IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 542 OF 95

BETWEEN:

S KALINDA ……. PLAINTIFF

AND

LIMBE LEAF TOBACCO LIMITED ……DEFENDANT

CORAM: MWAUNGULU, Judge
Nkhono, Legal Practitioner, for the plaintiff
Chirwa, Legal Practitioner, for the defendant
Katunga, the official court interpreter

Mwaungulu, J.

JUDGEMENT

This matter comes because Limbe Leaf Tobacco Company Limited, the employer, terminated Mr. Kalinda's employment of 25 years. Except for one aspect, parties agree on the facts. There is strident polarity on the legal implications. The legal practitioners cited many decisions of this Court, the Supreme Court and English courts on termination of employment. All authorities are about employees' rights under the Constitution, the Labour Relations and the Employment Acts. Difficulties arise because legal practitioners approached termination of employment from human rights under the Constitution (and the laws made there under, the common law statutes) and international conventions Malawi ratified. Much as this all this was useful, the exercise creates more cloud than

clarity. I should review and reconcile these decisions and clarify and harmonise on a law crucial to us all.

This is how Limbe Leaf Tobacco Limited terminated Mr. Kalinda's employment. On 16th June 2000, Mr. Kalinda sold 10 bags of cement to a driver. The driver took the cement and offloaded it in the company premises. When collecting the cement, security stopped him. He produced a document Mr. Kalinda issued. The security personnel, unsatisfied, called Mr. Kalinda. When he arrived security staff had left. The next morning he approached the Personnel Manager who promised to check. Mr. Kalinda heard nothing until the Personnel Manager asked him to see the Deputy Managing Director about the cement.

Mr. Kalinda saw the Deputy Managing Director, Mr. Kelsel and Mr. Chathatha. Little discussion occurred that day. The Deputy Managing Director, after accusing him of stealing, informed Mr. Kalinda that the Managing Director directed Mr. Kalinda's suspension and Mr. Chathatha was to write Mr. Kalinda. On 21st June 1995 the Group Personnel Manger wrote Mr. Kalinda suspending him reiterating the events of 16th June 1995 as grounds. The letter further charged him for presenting a false receipt for the cement. The receipt was issued by Mere Building Contractors who complained of stealing at premises in Limbe Leaf Tobacco Limited.

When the auditor came, Mr. Kalinda met his boss, the auditor and Mr. Chathatha. The auditor asked Mr. Kalinda to explain. After Mr. Kalinda's, the driver and a security guard gave their stories. They submitted reports to the company. Since the alleged theft occurred at Mere Building Contractors Mr. Kalinda discussed with Mr. Banda. Mr. Kalinda suggested the company investigate but Mr. Banda refused to investigate an external company. On 5th July 1995 the Company terminated the employment under the agreement. The company was to pay Mr. Kalinda 3 months salary in lieu of notice and pension.

The employee contends the employer could not suspend him without pay and should have investigated and concluded investigation on the ground and decide one way before terminating because the company, in a conversation, promised to investigate. The employee thinks his suspension and termination base on misconduct. The employer denies undertaking to investigate. The employer contends, contrary to the employee's assertions, it was not obliged to give reasons for termination of the contract.

From counsel's submissions, this court must primarily determine whether and to what extent an employer after the 1994 Constitution, which in section 31 introduced a right to fair labour practices and before the Employment Act, which introduced the statutory remedy of unfair dismissal, an employer who terminates employment according

to the contract of employment is liable to an employee. The sequel question is whether and in what circumstances should an employer after the 1994 Constitution, which in section 31 introduced a right to fair labour practices, give reasons for terminating employment.

