Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

CIVIL APPEAL CAUSE NO. 19 OF 2017

(Being High Court Case No 25 of 2009)

BETWEEN:

FIRST MERCHANT BANK.....APPELLANT

AND

EISENHOWER MKAKA AND OTHERS.....RESPONDENT

CORAM : THE HONOURABLE JUSTICE E. B. TWEA, SC, JA

THE HONOURABLE JUSTICE L. P. CHIKOPA SC, JA

THE HONOURABLE JUSTICE F. E. KAPANDA JA

M. Musisha ..... Counsel for the Appellant

D. Silungwe ..... Counsel for the Respondent

..... Judicial Research Officer

Mrs Chimtande ..... Recording Officer

JUDGMENT

Twea SC, JA

The appellant in this case is a commercial bank. The respondents are its former employees. The facts on record are not seriously disputed.

It is on record that between the year 2010 and 2012 the appellant was restructuring its organization. Initially steps were taken to alert its employees about the exercise. On 11th May, 2012 the respondents and others, who are not part of this case, were summoned to a meeting via email or phone call, with some Human Resource Officers. When they converged for the said meeting, each one of them was given a letter. They were each directed to read and sign the letter. Each letter was a terminating of employment by way of retrenchment. Although they were aggrieved by the procedure of termination, they resigned to fate and signed the letters. They were, then, each paid terminal benefits by cheque.

The respondents eventually took their grievances to the Industrial Relations Court claiming unfair dismissal. The trial court found the procedures followed by the appellants wanting in several respects, including consultation, and gave judgment to the respondents for unfair dismissal.

The appellant was not satisfied with the findings of the trial court and appealed to the High Court. The High Court again found for the respondents. The appellant then further appealed to this Court. This Court found that section 57(2) of the Employment Act, did not oblige an employer to afford an employee an opportunity to be heard when terminating a contract on basis of operational requirements. This Court, however, found that, the respondent by its own Terms and Conditions of Services; article 23, was obliged to give employees an opportunity to be heard. On this ground, this Court up-held the decision of the High Court that the respondents were unfairly dismissed. This Court then remitted the case to the trial court for assessment of damages.

The trial court heard the parties on assessment. However, the trial Court in its order awarded all respondent an omnibus figure without considering their individual circumstances. The ruling of the trial Court was not based on the tenets of the Employment Act. The appellant appealed to the High Court. The High Court heard the appeal and found for the appellant. It ordered that damages should be re -assessed in accordance with section

65(5) of the Employment Act and that respondents be assessed individually. The appellant was again aggrieved and appealed to this Court.

The appellant, in essence, was aggrieved by the interpretation of the earlier judgment of this Court, by the Court below. It was of the view that the earlier judgment of this Court was based on breach of the Terms and Conditions of the Service and not statutory unfair dismissal. The appellants filed six grounds of appeal. The gist of the appeal and submissions was that damages should not be assessed on the basis of statutory unfair dismissal but breach of the Terms and Conditions of the Service between the appellant and the respondents.

We must point out that at the hearing of the appeal we had some anxious moments and recalled, to the parties, that the appeal was on assessment of damages and not to review the judgment of the Court below or of this Court in respect of liability.

The judgment appealed against is that of Mkandawire J.of 2nd February, 2017. The final order of the Judge read as follows:

> *"I therefore order that this matter should be remitted back to the Industrial Relations Court for a re-assessment of the compensation which should be done within 30 days from the date hereof....."*

We have carefully examined the judgment of the Court below and we are inclined to agree with the Judge.

We have noted that the appellant was dissatisfied with the judgment on the ground that the Court below should have found that section 63 of the Employment Act was not applicable to the unfair dismissal of the respondents, in so far as this Court, in its judgment on liability, found that there was breach of the Terms and conditions of Service when it affirmed the judgment of the Court below then.

It is important to note that the point of departure between the judgment of the Court below and this Court was that, the Court below found that the respondents were unfairly dismissed because they were not consulted in respect of the redundancy. This Court however, found that the respondents were unfairly dismissed because, by the Terms and Conditions of Service, the appellant was required to consult them before declaring them redundant. This, not having been done, was breach of contract, hence unfair dismissal.

