IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NUMBER 21 OF 2001

(Being High Court civil cause number 27 of 1996)

BETWEEN:

VICTOR LIKAKU
APPELLANT/RESPONDENT

And

THE NEW BUILDING SOCIETY
RESPONDENT/APPELLANT

CORAM: **JUSTICE J. KATSALA**
Mr G. Banda of counsel for the Appellant/Respondent
Mr S. Tembenu of counsel for the Respondent/Appellant
Nsomba, official interpreter

RULING

Katsala J,

This is an appeal by New Building Society, the respondent in the main appeal, against the order made by the Senior Deputy Registrar on 6th May 2004 dismissing its objection to the appointment to assess damages taken out by Victor Likaku the appellant in the main appeal but respondent in this application.

The facts as they appear from the court record are that the respondent took out an action in the High Court of Malawi claiming damages for wrongful dismissal. He failed in the High Court but succeeded on appeal in the Malawi Supreme Court of Appeal. In its judgment delivered on 10th February 2003 the Supreme Court awarded him his salary and benefits from the time of his suspension from work, August 1990 to March 1991 when his employment could have been lawfully terminated. The benefits due to Mr Likaku included use of a car, a furnished executive

residence, a gardener, watchmen, water, electricity, telephone, entertainment allowance and annual bonus in form of a 13th cheque. The Supreme Court ordered that damages were to be assessed by the Registrar.

In pursuance of the judgment the respondent worked out the damages payable to him under the various heads of claims except those claims whose details were in the sole knowledge of the appellant. His legal practitioners wrote to the appellant herein on 24th February 2003 advising it of the calculations and demanding payment. The relevant parts of the letter read as follows:

> "The totals are:
>
> | | | |
> |---|---|---|
> | 1. | Salary | K 31,048.00 |
> | 2. | Bonus | K 2,586.67 |
> | 3. | Leave days | K 18,624.00 |
> | 4. | Motor vehicle | K 115,200.00 |
> | 5. | House | K 45,800.00 |
> | | Total | K 213,258.67 |
>
> We do not have any basis for coming up with an assessment for the monthly payments for water, electricity, house servant (2) gardeners, watchmen (3) one in the day and two at night, telephone and entertainment allowances. Mr Likaku has advised us that the bills were being sent to the New Building Society who paid directly to the respective service providers. Therefore the assessment for the foregoing entitlements will depend on what your records show. Please check your records and come up with figures of how much Mr Likaku should have been paid for in five months. Once you come up with the figures please add them to the K 213,258.67. If you agree with our assessment do come back to us with a cheque in full and final conclusion of this matter. We would appreciate if payment was made within 10 days from today's date.
>
> We have considered the issue of party and party costs. We propose that these be put at K175, 000.00 to cover costs for both the High Court and Supreme Court proceedings. If you are in agreement with our proposal do send us a cheque. If not, make a counter proposal within 10 days from today's date.
>
> Note that we have not included interest and have reduced the party and party costs because we intend to settle out of court as per the proposals contained herein. The issue of interest will be included if we go to court for assessment where costs will obviously be enhanced."

The appellant responded to the letter by its own letter dated 17th March 2003. The relevant parts read as follows:-

> "Please note that we accept your offer for an out of court settlement. Therefore we request you not to proceed to issue process for assessment by the Registrar. We are meanwhile, attending to the detailed contents of your proposal."

Following the exchange of these letters, the appellant paid the following sums to the respondent:

a) K175,000.00 as agreed party and party costs;

b) K213,258.67 as damages per the respondent's calculation in letter dated 24th February 2003.

c) K3,200.00 as damages under the other remaining heads of claims, whose details were with the appellant.

Though not relevant to the issue before me, it is worth mentioning that the sums of money under (b) and (c) were attached by a garnishee order made in another matter in which the respondent is a defendant. The costs were paid direct to the respondent's legal practitioners then Messrs Chisanga and Tomoka. The evidence on the court record does not show when the appellant paid these sums of money.