First, the plaintiff legal practitioner argues the employer, under section 43 of the Constitution, should allow the employee to answer allegations against him. In particular he contends the employer could not dismiss before concluding promised investigations. He submits this Court's and the Supreme Court's decisions on application of section 43 to employment contracts are uneventful. The defendant, relying on them heavily, contends the decisions are correct and bind this Court. Section 43 provides:

"Every person shall have the right to lawful and procedurally fair administrative action"

The employee contends that, under natural justice principles, he was entitled to fair administrative action and the employer could not terminate the contract without giving reasons or terminate the contract before investigations concluded. He contends therefore that the employer breached his right to procedurally fair administrative action. The defendant argues this runs against this Court's decision in Saukila v the National Insurance Company Limited, Civil Cause No. 117 of 1997 (unreported). In that case Kapanda, J., following Mchawi v Minister of Education Science and Technology, Civil Cause No. 82 of 1997 (unreported), this Court's decision, and Chawani v The Attorney General, MSCA Civil Appeal No. 18 of 2000 (unreported), a Supreme Court decision, said:

"I wholly agree with the dictums of both Kumitsonyo, J. (as he then was) and Tambala, J.A. It is clear, in my judgment, that after reading the decisions in these two cases that section 43 applies to situations where there is an abuse of executive arm of government and no more. Further, it is my understanding that the said section 43 of the Constitution is intended to provide protection to persons from potential arbitrary executive action."

In the Supreme Court, in Chawani v The Attorney General, Tambala, J.A., said:

"…We are unable to accept that the purpose or function of section 43 of the Constitution is to protect an individual's legitimate expectations. If the section was intended to afford such protection, then clearly, such intention was not stated in the section. Section 43 simply gives a person (i) a right to lawful and fair administrative action and (ii) a right to be given reason including written reasons which must support an administrative action. It is true that the two rights arise where a person has some right, freedom or interest or legitimate expectation which is likely to be affected by the administrative action, but it seems that it is not the purposes of section 43 to protect such right, freedom, interest or

legitimate expectation. If the section affords such a protection, then it does so only indirectly or incidentally. In our view, section 43 of the Constitution is simply an entrenchment of the principle of a natural justice which requires that no person shall be condemned without being heard. The section has of course, stretched the principle a bit to include the requirement to give reasons which must support an administrative action…"

I abstain distending the argument that section 43 does not apply to situations like the present where there is no, so to speak, executive or administrative action. There is however a window in Justice Tambala's statement. The Justice of Appeal stresses that section 43 of the Constitution entrenches principles of natural justice. Certainly a right to natural justice does not only apply, as suggested, only against persons responsible for executive or administrative action. Principles of natural justice apply widely in public and private law. If, as the Justice of Appeal suggests, section 43 of the Constitution entrenches principles of natural justice, the right under section 43 cannot be constricted in the manner suggested. I leave the argument for future consideration. It suffices to say that the trend is to incorporate natural justice in employment situations.

The latest decision is Nkhwazi v Commercial Bank, Civil Cause No. 233 of 1999, (unreported) where this Court said:

"Even if there are no contractual safeguards, courts, notwithstanding Lord Reid's suggestion in Ridge v Baldwin [1964] A C 40, 65 and Malloch v Aberdeen Corporation [1971] 2 All ER 1278, that courts will not readily do so, now readily imply natural justice principles in employment cases, particularly where a reason is given for the course of action the employer took."

This Court relied on words of Buckley, L.J., in Stevenson v United Transport Union [1971] 2 All ER 941, Woolf, L.J., approved in R v British Broadcasting Corporation, ex parte Lavelle, [1982] 404:

"In our judgment, a useful test can be formulated in this way. When one party has a discretionary power to terminate the tenure or the employment of another or an office or a post or a privilege, is that power conditional on the party invested with the power being first satisfied on a particular point which involves investigating some matter on which the other party ought in fairness to be heard or to be allowed to give his explanation or put his case? If the answer to the question is yes, then unless, before the power purports to have been exercised, the condition has been satisfied after the other party has been given a fair opportunity of being heard or of giving his explanation or putting his case, the power will not have been well exercised."

Apart from this statement, the trend has a long pedigree, particularly in relation to Trade Unions beginning with Abbot v Sullivan [1952] 1 All ER 226 and Lee v Showmen's Guild of Great Britain [1952] 1 All ER 1175 , CA. In Russell v Duke of Norfolk [1949] 1 All ER 109, Lord Denning asserted it was contrary to public policy to 'condemn a man unheard' so that irrespective of contract, a union was bound to observe natural justice principles – at least when a man's livelihood or reputation is at stake.

Even without section 43, therefore, the court would import natural justice principles in an employment contract. These principles are part of the general law. They are therefore subservient to and derive from the Constitution. It is anomalous to suggest that the Constitution, the fundamental law, entrenches laws made under it. Natural justice principles reflect the fundamental law, the Constitution, which, in many parts, reflects due process.

