IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NUMBER 33 OF 2008

(Being High Court Civil Appeal No. 91 of 2007)

(Also Being Matter No. IRC 227 of 2002)

BETWEEN:

BANJA LA MTSOGOLO.....APPELLANT

- AND -

HARRIET CHIOMBA.....RESPONDENT

CORAM : THE HON CHIEF JUSTICE, SC, JA

THE HON JUSTICE TAMBALA, SC, JA

THE HON JUSTICE TEMBO, SC, JA

Mr Kanyenda .....Counsel for the Appellant

Mr Kara .....Counsel for the Respondent

Mrs Matekenya.....Official Interpreter

J U D G M E N T

Tambala JA,

The appellant is Banja La Mtsogolo a Non Governmental Organization engaged in family planning and the provision of health services connected with family planning. It employed the respondent, during the relevant time, as a clinic manageress. The respondent was managing the appellant's health clinic at Zingwangwa in the city of Blantyre. On 22nd February 2002, the appellant terminated the employment of respondent. On the 4th of June, 2002 the respondent brought an action against the appellant grounded on wrongful termination of employment, in the Industrial Relations Court. On 24th October, 2005 the learned Chairperson of the Industrial Relations Court dismissed the action on the ground that the appellant had discharged its obligation by paying the respondent three months salary in lieu of giving notice upon the termination of the employment. The respondent was dissatisfied and appealed to the High Court against the decision of the Industrial Relations Court. The appeal was successful and the appellant was ordered to pay the respondent severance allowance covering the number of years that the respondent worked for the appellant. The appellant was dissatisfied and brought the present appeal.

The facts of the case are that the appellant suspected the respondent to be engaged in acts defamatory of some members in the senior management of the appellant. The defamatory words were contained in several anonymous letters some of which were sent to the local press. The respondent was also suspected of leaking highly classified and confidential information to unauthorized persons. We have no doubt that if the allegations were correct, the appellant was perfectly entitled to terminate the respondent's employment.

The appellant on 15th November, 2001 invited the respondent to a meeting where she was asked about the allegations. It would appear that she denied the accusations, but on the same day, the appellant issued a letter suspending the respondent from employment. The letter cited the same accusations as the reason for the suspension.

Then, on 30th November, 2001 the appellant issued another letter to the respondent. The letter contained a serious warning and informed the respondent that if she did not improve she would have her employment terminated. Besides, the letter stated that the appellant's investigations confirmed that the allegations made against her were true. The respondent did not take the serious warning kindly. She wrote the appellant protesting about the decision to warn her. On 22nd February 2002, the appellant terminated her

employment. She was paid three months notice pay as well as one month leave pay.

The learned chairperson in the Industrial Relations Court dismissed the respondents' action, holding:

> *It is now long established 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. See* ***Council of the University of Malawi v. Mkandawire M.S.C.A Civil Appeal No. 88 of 2003*** *unreported.*

The learned Chairperson concluded by stating that having received payment in lieu of notice from her employers, the respondent could not be allowed to turn round and commence an action claiming that her employment had been wrongfully or unlawfully terminated.

We agree with the learned Chairperson that damages for the wrongful or unlawful termination of employment are restricted to what is called notice pay, i.e, salary or wages paid in lieu of notice required to be given before employment is terminated. That is the position under the common law.

What happened during the trial of the action before the Chairperson in the Industrial Relations Court was this:

> Court: *I notice that the claim is for wrongful termination. The remedies for these are at common law-notice pay equivalent. Is this what you are claiming or you are claiming for unfair dismissal? You may amend or decide to proceed with this claim.*
>
> Ngwira: *I will proceed on the basis that this is a wrongful or unlawful dismissal.*

It would, therefore, seem that by choice learned counsel for the respondent decided to bring his action under the common law and sought damages for wrongful or unlawful termination of employment. The learned counsel refused to amend the pleadings to base his action under the statutory tort of unfair dismissal.

But in reversing the decision of the learned Chairperson Of the Industrial Relations Court, the learned Judge in the Court below stated:

> *"The Employment Act, 2000, is clear. It applies to the private sector and the government, including any public*

authority or enterprise: section 2 (1). The new labour statutes created a new labour regime which is not based on common law but human rights and equity. The said sub section creates one regime for all labour issues. This is clear from the decisions of the Supreme Court of Appeal: ***Ndema Vs Leyland Doff MSCA No. 2 of 2006*** *and* ***the High Court DHL Vs Aubrey Nkhata Civil Appeal No. 50*** *of 2004. Clearly the common law approach is not congruent with the new regime. It is the duty of the courts however to harmonies them and avoid discriminating litigants on the basis of how an action is instituted.*

In the present case, it is clear, as it was to the trial court, that counsel for the appellant had brought the wrong heads. It was open to the court under its inherent power to amend the pleadings to give effect to the dispute. It is clear from the evidence on record that the claim was for unfair dismissal notwithstanding the way it was styled in pleadings. The litigant was before the competent court in terms of the Employment disputes. It was the duty of the court to give effective remedy. Where the heads of claim are wrongly or improperly titled, the court should accordingly amend them, more especially where the court is aware of the error. This is the only way that it can ensure that the litigants' right to access to justice and

effective legal remedies is protected. Section 41 of the Constitution.

In the present case therefore, it was open to the court of its own motion, to amend the pleading in conformity with the labour Relations and Employment Acts. The courts should not knowingly suffer a litigant to lose his or her right to a legal remedy just because of the default of his or her counsel.

We are unable to agree with the learned Judge in the court below that it was the duty of the chairperson in the Industrial Relations Court to amend the pleadings on behalf of counsel for the respondent so that at the end of trial the learned chairperson could award the respondent proper remedies for unfair dismissal. We think that the learned Chairperson fully discharged her duty when she advised learned counsel for the respondent to amend his pleadings to base his claim on the statutory tort of unfair dismissal. But learned counsel refused to make the amendment. Could the learned Chairperson compel learned counsel to make the amendment? If she could not compel him would it be proper to take it upon herself and draft the amendment to counsel's pleadings? Does the court's duty to give effective remedy to a litigant extend to actually doing the job of counsel even against the will and consent of such counsel? We do not think

so. It must be appreciated that there is usually tension between the court's zeal to give a litigant effective remedy and the court's overarching duty to remain impartial and neutral during legal proceedings. We think that care must be taken that the duty to provide effective legal remedy must not dwarf and undermine the duty to remain impartial. Nothing can be closer to partiality than taking over from counsel the duty to amend pleadings and discharging that duty on behalf of counsel for the benefit of his client.

We are unable to believe that granting an effective remedy is to give a litigant a remedy which has not been requested. The requests of litigants are contained in their pleadings. In the present case the respondent requested damages for the common law tort of wrongful termination of employment. She did not seek severance allowance. For the court, on its own to change the pleadings and substitute the claim for unfair dismissal for that of wrongful dismissal and to grant the relief of severance allowance, would be tantamount to giving a person an orange when that person asked for a mango. That surely is not what is meant by granting effective remedy. Nor is it a proper exercise of the court's inherent power. It would probably constitute an abuse of the power of the court.

We think that the learned Chairperson, in the Industrial Relations Court, did not commit any error at all when she dismissed the respondent's claim. It was wrong in our view, for the learned judge, in the court below, to reverse her decision. The appeal is allowed. The respondent is condemned to pay costs both here and below.

Pronounced in Open Court on .....day of ..... 2009.

Signed:.....

L.G. Munlo, Chief Justice, SC, JA

Signed:.....

D.G. Tambala, SC, JA

Signed:.....

A.K. Tembo, SC, JA