REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

IRC CIVIL APPEAL NUMBER 9 OF 2023

(Being IRC Matter Number 739 of 2019)

(Before Honourable Justice Muhome)

BETWEEN:

ERIC THOMSON AND 53 OTHERS…..……APPELLANTS

- AND -

TELEKOM NETWORKS MALAWI PLC……..……RESPONDENT

CORAM: HON. JUSTICE ALLAN HANS MUHOME

Mr Luciano Mickeus, of Counsel for the Appellants

Mr Shepher Mumba, of Counsel for the Respondent

Ms Fareeda Chida, Official Interpreter

JUDGMENT

Background

1. This is an appeal against the Judgment of the Deputy Chairperson of the Industrial Relations Court (IRC) dated 28th April 2023. The Appellants were employed by the Respondent in various capacities. Sometime in June 2019 the Respondents commenced a restructuring process based on their three-year strategic plan. It is alleged that the Respondent's Chief Executive Officer assured all employees that there would be no job losses, due to the restructuring.

2. However, a month later in August 2019, the Appellants were surprised with communication that their positions were declared redundant. They alleged that they were not consulted in the process and did not know the criteria that was used to declare their positions redundant. They also alleged that the Respondent was recruiting new employees to fill up their positions. They commenced an action in the lower court premised on unfair dismissal and discrimination.

3. The Respondent adduced evidence that proved that all employees were informed about the restructuring process and the fact that the same would lead to staff reduction. Several staff meetings were conducted across the country and employees were later informed that 138 positions were redundant. Staff representatives also requested the Respondent to consider an option of voluntary redundancy, which was actualized. Various updates on the restructuring process were shared through email, newsletters and video clips. Psychological sessions were also held to prepare all employees for the impending retrenchments. The Respondent further explained that no new employees were recruited to replace the Appellants. The Ministry of Labour was duly informed about the organizational restructuring and the attendant job losses. In essence, the Respondents argued that the Appellants were consulted per the tenets of fair labour practices.

4. The IRC found that the Respondent did not make any recruitments replacing the Appellants and that the Appellants were not discriminated against. A key finding made by the lower court, which is the main ground of this appeal is the fact that the Appellants were not consulted but were simply informed about the retrenchment.

However, the IRC proceeded to dismiss the Appellants claims mainly because the lower court considered that it was bound by the decision of the Supreme Court of Appeal (SCA) in ***Mkaka v First Merchant Bank*** [2014] MLR 105 (SCA), which is to the effect that consultations are not a requirement of the law, during retrenchment, unless they are provided for in the Conditions of Service. During trial, in the lower court, none of the parties tendered the Conditions of Service in evidence.

Grounds of Appeal

5. The Appellants are dissatisfied with the Judgment of the IRC and have filed three grounds of appeal, paraphrased, as follows:

    5.1 Ground One: The lower court erred in law in holding that consultation prior to redundancy is obligatory only where the same is provided for under the terms and Conditions of Service.

    5.2 Ground Two: The lower court, having found that the Appellants were not consulted before the redundancy, erred in law by disposing the case on a point of law of legal requirement for prior consultation in redundancy when that was not pleaded and was not in dispute.

    5.3 Ground Three: The lower court's Judgment is wrong in law and is unfair and against principles of fairness and equity as espoused under section 31 of the Constitution and section 57 and 61(2) of the Employment Act.

6. This Court will dispose of all the grounds of appeal jointly as both Counsel also argued the three grounds together relying on their skeleton arguments which we shall revert to where necessary.

Appeals from the IRC

7. Under section 65 of the Labour Relations Act, Cap 55:01 of the Laws of Malawi, decisions of the IRC are final and binding. However, a decision of the IRC may be appealed to the High Court on a question of law or jurisdiction. This Court is aware that an appeal is by way of a re-hearing. This entails reviewing the evidence and the court's decision with the aim of determining whether the lower court arrived at a correct decision. An appeal is not a second attempt at one's luck in a claim: see ***Steve Chingwalu and DHL International v Redson Chabuka and Another*** [2007] MLR 382 at 388.

