IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 17 OF 1995

BETWEEN:

BLANTYRE NETTING COMPANY.....……..APPELLANT

-and-

C V CHIDZULO AND OTHERS.....….....RESPONDENTS

BEFORE : THE HONOURABLE MR JUSTICE UNYOLO, JA

THE HONOURABLE MR JUSTICE MTEGHA, JA

THE HONOURABLE MR JUSTICE CHATSIKA, JA

Tembenu, Counsel for the Appellant

T.C. Nyirenda, Counsel for the Respondents

Chigalu, Official Interpreter/Recorder

JUDGEMENT

Unyolo, JA

This is an appeal against the decision of the High Court contained in the judgment of Tembo, J, delivered on 28th March 1995.

The facts are few and simple. The respondents were in the employ of the Appellant terminated the respondents' services by giving each of them one month salary in lieu of three months' notice. The appellant acted in this regard pursuant to Rule 6 of it's Terms and Conditions of Service which governed the respondents' employment.

The said Rule 6 Provides:

"NOTICE PERIOD

This is done as stipulated in the Conditions of Service Book on discharge entitlement for operative and junior grades. For senior staff this will be three months either way or one month's pay in lieu of notice either way. The objective of this is to ensure sufficient time to recruit replacements for senior staff responsibility."

By Originating Summons, the respondents commenced an action in the Court below seeking declarations of the Court, firstly, that the said Rule 6 contravenes the provisions of section 31 of the Constitution of the Republic of Malawi and secondly, that the said Rule 6 is contrary to common law, normal practices in employment situations and defeats the very purpose of giving notice or payment of salary in lieu of notice.

After considering the facts of the case and the arguments and submissions made thereon by Counsel, the learned Judge held that in the light of sections 5, 10(2) and 11 (1) and (2) of the Constitution, a private contract which contains terms and conditions inconsistent with the Constitution cannot be upheld by the Courts. He held further that the said Rule 6 was invalid, in that it was inconsistent with the provisions of section 31 (1) of the Constitution, which provide a right to everyone to fair and safe labour practice and to fair remuneration. The learned Judge declared that to the extent that the said Rule 6 prescribes payment of one months salary in lieu of three months notice the Rule infringed the Respondents right to fair remuneration. He accordingly declared that the appellant pays each respondent an amount equivalent to two months' salary which was payable to each respondent at the time when the respondents' service were terminated. It is against these findings that the appellant now appeals to this Court.

Four grounds of appeal were filed, as follows:

(i) The learned Judge erred in law in holding that there was loss of remuneration to the employee when the employer opted to pay a months pay in lieu of three months' notice.

(ii) The learned Judge erred in law in holding that the appellant's conditions of service providing for payment of a month's salary in lieu of three months notice infringed the provisions of section 31 of the Constitution of the Republic of Malawi.

(iii) The learned Judge misdirected himself on the effect of section 31 of the Constitution of the Republic of Malawi, on contractual obligations, in holding that the contractual provision for one month's pay in lieu of notice infringes the Constitution.

(iv) The learned Judge erred in law in equating payment in lieu of notice to remuneration.

Grounds (i) and (iv) were argued together. The findings under attack on these two grounds of appeal are contained in a passage at page 4 of the lower Court's judgment, which reads:

"I find that when Rule 6 is viewed in the light of my explanation herein, it is quite clear that the Rule, to the greatest extent, had operated to the relative advantage of the employer only. Let me note that a question of remuneration is a matter of greatest concern to any employee. Here, the employee was not able to receive a similar amount of payment to the one which he could otherwise have received had he served the entire notice period, particularly in the circumstances of the instant case, where the termination of the contract of employment was at the instance of the employer. To the employed, therefore, there was a definite loss of remuneration, whereas the same was not the case with the employer, who had the benefit of effecting payment of only one-third of the amount which he could have spent therefore had the full period of notice been served in employment by the employee."

Counsel for the appellant submitted that in the law of employment "remuneration" is simply quid pro quo, namely, money or something earned for having worked for it. He argued that, there could therefore, be no question of "remuneration" where the relationship of employer/employee had been terminated. Counsel submitted that a fortiori, pay in lieu of notice which is made upon termination of the contract of employment could not be described as "remuneration." He urged that the findings of the lower Court on this aspect cannot be supported and should be reversed, because they were made on the erroneous assumption that "remuneration" obtains even where a contract of employment had been terminated.

