what the question to be determined is.

The question must be suitable for determination without a full trial of the action (***Finance Bank of Malawi Ltd v Hanks) Supra.*** In an application for disposal of a case on a point of law, the Court must determine the case on that point of law and grant a final judgment. This therefore calls for

careful formulation of the question to be determined: (***Sympathy Katengeza Chisale v Willie Mphoka Phiri***) Supra.

According to ***Finance Bank of Malawi Ltd v Hanks*** (supra), it is of vital importance that there should be no dispute of facts respecting a point or issue of law to be determined by the court, or alternatively, the parties should agree on the facts to which the point or issue of law to be so determined relates. See also ***Shifa Medical Services v Mwala and Others*** (Civil Appeal No. 24 of 2012) [2017] MWHC 897 (3 November 2017).

In ***Tilling and another v Whiteman*** [1979] 1 All ER 737, Lord Wilberforce protested against the determination of matters on a point of law when there are disputed factual issues. He stated on pages 738-739 as follows:

"*The learned judge took what has turned out to be an unfortunate course. Instead of finding the fact, which should have presented no difficulty and taken a little time, he allowed a preliminary point of law to be taken... So the case has reached this House on hypothetical facts, the correctness of which remains to be tried. I, with others of Your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this frequently adds to difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If the practice cannot be confined to cases where the facts are not complicated and the legal issues short and easily decided, cases outside this guiding principle should at least be exceptional."* (*Emphasis supplied*)

Similar remarks were made in ***Allen v Gulf Oil Refining Ltd*** [1981] 1 All ER 353 at page 355

as follows:

"*My Lords, I, and others of Your Lordships have protested against the procedure of bringing, except in clear and simple cases, points of law for a preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is frequently so where they reach this House, they do not serve the cause of justice. The present is such an example. The question as originally framed was inept....the fact is that the result of the case must depend on the findings of fact on principles of law which are themselves flexible. There are too many variables to admit of clear-cut solution in advance."* (*Emphasis supplied)*

The position in Allen's case was also adopted in ***Sympathy Katengeza Chisale v Willie Mphoka Phiri*** (supra) in which Justice Mbendera SC stated that ideally this procedure should only be adopted in very clear cases and should never be applied to debatable cases.

In the case of ***Shifa Medical Services v Mwala and*** Others (Civil Appeal No. 24 of 2012) [2017] MWHC 897 (3 November 2017), the High Court considered an appeal against a decision of the Industrial Relations Court. The issue in that case was whether consultations had taken place before the appellant dismissed the respondents based on operational requirements. Counsel Tandwe in that case argued that there had not been consultations, such that, the respondents' dismissal was unfair under section 57 of the Employment Act. An application for disposal of the matter on a point of law was made and granted in the Industrial Relations Court. However, on appeal, the High Court in its wisdom held on pages 10 and 11 as follows:

"Whether or not there have been consultations depends on the facts of the case. What this means is that for a court to determine whether or not there was consultation, it must have all the relevant facts before it."

"It is the considered view of this court that the question whether or not there have been consultations being one depending on the facts of the case, the IRC in his [sic] case should have treaded carefully and conducted a trial to establish whether or not there were consultations more so in the light of the circular the appellants issued, the verbal discussions which the appellants allege had engaged respondents in and the involvement of the Ministry of Labour. In the result, this court would find and hold that the case ought not to have been disposed of through the summary process of disposal of case on a point of law and therefore to this extent the appeal should succeed." (Emphasis supplied)

Counsel for the Respondent has argued that in the present case, this Court has essentially been called upon to determine whether the Respondent had complied with section 57 of the Employment Act. The Court must consider the facts of the case, and how the Respondent conducted itself about the Applicant. Counsel has persuasively argued that this Court must be very slow to grant an application for disposal of a matter on a point of law where it appears that there is contention as to whether something happened or not because this is a factual matter. To determine the facts in question, there is a need for this Court to conduct a trial and not to determine the matter at this stage. See ***Shifa Medical Services v Mwala and Others*** (supra).

