JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE
M.S.C.A. Civil Appeal No. 03 of 2010

(Being High Court Civil Cause No. 1581 of 2006)

BETWEEN:

PORTLAND CEMENT COMPANY (1974) LTD.....APPELLANT

- AND -

GILTON CHAKHAZA.....RESPONDENT

BEFORE: THE HON THE CHIEF JUSTICE, L. G. MUNLO SC, JA
THE HON. JUSTICE NYIRENDA SC, JA
THE HON. JUSTICE TWEA JA
Ulaya, Counsel for the Appellant
Mpaka, Counsel for the Respondent
Mr Balakasi – Official interpreter

JUDGMENT

Twea JA,

This appeal is peculiar.

The respondent brought an action claiming unfair dismissal and defamation against the appellant who was his employer. There were numerous applications in the Court below between the filing of the case, on 12th May, 2006, and the commencement of trial, on 9th July 2007.

When trial commenced on 9th July, 2009 both parties raised preliminary issues. What is of relevance to this appeal is the application by the defendant then, that the matter was essentially a labour matter and should be transferred for trial in the Industrial Relations Court, hereinafter referred to as the IRC. It must be mentioned that the objection to the jurisdiction of the court below was somewhat ambivalent, so too was the response thereto. Be this as it may the court in its order said:-

> "I would therefore direct as follows: in view of the fact that the case herein has mixed claims, part of which the IRC has no jurisdiction while this Court has jurisdiction on both claims and within the spirit of avoiding multiplication of actions, the matter should proceed for trial before this Court and as regards to costs the court will at its final determination of the case invite the parties to address it on costs and an appropriate order should be made of course bearing in mind that if the labour related claims were to be tried in the Industrial Relations court no order as to costs would have been made.
> Signed
> (Potani J)
> 9.0.07

This extract was not part of the record of appeal. This court had to resort to the trial record to understand the appeal and cross appeal. It is also important to mention that the trial record was not transcribed; the above quotation was therefore, derived directly from the Judge's notes.

The trial proceeded as directed by the Judge in the court below. The Judge delivered his judgment on 29th May 2008 in favour of the plaintiff on both claims. Although the record of appeal is silent, it shows that soon after the judgment the parties raised the issue of costs with the Judge. He made the following order:-

> "On costs, in view of the directions made by the court at the commencement of the hearing of this matter, the parties are at liberty to address the court on that aspect bearing in mind that the plaintiff's claim in relation to the termination of his employment should ordinarily have been brought before the Industrial Relations Court in which by law, costs are not recoverable and that this Court only entertained the matter as it also has a claim for defamation

> over which the Industrial Relations Court has not jurisdiction".

The case was adjourned generally, for counsel to make submissions on costs.

It is not clear what happened thereafter, but the record of appeal shows that the parties appeared before the Assistant Registrar for assessment of damages. The order of assessment was delivered on 17th December 2008. The record of appeal is unclear as to what happened thereafter. However, the trial court record shows that the parties appeared before the court below and the Registrar on several occasions in respect of: the award of compensation, matters of enforcement, the true construction of the order of assessment for compensation, consent order of compensation paid into court and payment out of court. Last but not least, the record of appeal shows that the parties appeared before the trial Judge and addressed him on the issue of costs. The Judge delivered his ruling on 7th October, 2009.

In his ruling the Judge below examined the law in relations to costs in respect of cases that could have been brought in the lower courts under Sections 30 and 31 of the Courts Act and Section 72 of the Labour Relations Act, which restrict award of costs in the Industrial Relations Court. In the end the Judge made the following order –

> "The present case is such that if it were not for the claim on defamation, the Court would have insisted that the proceedings should be before the Industrial Relations Court in order to give full efficacy to Section 110(2) of the Constitution and in line with the prevailing judicial policy, so to speak. In such a scenario, the plaintiff would not have been entitled to any costs as per Section 72 of the Labour Relations Act. The inclination of the court is therefore that the just and fair manner of exercising its discretion on costs would be to award the plaintiff fifty percent of the costs of the proceedings at High Court scale representing costs incidental to the claim on defamation and such costs to be taxed by the Registrar if not agreed by the parties".

