



**REPUBLIC OF MALAWI**

**IN THE SUPREME COURT OF APPEAL**

**HELD AT LILONGWE**

**M.S.C.A CIVIL APPEAL CASE NO. 60 OF 2011**

*Being High Court Civil Appeal No. 168 of 2009*

**BETWEEN:**

**TERRASTONE CONSTRUCTION LIMITED ..... APPELLANT**

**AND**

**SOLOMON CHATUNTHA ..... RESPONDENT**

**BEFORE: HONOURABLE CHIEF JUSTICE MSOSA, SC**

**HONOURABLE JUSTICE NYIRENDA, SC JA**

**HONOURABLE R. R. MZIKAMANDA, SC JA**

Mvalo, Counsel for the Appellant

Absent, Counsel for the Respondent

Mrs. Gondwe, Court Reporter

Mr. Minikwa, Court Clerk

Mrs. Mwafulirwa, Principal Personal Secretary (P7)

**JUDGMENT**

**Msosa SC, CJ**

This is an appeal against the Judgment delivered on 26<sup>th</sup> July, 2010, by which Hon. Justice Chombo found for the respondent and awarded compensation for unfair dismissal.

The appellant is a construction company and had employed the respondent as a damper operator. The respondent was summarily dismissed from his employment on 9<sup>th</sup> October, 2007 when he was found with nails, the property of the appellant.

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The nails were found wrapped in a piece of paper and tied to his leg. It was for this reason that the respondent was dismissed as it was alleged that he had stolen the nails.

The respondent sued the appellant in the Industrial Relations Court seeking compensation for unlawful dismissal. He claimed notice pay, severance allowance and damages for unfair dismissal. The Court held that acts of dishonesty form a basis for summary dismissal under Section 59 of the Employment Act. The court further found that the respondent stole the nails and that the appellant would have been justified to dismiss him but that the dismissal was unlawful because the respondent was not given a fair hearing as upon being found with the nails, a decision was there and then made to dismiss him. The court awarded the respondent damages as compensation in the sum of K2900 which was one week's pay. Dissatisfied with the award, the respondent appealed to the High Court against the assessment of damages, mainly the quantum of damages.

The Court allowed the appeal and awarded the respondent damages in the sum of K742, 000.00 which was equivalent to a salary which he had earned during the 64 months he had worked for the appellant. The court also awarded him one month's pay in lieu of notice. The appellant has appealed against this decision to this Court.

The real issues raised in the grounds of appeal can be summarised as follows;

- i. Whether the Judge in the High Court erred in her application of Order 59 rule 10 of the Rules of the Supreme Court for failing to address her mind to the circumstances under which the respondent was found with the nails, in determining whether or not the decision of the Industrial Relations Court was based on inconsistent or inaccurate facts.
- ii. Whether the court erred in awarding the Respondent the amount of K754, 000.00 as compensation for the unfair dismissal
- iii. Whether the formula used in assessing the damages was correct.
- iv. Whether the appellant is entitled to costs of this action

Section 57 as read with section 59 of the Employment Act, Cap 55.01 Laws of Malawi, defines what may constitute an unfair dismissal. Section 57(1) provides that the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. Then section 57(2) provides that the employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is given an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.

The evidence in this case was that the respondent was found with the nails without authority of the appellant. At this point the appellant had a valid reason for dismissing the respondent. Unfortunately, the respondent was not given a fair hearing as required in Section 57 (2) of the Employment Act and it was for this reason that it was held that the dismissal was unlawful. When the respondent was found with the nails he failed to give a satisfactory explanation. All he said was that he had found the nails within the concrete waste. This was before the decision to dismiss him was made. The court found as a fact that he had stolen the nails but the dismissal was unlawful because the respondent was not given an opportunity to be heard. We are therefore dealing with a case of unlawful dismissal and the issue before us is the quantum of damages awarded to the respondent in compensation.

Reinstatement or re-employment is the primary remedy in cases of unfair dismissal except where the provisions of section 59 of the Employment Act apply, in which case reinstatement cannot be ordered by the court. Also, when an employee does not wish to be reinstated or re-employed, or the circumstances surrounding the dismissal would make the continued employment relationship intolerable, or it is not reasonably practicable to reinstate or re-employ the employee, compensation would be the appropriate remedy. Section 59 of the Act provides circumstances where the employer can summarily dismiss an employee. Our courts have held in a number of cases that acts of dishonesty involving theft form a basis of summary dismissal under this provision.

The Respondent did not seek reinstatement. He sought compensation for the unlawful dismissal. The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a valid reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances.

Section 31(1) of the Constitution provides that "every person has a right to fair and safe labour practices and to fair remuneration". This provision is further supported by section 43 of the Constitution which provides:

*"Every person shall have the right to –*

- (a) Lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his rights, freedoms, legitimate expectation or interests are affected or threatened; and*
- (b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known."*

These provisions give direction to the way workers are to be treated. It protects them from exploitation, abuse and being taken advantage of by their employers. It further requires those in authority to consider the legitimate expectations of those working under them, requiring them to be fair when handling any work place disputes.

Section 63 of the Employment Act gives the Court the power to grant an employee who is unfairly dismissed various remedies. Among the remedies available is compensation. According to Section 63(1)(c) a compensation order is one that requires the employer to pay the employee an amount of money in recompense for unfair dismissal or an unfair labour practice. This payment is not one for measured damages or quantified losses suffered by the employee. That is, the provision does not require proof from the employee of specific financial losses resulting from the dismissal.