Counsel for the respondents was brief in his response to the appellant's arguments. He stated that the interpretation given by the appellant for the word "remuneration" is narrow. Counsel urged the Court to give the word herein is natural and ordinary meaning. He submitted that in ordinary parlance, the word "remuneration , in the context of employment, simply means wages or salary. He said that there can be no doubt that a payment in lieu of notice is a payment of wages or salary, which is the same thing as "remuneration."

The Shorter English Dictionary defines the verb "remunerate" as, "to reward or pay a person for services rendered or work done." Hence, the noun "remuneration" may be defined as "reward or payment for services rendered or work done."

In an Australian case, Herring, CJ, in Connolly v. Victorian Railways Commissioners (1957), VR 466, made the following remarks:

"The word remuneration should be given its natural meaning unless there is reason to do otherwise. In our judgment, that natural meaning is a full sum for which a worker is engaged to do the work in question....."

In an English case, namely, R -v- Postmaster General (1875176), 1 QBD 663, Blackburn J, at page 664, stated:

"remuneration is a wider term than "salary."

'Remuneration' means a quid pro quo. Whatever a person gets from giving his services seems to me a "remuneration" for them."

There can be little doubt from the foregoing that "remuneration" basically involves a payment made or received in return for work done or services rendered a quid pro quo (something-for-something) situation, that is.

Pausing here, let as us look at these two scenarios. First, where an employee does his work in the normal course of his contract of employment. Clearly, the wages or salary that he would get at the end of the month (where he gets paid monthly) would be remuneration a payment for the work done or services rendered.

The second scenario is where an employee has been given notice of termination of his employment; given, for example, three months notice, and he continues to work during those three months. From what we have seen above, in regard to the meaning of the term "remuneration", there can be no doubt that the payment the employee would get each month worked for the three-month period, would also be described as "remuneration", for, here again, the payment would be made in return to work done or services rendered. In our judgment, the fact that the employee had worked while service notice, would make no difference; and to try and draw a distinction between this scenario and the first scenario above, would, in our judgment, simply be a splitting of the hairs.

Now, let's bring in a third scenario, where an employee is given one month's salary or three months' salary in lieu of notice. According to the appellant, the payment made in such a case would not be remuneration, just because the employee did not perform any work or render any services. With respect, we are unable to subscribe to this view. The matter must be looked at from a common sense point of view. A payment in lieu of notice can be viewed as an ordinary giving of notice, accompanied by a waiver of services by

the employer which is accepted by the employee. In this sense, the payment in lieu of notice can properly be described as "remuneration." Indeed, it is significant to note that payment in lieu of notice is ordinarily attached to the wages or salary the employee got before the termination of the employment. In short, we hold the view that the term "remuneration" must be extended to include money paid in lieu of notice.

For the foregoing reasons, we are of the view that the learned Judge was correct in equating payment in lieu of notice with remuneration.

This brings us to the other question raised in the first ground of appeal, namely, whether the learned Judge erred in upholding that there was loss of remuneration to the respondents when the appellant opted to pay them a month's salary each in lieu of three months notice. The position here is this. Going by the option the appellant exercised, the respondents only got one month's salary. They would, however, have got three months' salary each had the appellant exercised the other option, i.e. had the appellant given the respondents three months' notice. Looking at the matter from this perspective, we can see that the finding of the Court below on this point cannot be assailed. Accordingly, the two grounds of appeal herein, grounds one and four, that is, must fail.

We now turn to the other two grounds of appeal, namely, the second and third grounds. These may also conveniently be dealt with together. As already shown, the appellant contends on this aspect, firstly, that the learned Judge in the Court below erred in law in holding that the said Rule 6, by providing for payment of one month's salary in lieu of three months notice, infringed the provisions of section 31 of the Constitution of the Republic of Malawi. Secondly, the appellant contends that the learned Judge also misdirected himself on the effect of the said section 31, on contractual obligations, in holding that the said Rule 6, which was a contractual provision, infringed the Constitution.

In arguing the appeal, Counsel for the appellant submitted that there is no rule of law stipulating that notice pay must correspond with the length of notice. He said that what seems to come out from decided cases on this point is that, where a contract stipulates the length of notice, an employer is merely obliged to pay the employee the wages for the length of the notice if the employer opts not to allow the employee to work his full notice period. Counsel argued that where, however, both the period of notice and the amount to be paid in lieu of notice are expressly provided for, the Court must not rewrite those contractual provisions. Its duty is simply to interpret and enforce them. Referring to the present case, Counsel urged that being a term of contract binding on into between the parties herein, the said Rule 6 was legally binding on the respondents, as it was on the appellant, and that it would be wrong for the Court to go outside the contract or to introduce into it matters that were clearly excluded by the parties. He further submitted that even the Constitution cannot nullify what the parties intended and agreed.