On 21st October 2009 the defendant filed notice of appeal against the Judge's ruling. The part of the ruling that the appellant was complaining about was the order to bear "50% of the costs". The appellant filed four

grounds of appeal. However, at the hearing, three were withdrawn. The only ground that remained read as follows:

> "3.3 The learned Judge erred in holding that the defendant is liable to pay 50% of the party and party costs".

This leaves us in no doubt that the only issue is costs.

The plaintiff cross-appealed on 22nd November, 2009. The plaintiff/respondent complained against the whole decision of the court below. The cross appeal was on three grounds: (a) that the court below failed to apply Section 30 of Court's Act (b) that the court below erred in holding that had it not been for the claim on defamation trial would have been had in the Industrial Relations Court (c) that the lower Court erred in purporting to enforce policy decisions at the expense of the rights of the parties. The respondent prayed for full or enhanced or confirmation of costs and dismissal of the appellant's appeal.

When the appeal was called this court intimated that it had difficulty in appreciating what was at issue and also the referring back to various directions, rulings, judgments and orders. The parties indicated that what was in issue was the "50% costs order" by the court below and that referring back to various directions, rulings, judgments and orders was essential in support of their arguments. This Court allowed them to proceed to be heard in the hope that issues could become clearer. Unfortunately, it transpired that both parties were unhappy with the order for costs, according to their understanding. This Court indicated that the issues raised were pre-mature and most likely that both parties had misinterpreted the Judge's order.

After duly listening to the parties, it is our finding that the appeal and cross-appeal must fail. First, we will consider the referring back to various directions, rulings, judgments and orders in the court below and then the appeal against costs.

Notwithstanding the stated grounds of appeal, the parties attacked the decision of the court below directing that trial on both claims: unfair dismissal and defamation, be in the High Court. We would have made comments on this direction and reasons thereof had the matter been properly before us. More particularly, in respect of Section 43 of the Constitution, the need to give the real reasons for the dismissal of an employee, the

reasonableness of employer's conduct and how an employer arrives at and communicates a decision to dismiss an employee. In our view the cases of ***Jawadu V Malawi Revenue Authority 2005 MLLR 397, Abernethy V Mott, Hay and Anderson 1974 ICR 323,CA*** and ***F. F. Chavula V The Attorney General Civil Cause 10 of 2009*** would have been instructive. Be this as it may, the direction in issue was given on 9th July 2007 none of the parties appealed. The judgment on the issues was given on 29th May 2008. We would have made comments on the judgment had the matter been properly brought. Some such issues worth commenting on have already been referred to above. However, it is significant to note that the internal communication of corporate decisions and what amounts to publication thereof was not seriously considered when determining the claim for defamation.

All we can say for now is that there was no appeal and that, since then, several orders have been made on the judgment.

By attacking the decisions made before the order for costs the parties were, in effect, appealing to this Court to reverse them. We find that such a procedure is not supported by Section 23 of the Supreme Court of Appeal Act. If either of them was aggrieved they should have appealed against the direction, within 14 days, or the judgment, within six weeks thereof, or, at least, sought leave to appeal out of time. None of them did any such thing as far as the record of appeal is concerned or from perusal of the record of the trial court. Allowing the parties to proceed in such a manner would therefore be contrary to Section 23 of the Supreme Court of Appeal Act and tantamount to allowing an appeal through the back door.

It is important for us to point out that this is a matter of jurisdiction. It does not matter that both parties are complaining about the same issue. This Court has jurisdiction to hear and determine only such appeals as are regularly and procedurally brought before it. Jurisdiction, being a matter of law, cannot be conferred by agreement or acquiescence of the parties.

We now come to the issue of the appeal against the order for costs. Section 21 of he Supreme Court of Appeal Act provides as follows –

> "21. An appeal shall lie to the Court from any judgment of the High Court or any Judge thereof in any civil cause or matter:....