The Law on Consultation

8. Since the operationalisation of the IRC in or about 1996, the SCA, the High Court and the IRC itself, have all consistently held that where an employer intends to effect termination of employment due to operational requirements, consultation between the employer and employees is required by both national and international laws: see ***Ngwenya and Gondwe v Automotive Products Ltd (Ngwenya Case)*** IRC Matter No. 180 of 2000 and ***Boloweza and another v Doogles Lodge*** [2008] MLLR 362, for the IRC position as determined by the then Chairperson, Hon. Mkandawire (as he then was); ***Chauncy Nanthambwe v Bunda Collage of Agriculture*** Civil Appeal Number 4 of 2014, for the High Court stand per the opinion of Hon. Mbvundula J. (as he then was) and a Judgement by Hon. Madise J (as he then was) in ***Rabecca Kayira v Malawi Telecommunications Limited*** Civil Appeal Number 40 of 2010. Lastly, for the Apex Court's authority see ***Malawi Telecommunications Ltd v Makande and Another***, ***(Makande Case)*** [2008] MLLR 35.

9. Over the years, the Courts have developed standards that an employer must comply with before effecting the intended retrenchment or redundancy. The IRC first discussed the standards in the ***Ngwenya Case*** and are also reproduced in the reported case of ***Boloweza and Another v Doogles Lodge*** (above, at page 366). The following are the questions which the Court must ask itself in determining whether or not the redundancy or retrenchment was properly proceeded with:

i) Was there any consultation between the employer and the employees or employees' representatives?

ii) Was there any attempt to reach a consensus?

iii) Was there any disclosure of information to the employer?

iv) Were the employees afforded an opportunity to make representations? and

v) What were the selection criteria as regards those who were to be on retrenchment or redundancy list?

10. Commenting on the foregoing standards in ***Malawi Telecommunications Ltd v Makande and Another***, [2008] MLLR 35 the SCA opined that the consultation prior to dismissal based on operational requirements must in fact entail genuine engagements of the employees in the process of restructuring. It should not merely be a purported attempt at effecting a unilateral notification from the employer to employees, in a manner which does not at the same time seek feedback from employees.

11. The above appears to have been the position of the law until 2014 when the majority decision in the SCA suggested otherwise in ***First Merchant Bank v Mkaka***, [2014] MLR 105 (SCA) ***(Mkaka One)*** where it was held that consultation prior to redundancy is obligatory only where the same is provided for under the Terms and Conditions of Service. That the ***Makande Case*** was no longer applicable with the coming into force of the Employment Act 2000 which in terms of section 211(2) of the Constitution provided otherwise than articles 13 and 14 in the ILO Convention 158.

12. Following the landmark decision in ***Mkaka One***, Courts, including the SCA itself, have struggled to align themselves with its reasoning. For example, in ***BM Phiri v Mount Soche Hotel*** Civil Appeal Cause Number 15 of 2015, my Brother Judge, Hon. Tembo J. implored the SCA to fully revisit their decision in ***Mkaka One*** as it stood against the provisions of fair labour practice under section 31(1) of the Constitution: he subscribed to the minority decision of Chikopa JA, SC, that consultation is a

hallmark of fairness in all kinds of redundancies, as provided for under section 31(1) of the Constitution and section 61(2) of the Employment Act - Cap 55:01 of the Laws of Malawi. In other cases, the High Court has devised ways of bypassing ***Mkaka One***. For instance, in ***Premium Tama Tobacco Ltd and Others v Frank Mambala and Others*** Civil Appeal Number 103 of 2015, Hon. Mkandawire J. (as he then was) was able to distinguish ***Mkaka One*** by stating that where there is doubt as to the genuineness of the reasons for retrenchment, ***Mkaka One*** does not apply wholesale. Hon. Ligowe J. in ***Opportunity Bank of Malawi Ltd v Chiphwanya and Others*** Civil Appeal Number 24 of 2019, whilst accepting the binding authority of ***Mkaka One***, stated that the application of articles 13 and 14 of the ILO Convention 158 was inevitable in the interpretation of the concept of 'justice and equity' under section 61(2) of the Employment Act, although strictly speaking the convention is not part of the law of this country. The SCA itself, in ***Airtel Malawi Limited v Komiha and Others*** SCA Civil Appeal number 59 of 2013, had opportunity to review ***Mkaka One*** but regrettably refrained from commenting thereon. In ***First Merchant Bank v Mkaka*** SCA Civil Appeal Number 19 of 2017 ***(Mkaka Two)*** the SCA slightly reviewed ***Mkaka One*** by suggesting that under section 61(2) of the Employment Act, which provides that 'an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee,' consultation may be an aspect of 'justice and equity'. By doing this, the Court was toeing the line that was taken by Hon. Chikopa JA, SC in ***Mkaka One.*** The IRC has often used this window in ***Mkaka Two*** to arrive at a conclusion that consultation is a requirement: see ***Prescott Nkhata and Others v Indebank*** IRC Matter Number PR 398 of 2016 and ***Richard Chikalipo v Manica (Malawi) Ltd*** IRC Matter Number PR 1 of 2021.

