IN THE MALAWI SUPREME COURT OFAPPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 8 OF 2001

(Being High Court Civil Cause No. 3 Of 1994)

BETWEEN:

COMMERCIAL BANK OF MALAWI …… APPELLANT

-and-

EDGAR JOEL MHANGO …… RESPONDENT

BEFORE: THE HON. JUSTICE KALAILE, JA

THE HON. JUSTICE TAMBALA, JA

THE HON. JUSTICE MSOSA, JA

Chilenga, Counsel for the Appellant

Mvalo, Counsel for the Defendant

Mbekwani (Mrs.), Court Official

JUDGMENT

MSOSA, JA

The respondent's claim against the appellant in the High Court was for damages for his remaining leave days up to the date his services were terminated and interest thereon; exemplary damages for the exceptional treatment given out to him by the appellant despite his twelve years service and damages for defamation. He also claimed for an order nullifying the decision of the appellant, Commercial Bank of Malawi (hereinafter called the Bank) to summarily dismiss him in preference to the normal termination under the Bank's conditions of service and finally costs of the proceedings. The judge entered judgment in favour of the respondent on all his claims except on interest and exemplary damages. It is against that part of the judgment in favour of the respondent that the appellant now appeals.

The undisputed facts of the case were that the respondent was employed by Commercial Bank of Malawi Limited as Supervisor in 1981. He was initially stationed at the Bank's Main Branch in Blantyre. Later he rose to the post of Training Officer, Senior Inspector and then finally Branch Manager. His duty station as Branch Manager was Salima Commercial Bank Branch. His duties included approving grants of loans to farmers who were customers of the Bank at that Branch. Most of these farmers were tobacco farmers. It was the responsibility of the respondent to ensure that the tobacco for which the loans were given was insured against fire.

Mr. Kotokwa, the Chief inspector of the Bank was requested by his bosses to conduct an investigation at the Salima Commercial Bank Branch, He conducted the investigation in November 1993, and he discovered a number of irregularities in the way the respondent was discharging his duties, The first irregularity was that the respondent was debiting the accounts of the customers and paying out the money so deducted to the insurance broker for policies without their authority. He further discovered that the respondent failed to

ensure that the policies for which the payments were made were issued and in fact most of the policies were not issued. He also discovered that the respondent was lending out money of the Bank to customers without following the correct procedure.

The respondent was consequently summarily dismissed from employment for serious misconduct on 23rd November 1993. The respondent was dissatisfied with the dismissal. He, therefore instituted legal proceedings against the Bank claiming damages.

The appellant denied all the claims of the respondent. The appellant contended, in their defence, that they dismissed the respondent because he misconducted himself whilst in appellant's employ. The appellant, in turn, counterclaimed damages against the respondent stating that they had suffered loss because of the negligence of the respondent . The appellant contended that the respondent was negligent in collecting insurance premiums from customers' accounts without their prior approval and failing to ensure that the policies were issued. Further, that the respondent was increasing the customers' lending base for his benefit instead of the appellant. The appellant, also contended that the respondent was negligent in lending out money to some customers of the Bank knowing that those customers were using fictitious names. The appellant also accused the respondent of negligence for following a wanton lending policy contrary to acceptable banking procedures when granting loans to customers and for receiving bribes. The Judge dismissed the counterclaim in its entirety.

The appellant filed twelve grounds of appeal. The first ground of appeal is that the learned trial judge erred in holding that the defendant was held to a higher burden of proof than the plaintiff when the burden of proof is the same on both sides, i.e. proof on balance of probability. The respondent has argued in this court that the learned judge did not err when he said that the burden of proof cast on the defendant was much heavier than that of the plaintiff. The respondent argued that the leaned Judge was talking about burden of proof and not standard of proof. He therefore submitted that the judge was correct when he said that the burden of proof was on the defendant to prove the allegations that he made against the plaintiff. The respondent also said that the learned judge properly directed his mind on the question of standard of proof when he had stated that in a civil case the standard of proof is on a balance of probabilities.

Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v. National Trust Co., (1927) AC 515, 520 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v. Imperial Smelting Corporation (1943) A.C. 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who

invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties - see Bond Air Services Ltd v. Hill (1955) 2 QB 417.

The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the " balance of probabilities", and this is the standard of proof required in civil cases.

