

IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.6 OF 1986

BETWEEN:

BLANTYRE WATER BOARD APPELLANT

- and -

L.J.D. MULONGOTI RESPONDENT

Before: The Honourable Chief Justice (Mr. Makuta)
The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Mtegha, J.A.

Makhalira, Counsel for the Appellant
Nakanga, Counsel for the Respondent
Manda/Mrs Gausi, Court Reporters
Kadyakale, Official Interpreter

JUDGMENT

Mtegha, J.

The respondent in this case, L.J. Mulongoti brought an action against the appellant, Blantyre Water Board, claiming damages for wrongful dismissal and defamation. This action came before the Resident Magistrate. The appellant pleaded that it was justified in dismissing the respondent because he dishonestly dealt with the appellant's property which constituted misconduct; and that the claim for general damages in respect of defamation emanating from the contents of the letter dismissing the respondent was privileged.

The learned Magistrate found that the appellants were entitled to dismiss the respondent and consequently the claim for wrongful dismissal failed. The claim for defamation also failed because the learned Magistrate found that the letter of dismissal was privileged communication. However, the respondent's claim for leave pay and pension contribution succeeded, the total of which was K506.44. The appellant's counterclaim for K916.87 advanced to the respondent to purchase a motor vehicle succeeded.

The respondent, being dissatisfied with the learned Magistrate's judgment appealed to the High Court in respect of findings relating to wrongful dismissal and defamation, as well as the findings on the counterclaim. The learned Judge, on appeal, upheld the findings of the lower Court in respect of the claim for wrongful dismissal, but reversed the lower Court's findings in respect of defamation, and awarded K3,000.00 as damages. He also reversed the

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Magistrate's finding in respect of the counterclaim, because the appellant had already repossessed the motor cycle. It is against these findings that the appellant now appeals to this Court.

When the case came up before this Court to consider the appeal, Mr. Makhalira told the Court that about three weeks ago he had told Mr. Nakanga that the respondent in this case had died and he was considering to withdraw the appeal, but Mr. Nakanga appeared not to accept this. Having looked at the relevant law, and in particular section 10 (1) of the Statute Law (Miscellaneous Provision) Act Cap 5:01, he was withdrawing the case. Section 10 (1) of this Act stipulates:

"Subject to this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive *in part*, against, or as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation
....."

We are in agreement with Mr. Makhalira's observations of the law in that he had rightly, in our view, withdrawn the case.

But this is not the end of the matter. Mr. Nakanga has said that indeed Mr. Makhalira informed him of the death of the respondent - Mr. Nakanga's client, but that he, Mr. Makhalira, did not indicate to him that he was withdrawing the case; as a result he went on to prepare for the appeal. Since he has already prepared for the appeal, he is asking for costs. We are very surprised with Mr. Nakanga's submission. It is trite law that when Counsel's client is dead, Counsel's authority to prosecute his dead client's action ceases because from the point of death, the rights and obligations of the deceased are vested in his administrators or his executors. Only if these appoint him will he act. Cordery on Solicitors, Sixth Edition, at page 99 cites the case of Pool v Pool (1889) 58 L.J.P. 67 where it was decided as follows:

"When the client dies the solicitor's authority comes to an immediate end so that the solicitor can recover no costs of subsequent work unless the personal representatives continue the action and make themselves liable."

We are of the view that Mr. Nakanga is not entitled to costs subsequent to the death of his client.

We would also like to point out, in passing, that Mr. Nakanga made no effort to ascertain when his client died after he was told by Mr. Makhalira. One wonders why he did that - perhaps he wanted a higher quantum of costs and as a result he deliberately put a deaf ear to the fact. This attitude made him not to look up the law and as a result professed ignorance of the law relating to this issue before us.

DELIVERED at Blantyre this 19th day of August, 1988.

(Signed):



Makuta, C.J.

(Signed):



Banda, J.A.

(Signed):



Mtegha, J.A.