Secondly, the plaintiff's legal practitioner argues that failure to give reasons for termination of employment offended section 31 of the Constitution. He contends that a contract which provides termination of employment without giving reasons violates the spirit of the Constitution and violates fundamental human rights. He submits Guwende v AON Malawi Limited, Miscellaneous Civil Cause No. 25 of 2000 (unreported), this Court's decision, is per incuriam, it not having been put to the judge that the law, by section 211 of the Constitution, changed. In Guwende v AON Malawi Limited, Chipeta, J., following this Court's decision in Mwalwanda v Press Holdings Ltd [1981 – 83] 10 MLR 321 and the English case of Barber v Manchester Hospital Board [1958] 1 All ER, 322 held that no reasons be given for termination of employment:

"Further still, many local case authorities, including the cases of Chihana and Chanamuna above cited, after a review of persuasive precedents, firmly state the law as being that termination with notice or with payment in lieu of notice, is valid and that it need not be accompanied with any reasons. Said Justice Mtegha in the Chihana case:

"Where there is an ordinary contractual relationship of master and servant, in the ordinary sense that we know it, the matter can terminate the contract with his servant at any time and for any reason; he is not even obliged to give reasons for so doing."

Moreover on the existing authorities even the fact that a contract of employment is for a fixed term, does not change matters if there is in it a termination clause as indicated by the Hon. Skinner, C.J. in Cotrim v Dos Santos [1973 – 74] MLR, 111, a case in which such clause was, however, absent. Courts have been steadfast in holding that no matter how permanent a species of employment appears to be, in the absence of clear language that it cannot be terminated, it should be construed as one that can be determined by reasonable notice. See MSCA, Civil Appeal No. 13 0f 1992 Malawi Railways Limited v P T K Nyasulu (unreported)"

To the criticism the judge' decision was per incurium, the judge did consider international conventions and treaties:

"In this regard section 211 of the constitution is illuminating. In this case no specific Act of Parliament was referred to or cited as ratifying the ILO Convention part of the laws of Malawi. Further, the instrument of ratification was not furnished to the court for verification of existence or absence of any reservations Malawi might have entered against the convention."

Section 211 (2) of the Constitution provides:

"International agreement entered into before the commencement of this constitution and binding in the Republic shall form part of the law of the Republic unless Parliament provides otherwise."

Certainly, Malawi ratified the International Labour Organisation Convention and the Termination of Employment Convention. Malawi ratified the Termination of Employment Convention on 1st October 1986, before the 1994 Constitution. Under rules of evidence, a court takes judicial notice of treaties and conventions and, of course, Acts establishing them without their production. These conventions, as section 211 (2) stipulates, bind the Republic. Under section 211 (2) of the Constitution, they bind the Republic unless Parliament provided otherwise. There is no legislation nullifying the Termination of Employment Convention. There is nothing in section 211 requiring that, at least for international agreements before the commencement of the Constitution, ratification be by an Act of Parliament. It might very well be that by the practice of our Ministry of Foreign Affairs, before the 1994 Constitution, international agreements became part of our law by legislation. It might very well be that it is this postulation that is envisaged in the words 'binding in the Republic' in section 211 of the Constitution cited by Chipeta, J., in Guwende v AON Malawi Limited. Section 211 of the Constitution was amended in 2001. It reads:

"(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament.

(2) Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of Malawi."

The uncertainty in section 211 (2), before the amendment, mentioned earlier still remains. International agreements after 1994, by legislation, and international customary law, automatically, become part of our law by domestic legislation. The words 'become part of our law' in the previous section 211 (2), and repeated in the new 211 (1) and 211 (3) have been dropped in the amendment. The 'Binding' aspect of the provision remain in section 211 (2) before and after amendment. This Court then has to interpret the meaning of the word 'binding' in relation to whether international agreements before the 1994 became part of our law.