Coming to the questions raised by the Applicant in his application, the first question of law was formulated as follows:

(i) A declaration that the disciplinary process which the Respondent instituted against the Applicant was charade [sic] which was only aimed at effecting a decision to dismiss the Applicant which the Respondent had already reached at the time.

To determine whether the Respondent's disciplinary process against the Applicant was a charade, as claimed by the Applicant, there is a need to consider the facts of what the Respondent did. In this regard, counsel for the Respondent has submitted that what the Applicant raises here is not a question of law at all, but rather a question of fact. Even in that case, the question of fact that has been raised is based on facts that are disputed by the Respondent. This question can therefore not be resolved without a full trial of the case. Counsel has further provided a discussion on what the Respondent did as below.

Counsel has indicated that the Respondent fully complied with section 57 of the Employment Act. Compliance with the provision started when the Respondent identified valid reasons for the Applicant's dismissal.

The Applicant was alleged to have acted in breach of the Disciplinary Policy A9.9.8 of the Employees Terms and Conditions for ESCOM Limited, which was exhibited to the Respondent's affidavit in opposition to the application which was marked.

Under the Employees Terms and Conditions of Service, the Applicant was charged with acting in breach by (i) Making use of the Corporation's property for personal gain or purpose, ignoring tender, financial, stores, and purchasing regulations and other procedures in the procurement, storage, and distribution of stocks throughout the Corporation; and (ii) Non-disclosure of conflict of interest which compromises professional ethics. Under Disciplinary Policy A9.9.8, the sanction that attends to the Respondent's employee found guilty of being in breach of the violations is dismissal.

Because there were valid reasons for the Applicant's dismissal connected with his conduct, the Respondent fully complied with section 57(1) of the Employment Act. It is worth noting that the reasons for dismissal identified by the Respondent are not prohibited under section 57(3) of the Employment Act.

In terms of compliance with section 57(2) of the Employment Act, the Applicant was duly served with a charge sheet containing the allegations against him and particulars thereof.

Through the same charge sheet, the Applicant was invited to submit his written representations, which he did on 1st February 2019. The disciplinary hearing took place about fourteen days later on 15th February 2019. Under the Respondent's Employees Terms and Conditions of Service, where the Respondent has decided that serious disciplinary action may be warranted against an employee, the employee is entitled to a minimum of three days to prepare for the hearing. The Applicant herein thus had more than sufficient time to prepare for the hearing.

When the hearing took place, the disciplinary panel found the Applicant guilty as charged. Being dissatisfied with his dismissal, the Applicant appealed against the decision. The panel hearing the appeal was constituted differently from the initial disciplinary committee. Through the appeal process, the Applicant was given a further opportunity to defend himself against the allegations made. Ultimately, the decision to dismiss him was upheld.

Looking at the steps taken before the Applicant's dismissal, it is clear that the Respondent had complied with the whole of section 57 of the Employment Act. In this regard, the Applicant's assertion that the disciplinary process was a charade is not correct. The dismissal was justified substantively and procedurally. This Court is implored to attach significant weight to these actions taken by the Respondent.

In support of his factual claim that the disciplinary process was a charade, the Applicant exhibited to his affidavit a copy of purported minutes of the Respondent's Board. However, the provenance and authenticity of the purported minutes are questionable considering that the document is not signed by any officer of the Respondent or any member of the Respondent Board to show that it is an official document from the Respondent. Further, it does not mention the people who attended the meeting.