However, this is not the end of the matter. The respondent engaged Messrs Banda, Banda & Co, legal practitioners in place of Messrs Chisanga & Tomoka, to continue with the matter. In their letter dated 13th August 2004 addressed to the appellant the new legal practitioners recomputed the damages payable to the respondent. The relevant parts of their letter read as follows:-

> "We write to inform you that we have received instructions to deal with you regarding the issue of computing the damages payable to Mr Likaku following the decision of the Malawi Supreme Court of Appeal.

…….

> It has taken twelve (12) years to finally resolve the issue of Mr Likaku's suspension and premature retirement because the society decided to defend the action. It is therefore our submission that in computing the damages due to Mr Likaku consideration should be given to the length of time it has taken from the termination of his employment to the payment of the claim. During this period there has been a dramatic depletion in the value of the Malawi Kwacha resulting in hyper inflation. There has been a lack of foreign exchange, interest rates have escalated astronomically. It is therefore right and equitable to take into account these factors in order to assess the current value of Mr Likaku's damages. In order to arrive at the correct quantum in real terms we have looked at two formula in computing the damages.

……..

It is clear to us that after taking into account the length of time it has taken to pay the claim and taking into consideration the economic factors that prevailed during the relevant period, it is our submission that Mr Likaku's damages must be placed between Five and Six Million Kwachas. We are therefore claiming MK6 million as damages to be paid to Mr Likaku.

The issue of party and party costs can be discussed later after this main issue has been resolved."

The appellant replied arguing that the matter was concluded and could not be reopened. The relevant parts of their letter dated 19th August 2003 read as follows:-

> "We wish to advise as follows:
>
> 1. That the issue of what is payable to Mr Likaku pursuant to the judgment of the Supreme Court was concluded between the Society and Mr Likaku through his former lawyers Messrs Chisanga and Tomoka. We are of the view that this subject matter cannot be re-opened after such conclusion.
>
> 2. We do not think that there exists any legal judicial or other basis for the alternative formulae that you propose in your letter."

Obviously the respondent was not satisfied with this response. He then took out a notice of appointment to assess damages before the Registrar. The appellant objected to the intended assessment arguing first, that issue of damages was already settled and compromised by the respondent through his former legal practitioners by their letter dated 24th February 2003 and the subsequent payment of the total sum of K391,458.67 made by the appellant to the respondent. Secondly, that the said compromise extinguished all the respondent's claims against the appellant.

After hearing arguments the learned Senior Deputy Registrar came to the conclusion that there was no compromise and ordered that the notice of appointment to assess damages should stand. It is against this decision that the applicant now appeals to this court.

Three grounds of appeal have been filed. They are:

> a) The Learned Registrar erred in law when he held that there was no agreement between the plaintiff and the defendant to settle the issue of damages out of court (through their mutual exchange of correspondence).
>
> b) The Learned Registrar erred in law in holding that the issue of damages had not been compromised and settled by the parties.
>
> c) The Learned Registrar erred in law in holding that the payments made to the plaintiff by the defendant could not extinguish all the plaintiff's claims such as interest, when the Supreme Court made no award for interest in its decision dated 10th February 2003.

I do not wish to deal with each of the grounds of appeal specifically. The question before me really is whether the issue of damages was settled and compromised as is alleged by the appellant. In answering this question I would propose to put the claims the respondent had into four categories and deal with each one of them specifically. I would classify the claims as follows:

> (a) those worked out by the respondent;

(b) those worked out by the appellant;
(c) interest; and
(d) legal costs.