> And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the Judge who made or gave the judgment in question where the judgment (not being a judgment to which Section 68 (1) of the Constitution applies) is –
>
> b) An order of the High Court or any Judge thereof made with consent of the parties or an order as to costs only which by law is left to the discretion of the High Court".

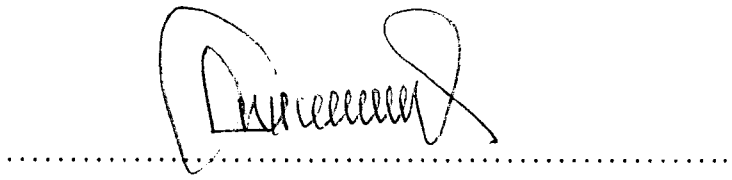
It is important for us to point out that the Section 68(1) of the Constitution referred to in this Section refers to the 1965 Republican Constitution which provided for appeals that would lie to this court as of right. It is also imperative to note that Sections 68 – 72 of the New Constitution, which dealt with the Senate, were all repealed by Act No 4 of 2001.

Section 21 of the Supreme Court of Appeal Act is amply supported by Order 59/1/30 and 31 of the Supreme Court Practice Rules, which equally provide that no appeal shall lie without leave of the court below or any Judge thereof against a consent order or an order for costs only. Our law and rules are clear therefore, that this Court has no jurisdiction to entertain an appeal against costs only where the Judge exercised his discretion judicially and has not given leave to appeal or where leave to appeal has not been obtained. The exceptions to this is where the Judge did not exercise any discretion at all or exercised such discretion otherwise than judicially: ***Scherer V Counting Systems Ltd [1986] 2 ALL E.R. 529***. This is what is known as the "Scherer principle" - The procedure in such a case is that the appeal is set down after the notice of appeal is served. The onus then lies on the appellant to show that the appeal, sought without leave, falls under the principle. This would be heard as a preliminary issue before the substantive appeal.

When this appeal was called we enquired from the parties as to the nature of their appeals and gave them the benefit of doubt. However, it is our view that the parties did not establish that the Judge in the court below failed to exercise his discretion or that he exercised his discretion otherwise than judicially. Consequently, we find that this Court has no jurisdiction to hear such appeal against costs.

As we observed during the hearing, the matters before us may have been brought prematurely or that the parties are labouring under a misinterpretation of the Judge's order. Be this as it may, the matters are still within the jurisdiction of the Court below. It is our judgment therefore, that both the appeal and cross-appeal must fail for being improperly brought before this Court. We make no order as to costs.

Pronounced in Open Court this 28th day of July 2010 at Blantyre.



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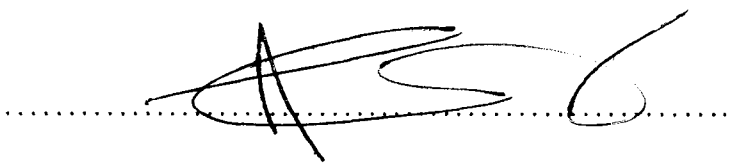
L. G. Munlo SC, CHIEF JUSTICE



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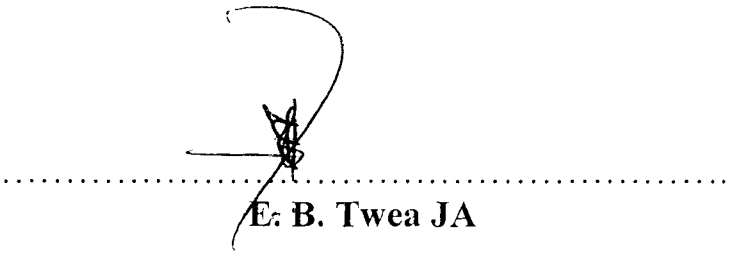
A. K. C. Nyirenda SC, JA.



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E. B. Twea JA