13. Thus far, the SCA and the High Court have fallen short of holding that ***Mkaka One*** was made *per incuriam* and ought not be followed by this Court and indeed lower courts. However, certain authorities, albeit not binding, have categorically stated that ***Mkaka One*** was made *per incuriam*: see Rachael Sophie Sikwese, ***Labour Law in Malawi*** 4th Edition at page 88 and the decision of the IRC in ***Henry Chauluma Kaunda v Export Development Fund*** Matter No. IRC 182 of 2022. This Court shall demonstrate that ***Mkaka One*** was made by the majority of the SCA through inadvertence.

The Law on 'per incuriam'

14. This Court is aware that *'per incuriam'* which literally translates as 'through lack of care' or 'through inadvertence' is a device within which the common law system of judicial precedent is founded. A finding *per incuriam* means a previous court judgment has failed to pay attention to relevant statutory provision or precedents. The significance of a judgment having been decided *'per incuriam'* is that it does not have to be followed by a lower court. Ordinarily, in the common law, as is our judicial system, the reason for the decisions (*Ratio Decidendi*) of upper courts must be followed thereafter by lower courts, while hearing similar cases: see ***Civil Liberties Committee v Minister of Justice and Another*** SCA Civil Appeal Number 12 of 1999 and ***Mutharika and Malawi Electoral Commission v Chilima and Chakwera*** Constitutional Appeal Number 1 of 2020 at 103. It is only in very exceptional cases, like the present one, that this Court is permitted, with good reasons, to depart from an earlier judgment of the SCA where that earlier judgment was decided *per incuriam* as shall be established below.

15. In English jurisprudence, the Court of Appeal in ***Morelle Ltd v Wakeling*** [1955] 2 QB 379 stated that as a general rule the only cases in which decisions should be held to have been *per incuriam* are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned; so that in such cases, some part of the decision or some step in the reasoning on which it is based is found on that account, to be demonstrably wrong. In ***R v Northumberland Compensation Appeal Tribunal ex parte Shaw*** [1951] All ER268, a divisional court of the Kings Bench division declined to follow a Court of Appeal decision on the ground that the decision had been reached *per incuriam* for failure to cite a relevant House of Lords decision.

16. In Malawi, the concept of *per incuriam* is well entrenched. For instance, ***Chakwamba and Others v Attorney General and Malawi Congress Party*** [2000-2001] MLR 26 (SCA) was held *per incuriam* ***Attorney General v Malawi Congress Party*** [1997] 2 MLR 181 (HC) in the interpretation of the meaning of 'majority' in presidential elections cases. In the former case, majority was interpreted as 'first past the post', whereas in the latter case, majority was understood as '50 + 1'. In ***Mutharika and***

Malawi Electoral Commission v Chilima and Chakwera Constitutional Appeal Number 1 of 2020, the SCA upheld the High Court decision in ***Attorney General v Malawi Congress Party*** which assigned the meaning of majority as '50 +1' holding that the ***Chakwamba Case*** was decided by the SCA through inadvertence. See also ***Khoviwa v R*** SCA Miscellaneous Criminal Appeal Number 12 of 2017.

17. This Court is of the view that: to the extent that ***Mkaka One*** propounds that consultation prior to redundancy is obligatory only where the same is provided for under the Terms and Conditions of Service, the same was made *per incuriam*, for the following four reasons:

    17.1 Firstly, section 31(1) of the Constitution provides that 'every person shall have the right to fair and safe labour practices and to fair remuneration.' As opined by Hon. Chikopa J. (as he then was) in ***Kachinjika v Portland Cement Company*** [2008] MLLR 161, the objective of the above provision is not to make employees' position unduly entrenched, or indeed to make them incapable of dismissal or termination, but to introduce an aspect to the contract of employment that would ameliorate the harshness of the common law or the statutory law by ensuring that fairness attends all dealings between employer and employee. It is the opinion of this Court that consultation during retrenchments and redundancies is part and parcel of fair labour practices. The consultation process must take the form of a meaningful joint consensus-seeking process *inter alia* to avoid dismissal or seek alternatives to it where these are available.

