IN THE MALAWI SUPREME COURT OF APPEAL
MSCA CIVIL APPEAL NO. 40 OF 2007
(Being High Court Civil Appeal No. 69 of 2004)

BETWEEN:

G.M. WAWANYA ..... APPELLANT

- AND -

MALAWI HOUSING CORPORATION ..... RESPONDENT

CORAM: HON. JUSTICE TEMBO, SC, JA
HON. JUSTICE NYIRENDA, SC, JA
HON. JUSTICE SINGINI, SC, JA

Masanje, of Counsel for the Appellant
Kaphale, of Counsel for the Respondent
Beni, Official Interpreter
Ethel Matunga Chisale (Ndunya) Typesetter

JUDGMENT

NYIRENDA, SC, JA

The appellant, in the main, challenges the remedies awarded by Justice Chimasula Phiri in the High Court by his judgment of 11th March 2005. The High Court determined that the appellant be paid three month's pay in *lieu* of notice and also housing allowance for the three months.

The case originates from the Industrial Relations Court, herein after referred to as the Court of first instance, where the appellant's action against the respondent was as a result of the respondent's termination of the appellant's employment. According to the appellant's statement of claim before that Court the action was for invalid termination, withholding of wages and benefits and, in the alternative, unfair and wrongful dismissal. Among the issues which arose before the Court of first instance was whether the appellant was at all employed by the respondent because the final details of the contract had not been discussed although the parties had agreed to do so.

Briefly the facts of the case are that the appellant responded to an advertisement from the respondent for the position of general manager in the respondent organization. The appellant was invited for an interview after which he was offered the position. The appellant accepted the position and started working for the respondent. At the time he started working the terms of engagement were not agreed upon except for the Chairman of the respondent verbally informing the appellant that his salary was K150,000.00 per month and that his contract was for a fixed term of three years.

The appellant worked for five days only when he was told at the close of the fifth day that his services were terminated and no reason was given for that decision. The letter of termination stated that the appellant would be paid three months salary in *lieu* of notice.

The Court of first instance found that there was a valid contract of employment between the appellant and the respondent. The Court found further that the respondent had unfairly dismissed the appellant. The Court however referred the determination of remedies to the Registrar upon inquiry pursuant to section 63 (2) of the Employment Act.

Dissatisfied with the judgment of the Court of first instance the respondent appealed to the High Court mainly on the ground that the Court of first instance fell in error when it

found that there was a valid contract of employment between the appellant and the respondent. The argument was that all there was was an agreement to agree. The High Court dismissed the appeal and then proceeded to award compensation to the appellant. It is that award of compensation that is now the subject matter of this appeal. The grounds of appeal are as follows:

1. Having found that there existed between the appellant and the respondent a contract of employment and that the appellant had been unfairly dismissed, the lower Court erred in proceeding to order compensation for the appellant without an inquiry as to the remedy in which the appellant was interested as directed by the Court of first instance.

2. The lower Court erred in holding that the appellant is not entitled to be paid his salary and benefits for the unexpired period of his three year fixed contract, contrary to decided cases on the matter.

3. The lower Court erred in holding that the benefits other than salary and housing allowance that the appellant lost are unclear; and in not awarding him such benefits for the unexpired period of his three years fixed contract or, alternatively, for three months in *lieu* of notice.

At the hearing counsel on behalf of the appellant informed the Court that the third ground of appeal was not being pursued. The respondent also withdrew the cross appeal they had made.

On the first ground of appeal both the appellant and the respondent were very brief. For the appellant it is submitted firstly that the High Court did not consider the wishes of the appellant and went ahead to award compensation against the provisions of section 63 (2) of the Employment Act. It is submitted that the High Court overlooked the Order of the Court of first instance which would have allowed the appellant

express his wishes on the type of remedy he preferred. Secondly it is submitted that the issue of remedies was not raised in the appeal before the High Court and therefore that the Court, against the pleadings, awarded compensation to the appellant when that was not prayed for before the Learned Judge. It is sought, by this ground, that the question of remedies should be referred back to the Court of first instance for determination.