As already stated herein before, the Malawi Supreme Court of Appeal awarded the respondent five months salary and benefits in form of loss of use of car, loss of residence and accompanying benefits of a gardener, watchman, water, electricity, and telephone, entertainment allowance and annual bonuses in form of 13th cheque. Again as already stated, the respondent worked out the amounts due to him on each and every head except those he did not have information on. The applicant accepted the amounts and paid the total sum thereof to the respondent. The question now is, can the respondent come back and say that he was not paid in full on those heads of his claim. I do not think so. In my considered view it is very wrong for the respondent to do so. As far as I can see, having worked out what was due to him and the appellant having paid the same, the issue was settled and duly closed. And it stands closed to this very day. He cannot reopen it. He has to live up with what he demanded and got. Therefore, I do not think there are any damages to be assessed by the Registrar on these heads.

Coming to the second category of benefits, those worked out by the appellant, I do not think that the position is any different. The respondent did not have any information to enable him calculate how much was due to him. He therefore asked the appellant to calculate the same, since it was in possession of the relevant information, and to add up the total to the amount due under the first category. He was prepared and in my view undertook to accept the amount the appellant would come up with based on the information in its possession. The appellant obliged and paid the amount due. Again, in these circumstances, can the respondent come back and say the amount under this category should be assessed by the Registrar? I do not think so. The respondent's claims were settled in full. Consequently, there are no damages to be assessed under this category.

Further, let me say that it was the intention of the parties that the payment of the amounts as worked out by the respondent under the first category and to be worked out by the appellant under the second category would conclude the matter and discharge the respondent of any further liability. The respondent in his letter of 24th February, 2003 expressly stated "if you agree with our assessment do come back to us with a cheque in full and final conclusion of this matter". The respondent agreed with the assessment and paid the amounts due. Surely, that fully and finally concluded the matter.

It is my considered view that in respect of these categories of the respondent's claim we should be talking of the claims having been settled in full and not compromised. I do not see any compromise at all because when a matter has been compromised it "assumes that a mutual concession has been made by both parties and that each party has got something less than he claimed", per Lawrence L.J. in *Gurney v.Grimmer* (1932) 38 Com.Cas. 12 at 18. The respondent got neither less than what he claimed nor what he was entitled to as damages.

One may argue that surely the matter having taken twelve years to conclude, the respondent is entitled to interest on the damages in order to retain their value. This seems to be the argument in the respondent's letter dated 13th August 2003 hereinbefore reproduced. There are two responses to this argument. First, it must be noted that the Malawi Supreme Court of Appeal did not award the respondent any interest. Consequently, the only interest that the respondent would be entitled to is the interest chargeable on judgment debts. This interest would accrue from the date of the judgment, 10th February 2003 to date of payment. Secondly, it is clear that the respondent

dropped the claim for interest. In the last paragraph of the letter from the respondent's lawyers dated 24th February 2003, which I have already reproduced, it was stated that the respondent would abandon the claim for interest if the matter were settled out of court. In other words, the issue of interest would be pursued if the matter went to court for assessment of the damages. And as things turned out, the damages were agreed upon and paid outside court. Can the respondent now turn round and demand interest on the damages. I do not think so. The condition precedent for the abandoning of the claim for interest having been satisfied, it would be grossly wrong and indeed inequitable for the respondent to revive the claim.

In support of my veiw I would refer to the dictum of Lord Caims, L.C. in Hughes v. Metropolitan Rail Co. [1874 – 80] ALL ER 187 at 191, where he said:

> "… it is the first principle upon which all courts of equity proceed if parties, who have entered into definite and distinct terms involving certain legal results, certain penalties, or legal forfeiture, afterwards by their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have to enforce those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties."

All in all on the facts of this case it would appear to me that by entering upon negotiation which they entered upon, the parties made it an equitable thing that the payment of the damages as agreed would discharge the applicant from the respondent's claims. The respondent cannot therefore be allowed to resile from such understanding. It would definitely be inequitable for the court to allow the respondent so to do, *J. P. Loga v. Durand and Bowden (Pty) Ltd*, MSCA civil appeal number 29 of 1994 (unreported).