There are two views. The first is that the word 'binding' in section 211 (2) before and after amendment, in relation to whether international agreements before 1994 are part of our law, means there must be domesticating legislation. The section does not suggest that. Neither is that the ordinary meaning of the word 'binding.' This postulation can only be premised on importation of a premise external to the Constitution, namely, that, under international law, which suggests variegated practices by international law players, and our foreign relation practice, this is the case. International law is not superior to our Constitution in its application in our courts. Equally, our foreign law practice is itself subservient to the Constitution. Both, therefore, are only aid interpretation. They would not be decisive on the matter under consideration because in both sections it is also possible to read the provisions as suggesting that, as long as it can be established that international agreements bind the Republic under international law, in the sense that the Republic ratified them, they are part of our law, unless an Act of Parliament provides differently. The effect of this is that all international agreements before 1994 binding on the Republic are part of our law.

Concluding that all binding international agreements are by operation of the Constitution part of our law can be criticized for accepting too much. The excess is mollified, in my view, by that Parliament, under the Constitution, can exclude objectionable international agreements from laws of the Republic. A rule targeting only international agreements domesticated by legislation is guilty of accepting too little. The paucity is placated by the rule that Parliament can introduce by legislation international agreements not so affected before 1994. Parliament, under this construction, has the monumental task of domesticating international agreements binding on the Republic before 1994 and after 1994. Parliament can do that. The Constitution as amended, however, decided for a break in 211 (1). This provision supports the second view.

The second view is that binding international agreements before 1994 became part of our law by operation of the Constitution. The uncertainty in section 211 before the amendment is cured by the amendment. Section 211 (1) as amended expressly states that international agreements entered after commencement of the Constitution shall form part of our law by domestic legislation. If it meant prior international agreements required domestic legislation, the Constitution would in section 211 (1) have added qualifications

to the effect that all international agreements before 1994 would, like the ones after, need domestic legislation. The Constitution restricts the requirement to legislation after commencement of the Constitution. On the face of it the Constitution excludes prior international agreements in section 211 (1). In my judgment, the Constitution, in section 211 (2), stresses the non-requirement of domestic legislation for international agreements prior to commencement of the Constitution. Moreover, if it was meant that domestication by legislation apply to international agreements prior to 1994, the Constitution would expressly have said so in section 211 (2) having omitted it in section 211 (1). This interpretation bases on the construction of section 211 before and after the amendment. It is not based on an external premise.

The second rendition is further enforced on two premises. First, before the amendment, these binding international agreements 'became part of our law' through the Constitution. The consequence of amendment cannot be to repeal all previous international agreements that were part of our law by operation of the Constitution in 1994. Secondly, the consequence of the new amendment means that our Parliament has been estopped from ever adopting unbinding international agreements before 1994.

In my judgment, a court will take judicial notice of treaties binding on the Republic. The Termination of Employment Convention was a binding agreement before the 1994 Constitution. There is no legislation nullifying it. It is part of our law. For all we know now, its contents inform the Employment Act.

The Termination of Employment Convention is couched in modern terms because its dictates could be furthered by judicial and legislative involvement. Article 1 provides:

"The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations."

In the absence of laws, statutes, or regulations, therefore, courts decisions make provisions of the Termination of Employment Convention effective. This Court is therefore conjoined to incorporate article 4 of the Termination of Employment Convention enjoining employers not to terminate the employment of an employee unless there is a valid reason for such termination connected reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. The Employment Act, passed after Guwende v AON Malawi Limited, incorporates article 4 of the Termination of Employment Convention in section 57:

“The employment of an employee shall not be terminated by any employee 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.”

Consequently it was the more urgent at the time Guwende v AON Malawi Limited was decided to incorporate article 4 of the Termination of Contract Convention by judicial decision because neither the Employment Act of the time and regulations there under and the common law, as demonstrated, reflected article 4 of the Convention.

The second criticism of Guwende v AON Malawi Limited is that it offends section 31 of the Constitution particularly the right to fair labour practice. The judge considered section 31 of the Convention:

“In particular, I observe, that neither in the Constitution nor in the Labour Relations Act is it spelt out that for parties to agree on a termination clause in their employment relationship to end on notice or on payment in lieu of notice without more amounts to an unfair labour practice.”