The respondent submits that the first ground of appeal has been overtaken by events in that the appellant has long accepted the compensation ordered by the High Court. It is argued that by accepting the compensation the appellant has waived his right to alternative remedies of reinstatement or reengagement. The argument is simply that the appellant cannot get compensation as well as be reinstated or be re-engaged.

Section 63 (2) of the Employment Act provides:

> *The Court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.*

The correct position therefore is that before the Industrial Relations Court makes a determination on appropriate remedy an inquiry must be made, in particular, as regards the wishes of the employee.

Section 63 (2) however should be read very carefully. Our reading of the provision is that the inquiry is for the purpose of determining ***which*** remedy to award as opposed to ***what*** remedy to award. The inquiry is for the purpose of priotising the remedies provided for in section 63 (1) according

to the wishes of the employee and also taking into account the circumstances of the individual case. The remedies to be priotised are reinstatement, reengagement and an award of compensation. It is acknowledged that the matter was before the High Court on appeal before an inquiry into remedies was made as ordered by the Court of first instance. The question of award of compensation was therefore still before the Court of first instance.

There are two observations we wish to proceed on. The first observation is that according to the statement of claim the appellant was only interested in the salary and benefits until termination of employment or expiry of contract and, in the alternative, payment of three months salary in *lieu* of notice and all benefits for the period of three months. Clearly in our view the appellant was estopped by his own pleadings even before the Court of first instance to seek reinstatement or reengagement. The importance of pleading has been emphasized again and again in our Courts and the often cited passage is by Sir Jack Jacob in his essay *"The Present Importance of Pleadings"*, Current Legal Problems (1960) where he said:

> *As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ---. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings.*

The only issue therefore that could have arisen before the Court of first instance would have been to what extent to award salary and benefits.

The second observation is that before the High Court the parties presented extensive arguments on compensation. The appellant in particular took quite a while, by his skeleton arguments, to address what was considered as appropriate compensation in the circumstances of this case. As expected and for the reasons we have advanced earlier in this judgment, the appellant could not and did not advance any arguments for reinstatement or reengagement. The fact though is that the appellant seized the opportunity before the High Court to respond to and extensively address the High Court on compensation. That effectively gave the matter to the Judge. If the matter was not before the High Court or the appellant did not want it to proceed before that Court, an objection should have been raised at that stage although as a matter of caution the appellant might still have proceeded to make the submissions. The Court would have been put on alert that the appellant was still looking at the Court of first instance for appropriate remedies. There was no objection of any sort raised. We find therefore, and we so determine, that the issue of remedies was before the High Court and the Learned Judge was entitled to deal with it. It is our further determination that the only issue the Judge had to deal with was one of determining the amount of salary and benefits as compensation for the appellant on the facts presented before him. In those circumstances there was nothing for section 63 (2).

We now turn to the second ground of appeal. The appellant's argument is that his contract with the respondent was for a specific period of three years. It is submitted that that being the case and considering the manner in which the appellant's services were terminated, this is a proper case where he should be paid for the entire unexpired term of the contract. It is argued further that there was no evidence that it was a term of the contract that either party could terminate

the services by three months notice. Counsel submits as follows:

> --- *It is not in dispute that the contract was for a specified period of time. As per the evidence before the High Court and the Industrial Relations Court there was no evidence that it was a term of the contract that the contract shall be determined by three months notice. There was no evidence that this term was agreed upon. What the High Court found was in respect of the existence of the contract and the amount of salary and housing allowance payable. The other terms were not certain. It was therefore wrong to hold that the damages awarded are those equivalent to three months salary when that was not part of the contractual term yet. The cases of* ***Chawani –Vs- Attorney General*** *MSCA Civil Appeal Number 18, of 2000; and* ***Council for the University of Malawi –Vs- Mkandawire****, MSCA Civil Appeal Number 38 of 2003 are therefore distinguishable. The awardable damages should be the salary and benefits for the unexpired period of the Appellant's three year fixed contract.*

In his further argument counsel has submitted that the Employment Act does not restrict the Industrial Relations Court to award only those damages provided for under section 63 of the Act. Counsel argues that section 63 read together with section 65 of the Act allows for damages at common law. The argument, as we understand it, is that the Judge in the High Court having decided to proceed to award damages should not have felt unduly restricted in considering what was appropriate by way of damages.