    17.2 Secondly, section 57 (1) of the Employment Act, which is subject to the Constitution, justifies dismissal based on operational requirements of an undertaking. Such a dismissal is not due to any fault of the employee. It is well known that some employers utilize dismissal based on operational requirements as a disguise for what it is in actual fact a dismissal based on misconduct, incapacity or indeed some invalid reason. For this reason, a dispute of unfair dismissal for operational requirement must be examined more closely by the courts as standardized by the SCA in the ***Makande Case.*** In so doing, the Courts shall truly protect the property right that employees have in their

jobs, as recognized by the High Court decisions of ***National Bank of Malawi v Zefaniya*** [2008] MLLR 247 at 255 g and ***Banda v Dimon (Malawi) Ltd*** [2008] MLLR 92 at 109.

17.3 Thirdly, section 61(2) of the Employment Act provides that 'an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.' In this respect, we enjoin the SCA in stating that this provision introduces principles of equity, fairness and justice: see ***Sugar Corporation of Malawi v Ron Manda*** SCA Civil Appeal Number 7 of 2007 and ***Lameck Moyo v National Bank of Malawi*** SCA Civil Appeal Number 19 of 2009. It would be unfair for an employee, upon reporting for work, to be advised that his or her services are no longer required based on operational requirements without initially engaging him or her on the cause of the situation; available alternatives and how and why he or she, out of many, is going home. 'Consulting an employee prior to retrenching them seems to me to be a fair labour practice. On the other hand, retrenching an employee without consulting them about it would be equal to an ambush.' Per the dissenting Judgment of Hon. Chikopa JA, SC in ***Mkaka One*** and as adopted in ***Mkaka Two***. Consultations should therefore be taken to be part and parcel of the statutory concept of *justice and equity*.

17.4 Lastly, articles 13 and 14 of ILO Convention 158, which Malawi has ratified, oblige an employer to consult employees before carrying out dismissals due to operational requirements. ***Mkaka One*** ought to have given effect to these provisions on account that International Labour Organisation conventions on fair labour practice provide a useful guide as to what amounts to fair labour practices and the Courts are mandated to interpret the Constitution by developing and employing principles that reflect the unique character and supreme status of the Constitution. Where applicable, Courts are under obligation to have regard to current norms of public international law and comparable foreign case law: see section 11(2)(c) of the Constitution and ***Kachinjika v Portland Cement Company*** [2008] MLLR 161 at 173 a. See also Rachael Sophie Sikwese, ***Labour Law in Malawi*** 4th Edition, page 88.

18. If this Court be wrong in the application of the *per incuriam* concept, we opine that relying on ***Mkaka Two*** we should have still allowed this appeal.

Whether the Appellants were consulted

19. The lower court already made a factual finding that the Appellants were not consulted. This Court shall not tamper with that finding. The Court is alive to the fact that appeals from the IRC to this Court are on a point of law or jurisdiction and not facts. See section 65 of the Labour Relations Act – Cap 55:01 of the Laws of Malawi and ***Magalasi v National Bank of Malawi*** 2008 [MLLR] 45 (SCA).

Disposal

20. This appeal therefore succeeds on the ground that the Appellants were not consulted, as factually found by the lower court. It is a further finding of this Court that ***Mkaka One***, was made *per incuriam*, and that the true position of the law is that consultations are obligatory in all instances where termination of employment is due to operational requirements and not only when Terms and Conditions of Service say so.

21. The Registrar shall assess appropriate compensation, if not agreed by the parties, within 14 days.

22. Each party shall bear their own costs on this appeal given that this is an employment matter and the pertinent statutory dictate is that each party bears its own costs: see Section 72 of the Labour Relations Act which is fully discussed by Hon. Chipeta JA in ***Mkaka One.***

Made in Open Court this 1st December, 2023.

Allan Hans Muhome

JUDGE