Further, Counsel for the appellant submitted that the respondents have no cause for complaint, since the said Rule 6 is fair, just and reasonable, in that the Rule applied equally to the respondents as it applied to the appellant to the appellant. Counsel stated that it would be wrong to hold that the Rule was invalid just because it was the appellant who exercised the mutual right conferred by the Rule on both parties.

In response, Counsel for the respondents began by saying that it is important for the Court to bear in mind that the said section 31 confers a fundamental human right and that the section must, therefore, be interpreted liberally. Counsel submitted that taking this approach, there is no way a payment of one month's salary in lieu of three months notice, as happened in the present case, could be described as "fair remuneration" within the meaning of the said section 31.

On the question that the said Rule 6 is a term of contract and, therefore, binding on both the appellant and the respondents, Counsel submitted that the said term was in actual fact not negotiated by the parties, but merely imposed by the appellant upon the respondents. Counsel said that the respondents, being necessitous men, had no choice but to submit to terms that the appellants (who were in dominant position) imposed. He submitted that this was an unconscionable bargain which the Court, as a court of conscience, should refuse to enforce.

Section 31 (1) of the Constitution is short. It provides that every person "shall have the right to fair and safe labour practices and to fair remuneration." It is not disputed that this right is one of the fundamental human rights enshrined in the new Constitution of the Republic of Malawi.

As regards the correct approach to be taken in the interpretation of constitutional rights, Lord Wilberforce, delivering the judgment of the Judicial committee of the Privy Council in Minister of Home Affairs -vFisher (1980), AC 319 (PC), a case from Bermuda, cautioned that a constitutional provision should not be treated as if it were an ordinary Act of Parliament. He said that rather, the proper approach was to construe such provision:

"as sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law."

The learned Judge went on to say that this approach called for:

"a generous interpretation, avoiding what has been called the, austerity of tabulated

legalism', suitable, to give the individuals the full measure of fundamental rights and freedoms referred to."

This principle was affirmed in a subsequent decision of the Privy Council in Attorney General of the Gambia -v- Momodou Jobe (1984). AC 649, where Lord Diplock, at page 700, stated.

"Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposeful construction."

In short, the principle laid down by the above cases is that a It generous approach should be taken to the interpretation of fundamental human rights and freedoms in a Constitution. We think that this approach accords with the tenor and spirit of the Malawi Constitution and we propose to adopt it. Referring to the present case, we are of the firm view that the responds could not be said to have got full measure of protection of their fundamental right, namely, right to fair remuneration under the said section 31(l), if they got, as they did, only one month's salary in lieu of three months notice. In our judgment, it seems absurd to hold otherwise.

We have considered the question whether the fact that the provisions of the said Rule 6 were reciprocal, and could be invoked by either side, makes any difference. With respect, we don't think so. Again, the matter should be looked at from a realistic and common sense point of view. To start with, it would be difficult for an employee of the respondents' class to find money to pay to an employer as payment of the lieu of notice. Secondly, it is clear, when the said Rule 6 is read together with section 31 (1) of the Constitution, that the Rule is really for the benefit of the appellant. Deep down, the appellant knew that if an employee wanted to leave employment, he would, for lack of money, have no choice but to serve the three months period of notice and this would give the appellant sufficient time to find a replacement. But, when it suited the appellant, conveniently the appellant would go for the option of one month's pay in lieu of notice. It has been observed that there is no end to man's ingenuity and what happened in the instant case appears to be an example of this.

We have considered the fact that the said Rule 6 was a term of contract. But, as was observed by the learned Judge in the lower Court, and as we have endeavoured to show in this judgment, the Rule infringes the provisions of section 31(l) of the Constitution. The learned Judge in the Court below was, therefore, right in declaring the said Rule 6 invalid, since the Constitution is the supreme law of the land: see section 10(l) of the said Constitution.

For all these reasons, the appeal must fail, and it is dismissed with costs.

DELIVERED in Open Court this 3 rd day of September 1996, at Blantyre.

Sgd L. E. UNYOLO, JA

Sgd H. M. MTEGHA, JA

Sgd L. A. CHATSIKA, JA