The document was also not disclosed as one of the documents in the Applicant's possession or control in his statement of claim. Rule 14(1) of the Industrial Relations Court (Procedure) Rules restricts the use, at the hearing, of a document that is not disclosed by a party obliged to disclose the document, except with leave of the Court. Hearing of applications for disposal of a matter on a point of law, such as the present one, are trial at which the court is going to make a final

determination regarding the rights of the parties. See the cases of ***Dick Chagwamnjira t/a Chagwamnjira and Co. v National Publications Ltd and Secucom International***; (PR) Civil Cause No. 2438 of 2000; ***Pamodzi Settlement Trust (2005) v Blantyre City Assembly***; Civil Cause No. 42 of 2016 and ***Finance Bank of Malawi Ltd v Hanks*** (Civil Cause No. 108 of 1989) [2001] MWHC 14 (28 March 2001); and ***Sympathy Katengeza Chisale v Willie Mphoka Phiri;*** Commercial Case No. 29 of 2009. The document must therefore not be admitted in evidence, but if the Court admits it, little or no weight must be attached to it for it is very questionable.

Issues of provenance and authenticity of the document, which are in dispute here, are factual matters and they must not be determined in an application for disposal of a matter on a point of law. This must be resolved at trial of the matter and not dealt with summarily at this stage. See ***Shifa Medical Services v Mwala and Others*** (supra).

Counsel further stated that they are mindful that under section 71 (2) of the Labour Relations Act, this Court is not bound by the rules of evidence in civil proceedings. However, should the Court admit the document purporting to be the minutes of the Respondent's 63rd Board Meeting as evidence of the Applicant's dismissal, the Respondent will be deprived of an opportunity to cross-examine the Applicant. As such, admitting the document at this stage and relying on it to dispose of the matter on a point of law will be unfair and prejudicial to the Respondent. See the case of ***Marlon Jere v Manica (Malawi) Ltd***; Matter No. IRC PR 517 of 2019 in which the Court had refused the applicant an opportunity to introduce documents in circumstances which would deprive the respondent an opportunity to cross-examine the applicant.

The Applicant's second purported question of law is as follows:

(ii) A declaration that the purported dismissal of the Applicant from employment comprised in the Respondent's letter dated 25th February 2019 is invalid and unfair for purporting to dismiss the Applicant from employment without there being a proper reason or basis for so doing and for failing to disclose a legally valid reason for such dismissal in the circumstances.

Similar to the first purported question of law, the second one is based on facts that are disputed by the Respondent. The letter through which the dismissal was communicated to the Applicant stated that the disciplinary hearing panel had found him guilty as charged. Sight must not be lost to the fact that the Applicant had been served with a charge sheet containing the allegations against him.

The Applicant duly responded to the charges through his written representations dated 1st February 2019 exhibited to the Respondent's affidavit. The Respondent was thus aware of what violations he was alleged to have committed and what he was eventually found guilty of after the disciplinary hearing.

On appeal, the decision of the disciplinary panel was upheld and this was communicated to the Applicant through a letter dated 30th April 2019 exhibited to the Respondent's affidavit. This letter clearly explained the basis for upholding the Applicant's dismissal.

It is therefore not correct to say that the dismissal was invalid, or unfair or that the Respondent purported to dismiss the Applicant from employment without there being a proper reason or basis for so doing. Valid reasons for his dismissal were disclosed, if one considers the totality of the evidence contained in the charge sheet, the letter dated 25th February 2019 which referred to the charges as being the basis for the dismissal, and the letter which communicated the results of the appeal.

The second question is not suitable for determination without full trial, considering that it is factual. Further, the facts relied on in formulating that question are in serious contention, and the parties have not come to an agreement on the facts to which the question relates.

The third purported question of law raised by the Applicant is framed as follows:

(iii) An Order that under the declarations in clauses (i) and (ii) hereof and in the circumstances, the Applicant is entitled at law to an order of reinstatement or re-engagement and/or compensation by way of remuneration or entitlements up to the time the Applicant would ordinarily have reached his retirement age under the Resident's [sic] Conditions of Service as the court may deem just and equitable.

This Court is reminded of the requirement that a question of law to be determined by the court in an application for disposal of a matter on a point of law should be stated or formulated in clear, careful, and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity, about what the question to be determined is. See ***Finance Bank of Malawi Ltd v Hanks*** (supra).

