

IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

M. S. C. A. CIVIL APPEAL NO. 38 OF 2003

*[Being High Court Civil Cause No. 569 of 2000
at Zomba District Registry]*

BETWEEN:

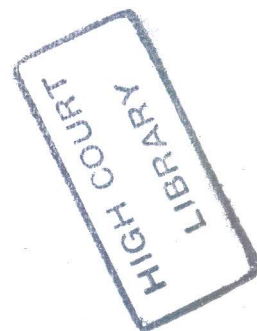
COUNCIL FOR THE UNIVERSITY OF MALAWI.....APPELLANT

AND

URBAN MKANDAWIRE [MALE]RESPONDENT

**BEFORE: THE HON. THE CHIEF JUSTICE
THE HON. JUSTICE MTAMBO, JA
THE HON. JUSTICE TEMBO, JA**

Dr. Mtambo, of Counsel for the Appellant
Mkandawire, Present/Unrepresented
Kunje [Mrs], Court Official



J U D M E N T

MTAMBO, JA

The respondent commenced proceedings in the High Court at Zomba by a writ of summons indorsed with a statement of claim in which he sought damages for wrongful termination of the contract of employment which he entered into with the appellant. He also sought other reliefs which are not our concern. The appellant

disputed the claim. The Court nonetheless found that the appellant was guilty of wrongful termination of the contract for not having given the respondent due notice and made an order that the respondent be paid three months' salary in **lieu** of notice. The Court went further and also found the appellant guilty of what it said was a "breach of one of the rules of natural justice which states that a person should not be condemned unheard," and awarded the respondent damages which it said that there was no doubt that the respondent had suffered as a result of the appellant's "action in terminating his services without giving him an opportunity to be heard."

We wish to observe at the outset that the court found as a fact that it was a term of the contract that the contract was determinable by either party upon giving the other three months' notice or three months' pay in **lieu** of notice. We also observe that the contract was silent about whether there would first be an opportunity for a hearing, or to be heard, before termination thereof.

The appellant appealed to this court on four grounds as follows:

- [a] that the High Court erred in ruling that the respondent was not a probationer at the time of his dismissal;
- [b] that the High Court erred in awarding the respondent damages in addition to the notice pay awarded to him;
- [c] that the High Court erred in awarding the respondent legal costs because he was not represented by counsel, and
- [d] that the High Court erred in treating the action as one of judicial review yet it was commenced by writ

We will deal with each ground of appeal in the order they appear to us to have been argued. And we think we should mention here that ground [a] was not argued before us, although we may appear to

allude to it in the course of the judgment as we deal with grounds [b] and [d].

The circumstances of the case are not in dispute and can be narrated very briefly. As we have indicated above the respondent entered into a contract of employment with the appellant as a lecturer; one of the terms or conditions of the contract was that the employment was determinable by either party upon giving the other due notice or payment of salary in **lieu** of notice. The respondent was in the job for some twelve months when the appellant terminated the employment by a letter which, in the relevant part, read:

"Dear Mr. Mkandawire

Please refer to your meeting with the Vice Chancellor..... and to the letter of warning sent to you. It is clear from reports from the department and the students that you have taken no steps to change your ways of teaching.

It has been decided therefore that your services be terminated with immediate effect. You are entitled to one month's salary in **lieu** of notice and this will be paid to you once the college has cleared you of any debts or other obligations"

Such really is the way the circumstances of the case look. We have said that the appellant has not argued ground [a], whose import was that the respondent was not entitled to more than one month's pay in **lieu** of notice because he was a probationer. We would like to say that we have ourselves carefully considered all the facts of the case and it seems to us that the High Court came to the correct conclusion when it found that the appellant was in breach of the contract when it paid the respondent one month's salary in **lieu** of notice. Having said that, we move on to ground [b], namely, that the High Court erred in awarding the respondent damages in addition to the notice pay awarded to him.