Section 63 (4) of the Act provides that:

*"An award of compensation shall be such an 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".*

Further Section 63 (5) gives options to the Judge on how he may consider awarding the employee compensation. It provides for the minimum consideration that a judge may award a successful litigant. Judges however have a very wide discretion, as provided by sub-section Section 63 (4) of the Act, as the term "fair and equitable" is not defined and is open to the discretion of the Court. The requirement to compensate an employee, who is unfairly dismissed, in our view, is complementary to sections 31(1) and 43 of the Constitution.

The questions that arise are: When will compensation be "just and equitable" and how will the courts apply their discretion in order to determine "just and equitable" compensation? In the matter of ***Amalgamated Beverages Industries v Jonker (Pty) Ltd 193 ILJ 1993*** the Court held that "compensation in ordinary meaning comprises the payment of a sum of money to an applicant to make good a loss resulting from an unfair practice".

The loss resulting from an unfair dismissal may itself take various forms. Quite obviously the employee may sustain direct loss of remuneration until he finds or may reasonably be expected to find alternative employment, but it need not necessarily be confined to this. The dismissal may result in other, less obvious harm, as for example a blemish on the employees' employment record. If the Industrial Court is satisfied that such a loss has occurred, and it is able on the evidence before it to place a value on that loss, in our view, it is entitled to take it into account in its assessment. An assessment of the loss which has been sustained does not, however, conclude the enquiry. The court may determine the dispute only on terms which it considers reasonable. In considering what is reasonable, not only the interests of the employee, but also the interest of the employer must be taken into account.

Our labour law is concerned with the attainment of fairness for both the employer and the employee. In weighing up the interests of the respective parties it is of paramount importance to ensure that a balance is achieved so as to give credence not only to commercial reality but also to a respect for human dignity.

Consequently, when a court has to assess the amount of compensation to award for the unfair conduct of the employer, which usually takes the form of an unfair labour practice or an unfair dismissal, it must achieve a balance between the sometimes competing policy considerations of human dignity and equality on the one hand and commercial reality on the other hand. These rights are often the competing rights of the employer on the one hand and the employee on the other.

Section 63(4) is not a blank cheque for the court to decide any amount to be payable. It needs to be read into section 63(5) whenever compensation is awarded. In our view, it is a guideline on how a court may give an award under sub section (5), and should not be read in isolation. This section provides for a minimum award, but the Court can award more than this minimum award depending on the circumstances of the case as provided in section 63(4) of the Act. The respondent contributed to his dismissal because it is likely that he would not have been dismissed if he not stolen from the appellant.

The Industrial Relations Court awarded the respondent one weeks' pay amounting to K 2900 in total. That figure was contested in the High Court, which awarded him K754, 000. Neither of the two courts gave reasons for their award.

It is important that courts must not be seen to award damages, with elements of punishment to the employer. The High Court awarded damages equivalent to the salary the respondent earned the whole period that he had worked for the appellant without giving reasons for the decision. It is important that reasons should always be given for coming up with the assessment of damages which are in excess of what is set down in the law.

The appellant had argued that the High Court had misapplied Order 59 Rule 2 of the Rules of the Supreme Court. This rule gives the Supreme Court of Appeal powers to make inferences. The issue is whether the Court was in the circumstances of this case right to make inferences on the facts of this case. The respondent was employed as a damper driver and was found with nails tied to his leg. This fact was not an issue in the Industrial Relations Court as the respondent had admitted to have been found with the nails as alleged. This was a clear case of theft. There was no need for the High Court to infer other facts as the facts of this case were clear. The court should not have had recourse to Order 59 Rule 2.

The respondent in his appeal to the High Court was essentially challenging the assessment of damages and in particular the quantum of damages awarded to him.

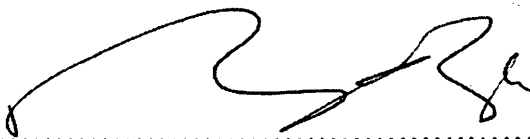
Section 63(5) of the Act directs the manner in which compensation should be determined. The amount of compensation would depend on the period the employee had worked before he was dismissed. According to section 63(5)(b) an employee who has served for more than five years but not more than ten years, the compensation is two week's pay for each year of service. The respondent had worked for 5 years and four months at the time he was dismissed. Having regard to the reasons that led to his dismissal, we would consider an award of two weeks' pay for each year worked, as stipulated in section 63(5)(b) and one month's salary in lieu of notice to the respondent as fair and just compensation. Therefore the respondent is entitled to:

K 5800 (Two weeks' wages) x 5 years	= K 29,000.00
One months' salary	= <u>K 11,600.00</u>
Total	= <u>K 40,600.00</u>

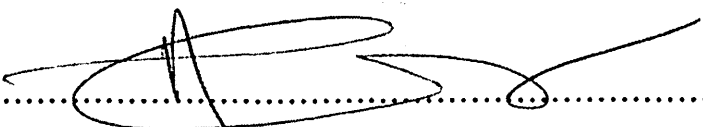
We make no order for interest because none was sought.

Each party shall bear its costs.

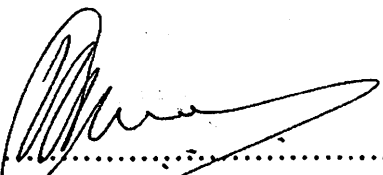
**DELIVERED** in Open Court this 6<sup>th</sup> day of February, 2015 at Blantyre.

Signed:  .....

**HONOURABLE CHIEF JUSTICE A S E MSOSA SC**

Signed:  .....

**HONOURABLE JUSTICE A K C NYIRENDA SC, JA**

Signed:  .....

**HONOURABLE JUSTICE R. R. MZIKAMANDA SC, JA**