The third question raised by the Applicant lacks clarity and it is not carefully or precisely formulated. As a result, the Respondent has difficulty comprehending what is to be determined by the question.

Additionally, this is not a question whose determination will finally determine the entire case, subject only to a possible appeal. If this question is determined, there will remain the Applicant's claims for unfair dismissal and unfair labour practices. Determination of this question will thus not determine the whole action leading to the disposal thereof.

Further, this purported question of law is premised on the first two factual questions earlier raised. Since the first two questions are factual and not suitable for determination at this stage of the proceedings, it is therefore obvious that the third question is also not suitable to be determined at this stage.

It is significant to note that the Applicant in the third question is applying for an Order of reinstatement or re-engagement. This relief which the Applicant seeks is not a relief which he originally sought in his statement of claim. It would appear that the Applicant is trying to sneak in and seek new remedies through the back door.

At the hearing of the application, counsel for the Applicant argued that the relief of reinstatement or re-engagement sought is covered under the claim for any other Order which the Court may deem just and appropriate in the circumstances. If the Applicant sought the general relief, there is no need for him to specify the relief. It should be left to the Court to determine which Order would be just and appropriate.

There is a danger that if the Court proceeds to determine this matter on a point of law, there may be difficulties if this matter goes to higher courts on appeal. This is because important facts in this matter are still in dispute and no factual findings will have been made thereon. The facts that may be relied on at the appeal would therefore be hypothetical. This, according to the case of ***Tilling and another v Whiteman (***supra), frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings.

This Court must be reminded that this procedure of determining matters on a point of law should only be adopted in very clear cases and should never be applied to debatable cases. See ***Sympathy Katengeza Chisale v Willie Mphoka Phiri*** (supra). The present case is debatable and must not be

determined under the procedure applied for by the Applicant. There is nothing exceptional about this case that should warrant a departure from the position of using this procedure only in very clear cases.

The court is so grateful for the presentation made by the Respondent through its final written submission. As stated earlier counsel for the Applicant did request 14 days to file the Applicant's final written submission. Unfortunately, the counsel who moved the court to dispose of the matter on point of law decided not to file his final written submission to answer and clarify issues as argued by the Respondent so that the court should have balanced arguments from both sides the Applicant and the Respondent to determine the matter on a well-balanced position of the law. The court is persuaded by arguments by counsel for the Respondent that in this matter, there are more factual issues that require the court to determine on a substantive hearing. For example, the Applicant has exhibited minutes of the board, the said minutes bear no names who were present at the said board meeting and are not signed by any member present at the said board meeting. This poses a question of the authenticity of the minutes. In my view, this is a factual question that needs to be tried at a full hearing. This factual question about the authenticity of the minutes cannot be disposed of as a point of law when the issue is factual.

Equally on the second issue, the Applicant alleged that the Respondent dismissed the Applicant without a valid reason. This allegation is triable in my view, counsel for the Respondent had indicated that there was a valid reason for the dismissal, while Counsel for the Applicant alleges there was no such valid reason for dismissal in law. The court shall need to hear both parties on this point, the court shall have to appreciate the valid reasons that compelled the Respondent to dismiss the Applicant and hear also the arguments from counsel for the Applicant on the reasons they are disputing that the reasons were not legal. There are both factual and legal issues that cannot be disposed of on a point of law only but shall require to be determined at a full trial hearing.

Counsel for the Applicant is therefore ordered to file a notice of hearing and a witness statement which they shall rely on a substantive hearing. The same should be served on the Respondent who is also ordered to file their witness statement in defense. The parties are ordered to file the said documents by hard copies and soft copies emailed to pkandulu@gmail.com copy pkandulu@judiciary,mw within 14 working days from the date of receipt of this order.

Delivered in chambers this 14th day of November 2023 at Blantyre.

HON. PETER M.E KANDULU

DEPUTY CHAIRPERSON