The respondent and the appellant had both claimed against each other. Therefore, each bore a burden of proof to prove to the required standard, the claim each had made against the other. We note that the judge clearly addressed his mind to the question of standard of proof when he said that the standard of proof in civil cases is on a balance of probabilities. However he fell into error when he said:-

"…Since they are all accusations leveled out by the defence, it is the defence the court had to look to for justifiable proof of these allegations. The plaintiff in that regard would only stand in a defensive position. As such the burden of proof cast upon the defendant is far much heavier than that of the plaintiff."

The law is very clear, the burden only shifts to the other party when sufficient evidence is adduced to raise a presumption that what is claimed is true. It was certainly not correct that the burden of proof on the defendant was heavier than that of the plaintiff. For the reasons given we would allow this ground of appeal.

The second ground of appeal is that the learned trial judge erred in finding that the failure to call Mrs. Kalumbi and Mr. Gwazani was fatal to the accusation that the plaintiff was guilty of negligence or misconduct in the handling of the account of Kalumbi. The appellant contended that the respondent as Manager, to have allowed withdrawals to be made on the account of Thupenzi Luwizi Kalumbi who was at that time dead, was gross negligence and illegal as the deceased's account should have been operated by a person duly appointed personal representative of the deceased.

Counsel for the respondent has argued that the respondent was not aware that Thupenzi Luwizi Kalumbi was dead because there was no formal notice to the Bank of Kalumbi's death. We note that, there was evidence that the respondent was aware that Kalumbi was dead. The respondent admitted in evidence that he was informed by the brother of the deceased that Kalumbi was dead. The respondent, however argued that such a notice was not valid because that was not the correct procedure by which the Bank is informed of

their customer's death. He argued that the respondent was, in the circumstances, fully entitled to allow operations on the account including withdrawals. The undisputed evidence shows that the respondent permitted Mrs. Kalimba to obtain a loan in the name of late Mr. Kalumbi because she could not get a loan on her account which she had with the same Bank. It seems Mrs Kalimba had exhausted her entitlement to a loan.

We have no doubt in our minds that the respondent as manager of the Bank was under a duty to protect the property of his employer, the Bank and follow correct procedures in lending out money of the Bank to the customers. We are also of the view that it was the duty of the respondent as Bank Manager to advise the informants, the correct procedure of reporting death of a customer of the Bank. The respondent was certainly negligent in allowing Mrs Kalimba to obtain a loan from late Kalumbi's account. We do not think the position would have been different even if the deceased had been alive. We would in the circumstances allow this ground of appeal.

The third ground of appeal is that the learned trial judge erred in giving no weight to Mr. Kotokwa's evidence regarding his conversation with some of the Bank's customers. The appellant contends that if Mr. Kotokwa's evidence was not objected to as hearsay when it was being given, the court was wrong in disregarding it as hearsay in its judgment. On this point this is what the judge said:-

" Mr Kotokwa did not hide the fact that he had the occasion to talk to both Mrs Kalumbi and Gwazani about their signatures. Whatever he discussed with those two, the court should hear it but not a reported form for fear of the hearsay rule. His evidence may fall prey to hyperbolism and circumspection. I am afraid I reject that evidence."

We observe that the evidence of Mr. Kotokwa was obtained from the records of the Bank and was admissible without necessarily calling each and every account holder to verify that the record regarding the entry relating to his or her name was correct. The records were not challenged. We are surprised that the Judge adopted the view he did, when the respondent did not dispute the records and the evidence contained therein. We would again allow this ground of appeal.

The fourth ground of appeal is that the learned trial judge erred in using his personal knowledge instead of using the evidence adduced in the case in regard to the question as to when was the insurance brokerage firm of Mr. Chapweteka started. The appellant contends that the learned trial judge failed to give proper weight to the fact that the respondent made payments to Mr. Chapweteka allegedly as premiums for policies for the Bank's customers, but took no steps to obtain the said policies. The appellant says this amounted to evidence of misconduct and collusion between the respondent and the insurance brokerage firm.

The evidence was that the respondent had, on behalf of the Bank made several payments to Mr. Chapweteka's insurance brokerage firm and to his personal account as premiums for the policies and yet no policies were issued and the respondent made no attempts to obtain them. We note that the judge gave no weight to the available evidence instead he used his personal knowledge of Mr. Chapweteka and this is what he said:-

"…It was the defence story that simultaneous to the time Mr Mhango went to Salima, Mr Chapweteka opened his insurance brokerage company. I personally do not subscribe my approval to that submission. I have personally known this firm as one established years earlier than 1992 perhaps with the production of a registration certificate the point would be made out…"

It is clear from the above comment that the Judge was using his personal knowledge to decide the credibility of Mr. Chapweteka and to decide whether it was true that the respondent and Mr. Chapweteka colluded in order to transfer funds from the customers accounts to the insurance brokerage company. This was certainly wrong. The duty of a Judge in deciding a case is to evaluate the evidence before him and the relevant law in order to arrive at a correct decision. Cases must be decided on the evidence before the court and the relevant law. We would again allow this ground of appeal.

