IN THE MALAWI SUPRME COURT OF APPEAL

AT BLANTYRE

M.S.C.A CIVIL APPEAL NO. 34 OF 2006
(Being High Court Civil Cause No. 956 of 1996)

BETWEEN:
STANBIC BANK LIMITED……APPELLANT

- and -

R. MTUKULA……RESPONDENT

BEFORE: THE HON. THE CHIEF JUSTICE
THE HON. JUSTICE D.G. TAMBALA, SC., JA
THE HON. JUSTICE I.J. MTAMBO, SC., JA
Chilenga, of Counsel for the Appellant
Kaphale, of Counsel for the Respondent
Selemani, Official Interpreter

JUDGMENT

TAMBALA, SC., JA

This is an appeal brought by an unsuccessful defendant bank in the Industrial Relations Court. Its appeal to the High Court against the decision of the Industrial Relations Court was dismissed and the costs of the appeal were awarded to the respondent. It now appeals to this Court against the decision of the High Court. The appeal is strongly opposed by the respondent.

The factual background of the appeal is as follows:- In 1985, on 1st August, the appellant bank employed the respondent as a Manager. He was then a young graduate at the age of 23. He rose through the ranks of the appellant, first as a branch accountant and ultimately became the Branch Manager.

In January, 2003, the respondent was working for the appellant at Lilongwe as a Branch Manager. On 6th January, 2003 a person identified as L. Kasimu brought a cheque to the appellant's bank at Lilongwe and presented it to a bank teller called Miss Gunde. The cheque was drawn on the account of Bookworm Limited. It was for K100,000.00. The bank teller could not pay the cheque as the amount was above her limit. She passed it to a supervisor to authorise the encashment. The supervisor could have given the authority to pay the cheque, but he noticed that the account was short of funds for the sum of K29.00. The supervisor passed the cheque to the respondent to authorise overdrawing the account by K29.00. The respondent, as Branch Manager, gave the authority to pay the cheque. The proceeds of the cheque were paid to L. Kasimu who was identified by a passport. It was later discovered that the cheque was a forged document. L. Kasimu
was a fraudster. He vanished soon after he received payment.

The appellant took the view that the respondent contributed to the loss of K100, 000.00. It accuses the respondent of failing to communicate with the account holder to get his authorization for an overdraft. The respondent is further accused of failing to comply with an internal instruction to confirm with the drawer of a cheque where a third party presents for encashment a cheque for an amount above K50, 000.00.

The respondent in the Industrial Relations Court insisted that a Branch Manager is mandated to grant an overdraft depending on the manner in which the account has been conducted by the account holder. He told that Court that there was no circular which required him to telephone the account holder before he authorized an account to be overdrawn. He said that his duty was to verify the history card of the account before making a decision to permit an account to be overdrawn. He stressed that the practice in the bank was that the bank manager could offer an overdraft without talking to the owner of the account.

Mr. Supply Mwale an internal auditor of the appellant testified on behalf of the appellant. He contradicted the respondent on the issue of communicating with the owner of the account when there are insufficient funds in the account. He insisted that the respondent should have referred to the drawer of the cheque and sought his authority to overdraw the account before the cheque was paid. He said that the amount of the overdraft is immaterial in so far as the requirement to seek the account holder's authority is concerned. Our view here is clear and simple. The issue whether the respondent was required to communicate with the owner of the account and seek his authority before authorizing the account to be overdrawn was, on the facts of this

case, a question of fact to be correctly and competently decided by the Court conducting the hearing of the case. The same applies to the issue whether the respondent was required to communicate with the account holder when a third party presented for payment a cheque for an amount exceeding K50, 000.00. These, being matters of fact, were competently and correctly decided in favour of the respondent. On the facts of this case we find no fault with the finding of the Industrial Relations Court on these issues. The decision of the Industrial Relations Court on these two issues is unappealable to this Court: see section 65 of the Labour Relations Act.

Before this Court learned Counsel for the appellant presented oral submissions on eight grounds of the appeal. In ground one the appellant argued that the Court erred in finding that the **"but for test"** did not apply to the respondent. It is contended by the learned counsel that, according to this test, the respondent caused the loss of K100,000.00 incurred by the bank. He suggests that by authorizing overdraft on the relevant account and by failing to communicate with the owner of the account, the respondent was responsible for the loss of K100,000.00 and that that warranted summary dismissal. The archaic principle of **but for** stresses unduly the importance of causation. But a civil wrong does not depend solely on proof of causation or an ***actus reus*** causing the damage unless the Court is dealing with a tort of strict liability. There is need to prove both the ***actus reus*** and the guilty state of mind. It is the guilty state of mind which was missing in this case. Both the Industrial Relations Court and the High Court took the view that in granting the overdraft of K29.00 the respondent acted perfectly within his mandate. They also took the view that it was not the responsibility of the respondent to communicate with the owner of the account in connection with either the overdraft or the amount payable to the third party. Once that decision was made, the **but for test** was of no use. It was totally irrelevant. There is no substance in ground one.

In ground two, it is argued that the Court was wrong in law in holding that the respondent was not a party to the fraud which resulted in the loss of K100,000.00. The evidence which was presented in the Industrial Relations Court did not support the view that the respondent was a party to the fraud, in the sense that he participated in the fraud. Surely, Mr. Supply Mwale the internal auditor of the appellant did not think that the respondent participated in the fraud. If that were his thinking he would have recommended the summary dismissal of the respondent. He was very sad when he heard that the respondent was dismissed. He had recommended a minor penalty of a warning. That would suggest that he did not believe that the respondent participated in the fraud. We take the view that it would be irrational and irresponsible

for any Court or tribunal to hold the view that the respondent took part in the fraud, on the facts of this case.