Section 63 (4) of The Employment Act provides as follows:

> *"An award of compensation shall be such amount as the Court considers just and equitable in the circumstances having regard to the loss sustained by*

the employee in consequence of the dismissal in so far as the loss is attributable to the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.

Section 63 (5) then sets out the minimum the Court shall award. Our reading of section 63 (4) is that a court has considerable latitude in awarding compensation under the Employment Act. In the end it really should not make any difference whether one wants to call the award an award under Section 63 of the Employment Act or a common law award or any other description as one may please. The provision allows for what the Court would consider just and equitable in the circumstances of the case. If the Court was minded, and the circumstances were compelling, there is nothing to stop it from awarding compensation for the unexpired term of a fixed term contract or indeed a shorter period. Where the contract of employment provides for a period of notice for termination and also payment in *lieu* of such notice, the compensation under section 63 (4) may be in addition to the payment in *lieu* of notice.

In awarding three months pay and three months housing allowance this is what the Learned Judge said, after analyzing the **Chawani** case:

The views of this Court are inline with the alternative submissions of the appellant. The Employment Act has tabulated award of compensation for unlawful dismissal in section 63 (5). It should be noted that the schedule does not make provision for employment period for less than one year. The reasons could include the fact that employment for less than a year lacks permanency. The views of this court are that in such a situation, common law practice should apply. The case of Chawani can be distinguished on the ground that such a case of senior civil servant who had worked for a very long time and had only 8 years to reach retirement age. In the present case

the respondent had virtually been in office for a week. I would order that he be paid 3 months salary in lieu of notice at the rate of K150,000.00 per month. Further, he should also be paid housing allowance for 3 months at the monthly rate of K45,000.00. The other benefits which the respondent lost are unclear because the respondent rushed into accepting employment without ascertaining and agreeing on those terms. The Court will not labour itself into formulating and reformulating terms between the appellant and respondent.

A couple of issues come out very clearly from this statement. It is clear that the learned Judge realized that the case for the appellant fell outside section 63 (5) of the Employment Act in that the period of service was too short. The Judge nonetheless felt, in his discretion, that it was just and equitable that he should award compensation in accordance with common law practice. In that regard the Judge felt three months pay and three months housing allowance was a reasonable measure of remedy. It is important to make clear that the learned Judge never found and did not say the three months was based on a term of the contract between the appellant and the respondent. Our understanding of the Judge's determination is that three months was what the Judge felt was just and equitable compensation. This comes out very clear from the passage when the Judge stresses that this case could not be compared with the **Chawani** case. It is not a case deserving an award for the remaining unexpired term of the contract because the appellant's period of service was too short to deserve the considerations and the sentiments that compelled the Court in the **Chawani** case to decide as it did.

To conclude the discussion on the award it is important that we point out that the appellant is being less than sincere in blaming the learned Judge for adopting three months as a good measure for the award of compensation. We have earlier referred to the statement of claim where the appellant himself

suggested that three months would be an acceptable alternative measure of remedy. The Judge cannot therefore be faulted for having accommodated the appellant who is his observation had virtually been in office for just one week.

We are of the firm view that the decision of the High Court cannot be faulted in any respect. We uphold it in its entirety. In the result this appeal is dismissed.

We make an order of costs for the respondent.

DELIVERED in open Court this 10th day of September 2009 at Blanytre.

Signed: .....

A.K. TEMBO, SC, JA

Signed: .....

A.K.C. NYIRENDA, SC, JA

Signed: .....

E.M. SINGINI SC, JA