There is very little that can be said in respect of legal costs since they depend solely on the amount of work that is done on a matter. What has been said above in respect of the other claims equally applies to costs. Since the matter was settled out of court there cannot be a further claim for costs. The sum of K175, 000.00 paid as party and party costs under the out of court agreement discharged the appellant's liability for costs up to the point of the agreement.

Before I conclude let me comment briefly on what appears to have weighed heavily on the mind of the learned Senior Deputy Registrar in arriving at his decision. He thought and held that time of payment of the sums due to the respondent was of the essence of the agreement between the parties. At page 11 of his ruling he said:

> "In any event the plaintiff [the respondent] had clearly indicated that he would forgo certain claims like interest, if the defendant [appellant] made payment within 10 days. The defendant never came forth within the said 10 days and the plaintiff has now revived the outstanding claims which, had the defendant accepted the offer then, the plaintiff said he would forgo them."

With due respect, the letter from the respondent does not say that interest would be forgone if payment is made within 10 days. Rather, as I have earlier said, it says interest would be forgone if the matter were settled out of court. This is clear from the last paragraph of the letter. Further, the respondent did not say that he would only be bound by the agreement if payment were made

within 10 days of the letter. What he said is that he would appreciate if payment were made within 10 days. In my view this did not make the time of payment of the essence of the agreement between the parties. It would therefore be erroneous, in my judgment, to say that the respondent was discharged from the agreement because of the appellant's failure to make payment within 10 days.

The learned Senior Deputy Registrar also seems to say that there was no agreement between the parties because the respondent's offer as contained in his letter dated 24th February 2003 was never accepted by the appellant. At page 9 of his ruling the Registrar said;

> "Clearly, the letter from the defendant's dated 17th March, 2003…. did not strictly speaking comply with the conditions that were contained in the plaintiff's letter of offer, which required that payment had to be made within 10 days or that if the defendant disagreed with the proposals then they had to make a counter offer within 10 days. When the defendant finally replied it only accepted the offer for an out of court settlement but not necessarily the substance of the offer …

……

In my considered opinion, the above letter…. did not constitute an acceptance, if anything it was a counter offer which had to be accepted by the plaintiff or not. Notably there is no letter signifying that acceptance save the fact the plaintiff received the payment that later came from the defendant. The question therefore is, did this indeed extinguish all the other plaintiff's claims?"

There is no doubt that indeed the appellant accepted the respondent's offer to settle the matter out of court. But with due respect to the learned Senior Deputy Registrar I would go further to say that the appellant also accepted the 'substance' of the respondent's offer. The respondent's letter of offer says 'if you agree with our assessment do come back to us with a cheque in full and final conclusion of this matter'. This is in respect of the damages. And in respect of party and party costs it says almost the same, that is, 'if you are in agreement with our proposal do send us a cheque'. What is clear from these statements is that the respondent prescribed the method and or mode of acceptance of the offer. Acceptance was to be by conduct. The appellant was required to signify acceptance by effecting payment. And this is what the appellant did. In my judgment the appellant cannot be condemned for having complied with the prescribed mode. Where an offer requires the acceptance to be expressed or communicated in a certain way it can generally be accepted only in that way. So where the offer had asked for acceptance to be expressed in writing it was held that the offeror could not be bound by an oral acceptance, *Financings Ltd. v. Stimson* [1962] 1W.L.R. 1184. In the instant case therefore if the appellant had expressed its acceptance by letter as held by the learned Senior Deputy Registrar such acceptance in my opinion would not have been binding on the respondent. But as things stand a binding agreement was created and accordingly, the respondent cannot be allowed to resile from it.

In the circumstances, and for the reasons I have given, it is my judgment that the issue of damages was already settled and or compromised between the parties herein. The payment of the agreed sums by the appellant discharged it from all claims that the respondent had against it. Consequently, there are no damages to be assessed. The appeal therefore succeeds with costs.

Made in chambers at Blantyre this 16th day of February 2005.

Katsala J.
JUDGE