The fifth ground of appeal is that the learned trial judge erred in failing to give due and proper weight to the evidence that the respondent took no steps to recover the premiums paid to Mr. Chapweteka for the policies which were not issued. The argument of the appellant is that the trial judge should have found, on the evidence, that the fact that the premiums were recovered after the departure of the respondent from the Bank, significant in showing collusion between the respondent and Mr Chapweteka. The appellant argues that, failure of the respondent to obtain insurance certificates for premiums which were already paid for was gross negligence and misconduct justifying dismissal.

There was sufficient evidence that policies were not issued although payment for them was made and the responded did nothing to ensure that they were issued. It is difficult to understand how a man of the position of the respondent could allow payments to be made without caring to obtain what was paid for. Our understanding, on the facts is that the premiums were made to safeguard against any losses which the customers could have suffered in the event of their tobacco catching fire, a situation which could have made it difficult for the customers to pay back the loans. On these facts the judge should not have had any problems in finding that the respondent was negligent and guilty of misconduct. We again allow this ground of appeal.

The sixth ground of appeal is that the learned judge erred in concluding that because criminal investigations had not been resorted to prior to the dismissal of the plaintiff, the case of wrongful dismissal was valid. A short answer to this is that it is not a legal

requirement that in a case like the present one, the offender should be prosecuted first before he is dismissed. What is important is whether the dismissal can be justified. The appellant gave reasons for dismissing the respondent, namely that the respondent was guilty of negligence and misconduct. We would again allow this ground of appeal.

In grounds 7 to 11 the appellant has attacked a number of findings of facts by the judge and we find that these do not differ much from the ones we have already considered, suffice to say that it is true that the judge made several findings of facts which were not supported by the evidence. For example, there was clear evidence that the respondent was lending out Bank money to their customers without following the correct procedure, yet the court found otherwise. There was also evidence that the respondent was a money lender in his personal capacity. This was clearly in conflict with his work since his employer, the Bank was also involved in lending money to its customers. The Judge, surprisingly, found that the respondent was not negligent and not guilty of misconduct because there was no loss to the Bank. The judge, instead found that the ”wild lending” by the respondent had earned the Bank some income. This finding was not supported by the evidence.

The final ground of appeal is in respect of the defamation charge. The appellant averred that the learned Judge erred in holding that a reference to the “ Bank Manager “ could only have been a reference to the respondent, when the Court had also found that similar practices in opening accounts were engaged in by the respondent’s predecessor. We observe that the judge made reference to an account which was opened by the respondent’s predecessor. He said that if there was any irregularity in respect of that account, the respondent was not answerable for that irregularity. We note that the issue in the court below was not the opening of customers accounts but debiting those accounts without the authority of the customers. As for the defamation charge, the respondent stated that the accountant told the appellant’s customers that their money which was stolen by the Bank manager had been found and according to him this was in reference to the money which he had paid to the insurance broker. The appellant argued that there was no defamation because if those words were uttered they were uttered to a specific group of farmers who had a special interest in the matter. We have already said that the payments were made without authority and there were no policies issued. This was just as good as stealing and if that statement was uttered it was a statement of truth and the appellant cannot be faulted. For the reasons given the appeal on this ground is allowed.

The respondent cross- appealed on two grounds. The first ground was that the terminal benefits should have included salary and other emoluments and benefits up to normal retirement age. Secondly that damages of K20,000 awarded for defamation of a nature imputing a criminal offence on the part of the respondent were inadequate. We have already said that the respondent was guilty of negligence and misconduct, and that there was no defamation. We, therefor, for the reasons we have already given, find no merit in both grounds of appeal. We consequently dismiss the cross appeal.

The respondent is condemned in costs for both the appeal and the cross appeal.

Delivered in Open Court at Blantyre this 18th day of December 2002, at Blantyre.

Sgd: ……..……
J. B. KALAILE, JA

Sgd: ……...…
D. G. TAMBALA, JA

Sgd: ……..
A. S. E. MSOSA, JA