It is now long settled that damages equivalent to a salary in lieu of notice are awarded to an employee whose services will have been wrongfully terminated and that that is because the period of notice is the period at the end of which an employer may lawfully terminate an employment. We have said above that the period at the end of which the court found the respondent's employment could lawfully have been terminated was three months. It seems to us, therefore, that the damages to which the respondent was entitled were, as we have already indicated above, those equivalent to a salary covering the period of three months, which the court below awarded.

That really should have been the point at which the court should have concluded the matter. But, as we have said above, the court went further and condemned the appellant in further damages for not having accorded the respondent the opportunity to be heard before the termination.

We think it is pertinent to say here that it is important to always remember that the general principles of the law of contract apply to contracts of employment. And that it is also important to always remember that one of such principles is that the law of contract is concerned only with legal obligations as agreed by the parties themselves and not with any other expectations however reasonable they might be; this principle was also alluded to by this court in the case of **Dr. BS. Chawani V. The Attorney General**, M.S.C.A. Civil Appeal No. 18 of 2000 [unreported]. There is also the case of **Hill -Vs- V. C. A. Parsons and Co. Limited** [1972] Ch. 304 for the legal authority to the effect that an employee who is wrongfully dismissed cannot be granted damages for loss of expected benefits to which he had no contractual right. And referring to the case at hand, it does not seem to us that it was any of the concern of the court below whether the respondent had been accorded an opportunity to be heard before the termination of the employment because that was not a term or condition in the contract. The concern of the court was only whether or not the termination was in accordance with the contract, or, put differently, whether it can be

said that the appellant's act of terminating the employment was in breach of the contract.

It, therefore, seem to us, in the light of the foregoing, that the High Court erred when it awarded the respondent damages in addition to those that it had awarded in **lieu** of notice for the reason, simply put, that the respondent had no contractual right to any expectation beyond the salary, which ended with the job.

Ground [d], namely, that the High Court erred in treating the action as one of judicial review yet it was commenced by writ, is in our view, closely connected to ground [b] in that it really questions the basis on which the court made the award. Having found above that the award was erroneous, it seems to us to follow that the basis thereof cannot be right. We, therefore, do not find it necessary to say more than what we have already said save to mention that if the respondent had indeed desired to contend that the rules of natural justice were not observed by the appellant when terminating his employment, he was perfectly entitled to have appropriately stated the issue in the pleadings as a separate cause of action. That not having been done it was not open to the court to raise the matter, even if there might have been evidence of it. A court is not entitled to treat a matter differently from what the parties have brought before it through pleadings or other process – and if authority is needed for this it is **Yanu Yanu V. Mbewe**, 10 M L R 417, **Chilenje V. The Attorney General** M S C A Civil Appeal No. 08 of 2003 [unreported] and **The Attorney General V. Kanjanga** M S C A Civil Appeal No. 03 of 2003 [unreported], among other cases.

That brings us to ground [c] in which the appellant contends that the High Court erred in awarding the respondent legal costs since he was not represented by counsel. In view of the order which the High Court made, we are unable to readily see the basis of this contention, and learned counsel was himself not very helpful to us. The court ordered that the costs of the proceedings were awarded to the respondent which it said were to be taxed by the Registrar, if not agreed. We find nothing wrong with the order and we, therefore, uphold it.

In the result, we uphold the decision of the High Court regarding the award of damages in the equivalent of three months' salary in **lieu** of notice. We allow the appeal against the award of damages in addition to those awarded in **lieu** of notice for lack of basis. We also allow the appeal against the decision of the High Court regarding the finding of breach of contract upon the court's finding that the appellant did not accord the respondent an opportunity to be heard before the termination of the contract for the reason that the issue was not before the court.

Considering that the appeal was essentially against the award which the court ought not to have made on the facts which were before it, we think that each party should bear own costs of the appeal, and it is so ordered.

DELIVERED in Open Court this 12th day of July 2004 at Blantyre.

Signed

L. E. UNYOLO, SC, CJ.

Signed

I. J. MTAMBO, SC, JA

Signed

A. K. TEMBO, SC, JA