This Court in its earlier judgment on liability held that Section 57(2) of the Employment Act, does not impose a duty on the employer to consult employees before declaring them redundant. Section 57 (2) of the Employment Act reads as follows:

"57 - (1) .....

(2) The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity."

The subsection in our view is of specific application; termination for reasons connected to capacity or conduct of the employee. We would therefore be very slow to endorse this position in respect of termination that is not based on the capacity or conduct of the employee. In the case of Airtel vs Komiha and 37 Others, MSCA Civil Cause 59 of 2013, this Court declined to comment on this part of the decision of our brother Justices. We still reserve our comments, in this case, suffice it to say that we are inclined to follow our decision in Airtel vs Komiha and 37 Others (Supra). Let us however, point out that we would find it difficult to accept that "consultation" and "opportunity to defend himself against the allegation made'' in Section 57 (2) of the Employment Act mean one and the same thing. For now, however, we content ourselves by finding that the opportunity to re-examine the interpretation of Section 57(2) of the Employment Act, has not arisen.

It is our view therefore, as was found by the Judge in the Court below, that the grounds on which the Court below and this Court, in its earlier decision, found that there was unfair dismissal may have differed but the fact remains that there was unfair dismissal.

We have taken into account Section 57 (1) of the Employment Act. This section enjoins the employer to give valid reasons for termination "based on the operation requirements of the undertaking." Further Section 61 (2) of the Employment Act provides that:

"61- (1)....

(2) in addition to proving that an employee was dismissed for reasons stated in Section 57(1), an employer shall be required to show that in all circumstances of the case be acted with justice and equity in dismissing the employee."

The appellant do not dispute that they did not consult the respondents before retrenching them. It is a fact that the respondents were summoned to a meeting by email or phone, given letters of termination of service which they were directed to read. Thereafter they were told by their employer to receive their terminal benefits and leave the company. In the circumstances of this case it would be difficult to find that the appellant acted within the requirements of Section 61 (2) of the Employment Act. The distinction which the appellant seeks to make: that the Court below should have distinguished statutory unfair dismissal from breach of Terms and Conditions of Service, is superficial and cannot be justified at law. Unfair dismissal is unfair dismissal. To go further than this would be to re–open the issue of liability which, in our view, is not what this appeal should be addressing.

For the guidance of the trial court however, let us specifically refer to ground 3.2 and 3.4 of the appellant's grounds of appeal. Ground 3.2 reads:

> *"The learned Judge erred (in) interpreting the decision of the Supreme Court by failing to correctly construe the provision of the Section 57 of the Employment Act which should have led to the conclusion that statutory unfair dismissal was not applicable to case of retrenchment."*

Ground 3.4 reads:

> *"The learned Judge erred in making no finding relating to the payments made to each Respondent under the Terms and Condition of Employment on retrenchment."*

These grounds are specially covered by Section 35 of the Employment Act. Section 35 (1) and (6) reads:

> *"35 – (1) On the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any circumstances, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with Part 1 of the First Schedule"*
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> .....
>
> *(6)The payment of a severance allowance under subsection (1) shall not affect the employees entitlement, if any, to payment in Lieu of Notice under Section 30 or to a compensatory or special award under section 63."*

Clearly, from the above section the respondents were entitled to be paid severance allowance when their employment was terminated. Such payment was independent of compensation for unfair dismissal. They are therefore entitled to be paid in accordance with Section 63(4) and (5) of the Employment Act.

This appeal therefore fails. We uphold the judgment and order of the Court below. Further we, hereby, confirm the directive by the Court below that the trial court should assess the respondents individually and have to regard to Section 35 of the Employment Act, when determining what is to be included or excluded when calculating the wages of an employee. In this sense therefore what the respondent received at the time of retrenchment should be taken into account and be deductable.

Costs for this appeal will be for the respondents.

Pronounced in open Court this 11 day of February, 2019, at Lilongwe.

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HONORABLE JUSTICE E. B. TWEA SC

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HONORABLE JUSTICE L.P. CHIKOPA SC

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HONORABLE JUSTICE F.E. KAPANDA SC