In ground three, it is argued that the Court erred in holding that exhibit 9 did not apply to the respondent. Exhibit 9 is a document which contained an instruction requiring a reference to the owner of an account when a third party presents to the bank a cheque for payment for a sum of money exceeding K50,000.00. After examining the document, both the Industrial Relations Court and the High Court came to the conclusion that the document did not relate to the respondent. The document was addressed to the branch operations manager or a senior officer. The two Courts thought that it was not addressed to the Branch Manager. We find no fault with that decision. Besides, we take the view that that was a finding on a matter of fact which is outside the jurisdiction of this Court. There is no merit in ground three.

In ground four, the appellant complains that the Court did not consider or give weight to the evidence of Mr. Supply Mwale. We have examined the judgments of the Industrial Relations Court and the High Court. We disagree that both Courts ignored the evidence of Mr. Supply Mwale. The Chairman of the Industrial Relations Court referred to the evidence of Mr. Supply Mwale when he gave an outline of the evidence adduced before him. He also referred to the evidence of Mr. Supply Mwale when he analysed the whole evidence in the course of making his decision. It would seem that where the evidence of Mr. Supply Mwale contradicted that of the respondent, the Chairman preferred that of the respondent, and he gave reasons to support his preference. We find no fault with the manner in which the Chairman analysed the evidence and eventually reached his decision.

In grounds five and six it is argued that the Court erred in law in finding that there is need for a hearing in summary dismissal. The Court also erred in finding that there was no case for summary dismissal. We are unable to appreciate the relevance of the two grounds. The appellant did not treat the conduct of the respondent as warranting summary dismissal. The appellant gave the respondent an opportunity to be heard. The respondent was called before a panel of officers of the appellant which inquired into the conduct of the respondent and the loss of K100,000.00. The respondent had a chance to defend himself before that panel. The record, both in the High Court and the Industrial Relations Court, does not suggest that the appellant defended the action on the basis that the respondent deserved to be dismissed summarily. Be that as it may, we take the clear view that there was no credible evidence which would have entitled a reasonable Court to hold the view

that the appellant had a valid reason for dismissing the respondent summarily. There is no substance in grounds five and six.

In ground seven, it is argued that the judgment was against the weight of evidence and legal principles. We disagree. We take the view that the weight of the evidence which was adduced in the Industrial Relations Court and legal principle supported the conclusion that the respondent was unfairly and wrongfully dismissed.

Finally, in ground nine, the appellant argues that the damages awarded to the respondent are excessive. The Industrial Relations Court ordered the reinstatement of the respondent. The appellant was unhappy with that order and did not comply with it. The learned Judge, in the High Court ordered the appellant to pay the respondent 12 weeks pay for refusing to comply with the order for re-instatement. That is a statutory requirement and the appellant cannot complain against that award.

The learned judge in the High Court also awarded the respondent severance allowance at the rate of one month salary for each year of service completed. That order was made in terms of section 35 – (1) of the Employment Act. Again it is a statutory requirement for the Court to make that order. The Court has no discretion in the matter. It would be idle for the appellant to complain against that order.

Then the learned Judge made an order of compensation; he awarded the respondent three months salary for each year of service completed. That order was made in terms of section 63-(4) of the Employment Act. It is, again, a statutory requirement that the special award of 12 weeks salary and the award of severance allowance must be made independent of each other and in addition to the award of compensation made under section 63-(4). That is clearly provided in section 35-(5) of the Employment Act which provides –

> "The payment of a severance allowance under subsection (1) shall not affect the employee's entitlement, if any, to payment in lieu of notice under section 30 or to a compensatory or special award under section 63."

The compensatory award represents an amount which the Court considers just and equitable, under the circumstances. It is an award made in the discretion of the Court. An appellate Court is ordinarily reluctant to interfere with an award of damages made by trial Courts in the usual exercise of their discretion: See **Davies and Another v. Powell Duffryn Associated Collieries Limited [1992] 1 All ER 657 at 661.** Again this Court is slow to interfere with an award of damages made by

the trial Court and will only do so where it is satisfied that the award is "glaringly large or small" and that no reasonable Court could make it. See **Peoples' Trading Centre v. Ng'oma M.S.C.A. Civil Appeal No. 30 of 1996 (unrep)** where it is stated –

> "The award of damages is a matter which falls within the discretion of the trial Court and the appellate Court is always slow to interfere with that discretion unless the award is glaringly "large or small" and that no reasonable Court could make it. Again this Court can interfere if the award represents an entirely erroneous estimate or show no reasonable proportion between the amount awarded and the loss sustained: See **Dangwe v. Aleke Banda, MSCA Civil Appeal No. 8 of 1993.**

In the instant case the respondent started working for the appellant as a young man after leaving college. He worked faithfully for 19 years before his services were terminated by the appellant. There remained 23 years of service before he could retire at the age of 65. He lost, for the duration of that period, a salary of K103,511.22 a month, monthly allowances of K14,031 for official car, K4,865.00 as garden allowance, a night guard and a security alarm system, electricity allowance, water allowance and telephone allowance. Clearly the basic salary was bound to rise. Again the respondent was likely to receive some promotions and rise to top positions during the remaining 23 years. The result of the compensatory award made by the learned Judge was that the respondent was only given a salary for 57 months (less than five years pay) by way of compensation. Can it be said that that award is glaringly large or is so excessive that no reasonable Court could make it? We do not think so. We see no valid reason for interfering with the present award of damages made by the learned Judge in the Court below.

The appeal is disallowed. The appellant shall pay costs of this appeal.

DELIVERED in Open Court this 20th day of December, 2006 at Blantyre.

Signed…….
L.E. Unyolo, SC., CJ

Signed…….
D.G. Tambala, SC., JA

Signed……

I.J. Mtambo, SC., JA