Section 31 of the Constitution, a fundamental law, only creates a right. The Constitution cannot achieve the specificity suggested. The Constitution cannot provide such detail without it being the law and not the fundamental law. It is the general law, legislative or common law, which governs the legal status of agreements that do or do not require reasons for termination of an employment and, as the judge rightly observed in many places, the common law position, now superceded by section 57 of the Employment Act, is that an employer or employee need not give reasons for terminating employment under terms of the contract such as terminating with notice. The fundamental law could not provide for this specific matter. The question, which I will consider in due course, remains whether and to what extent this common law rule affects the right to fair labour practices in section 31.

The judge continued:

“In fact if it was, I would have expected that in the Chidzulo case the Supreme Court would have seized the opportunity to so pronounce as the main issue for consideration in that case was a provision allowing for termination on notice or on a payment in lieu of notice… To my mind the fact that despite the opportunity the Supreme Court did not pronounce this type of agreement as offending section 31 of the constitution shows that the practice of incorporating such clauses in employment contracts does not offend that constitutional provision.”

There are reasons why the Supreme Court avoided pronouncement. The matter was not raised in the form raised before this Court. The Supreme Court probably avoided making a statement obiter. That silence cannot be pronouncement of a positive principle suggested. Certainly, this Court in the Guwende's case, unlike the Supreme Court in the Chidzulo case, had the opportunity to make a pronouncement and avoided it.

The question remains whether and to what extent the common law rules stated affects the fundamental right in section 31 and if so how. The common law rule that a termination under the terms of the contract, for example termination by notice, is valid should, of course, be distinguished from the other common law rule that the employer need not give reasons for termination of the contract. At one level terminating a contract under the terms of the contract may be all the reason the common law requires. A letter terminating an employee's employment and indicating that the employment is terminated under contractual terms, in my view, gives a reason for termination of employment. The reason, like any other, can be challenged on many grounds including, one that easily comes to mind, that it is in breach of contract as to termination as where, for example, the contract required termination on certain conditions. Where the terminating party, albeit by notice, is in fundamental breach of the contractual termination terms, the employment only ends at the election of the innocent party. Where the termination is not in breach of any contractual termination term, the termination is valid. This rule is distinct from one about giving reasons for termination of employment generally and specifically where the employer terminates under contractual terms.

Giving reasons for terminating a contract is related to the right to natural justice. The employment contract, like other contracts, creates contractual obligations. A contract, like most contracts now do, could specifically state that the right to natural justice would apply. Few problems arise there. The converse, namely that parties can contract out the right to natural justice principles, must be a nice question. In John v Rees [1969] 2 All ER 274 Megarry, J., thought if the right to natural justice can be excluded, there must be very clear words. John v Rees and Breen v Amalgamated Engineering Union [1971] 1 All ER 1148 are authority for the proposition that rules, and by juxtaposition contracts, cannot exclude a right to natural justice. More importantly, courts will imply, without anything to the contrary, a right to natural justice (see Lawlor v Union of Post Office Workers [1965] 1 All ER 353). These were trade union cases. In employment courts' willingness to imply natural justice rights is expressed by Buckley, L.J., in Stevenson v United Transport Union, approved by Woolf, L.J., in R v British Broadcasting Corporation, ex parte Lavelle, referred to earlier.

Requiring reasons, because of the right to natural justice, becomes, as this Court pointed out in Nkhwazi v Commercial Bank, stringent where, on the facts, the employer, as here and in the Nkhwazi case, terminates under the contract and accuses the employee of misconduct. Where the employee committed misconduct, terminating employment under the contract is a favour. Where the employee protests the misconduct either because the employer overlooked fairness procedures or, where followed, truth was

mulcted, the potency of the rule about termination according to terms is muted indeed. The law as is protects the employer. In England and Wales, until the Employment Acts, the employee lost the action for wrongful dismissal, not any more after the statutory remedy of unfair dismissal:

"The issue will usually revolve around whether the servant's breach of contract was repudiatory: whether it was sufficiently serious to justify dismissal. That depends on the circumstances: see e.g. Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285; …Wilson v Racher [1974] ICR 428 … If not justified, the dismissal is wrongful, and the master is liable in damages. Even if it is justifiable at common law, it is not necessarily justified under the statute: it is possible for the servant to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal. For example, the dismissal may be unfair because the employer unreasonably failed to operate agreed disciplinary procedures; or because he had not dismissed other employees guilty of the same misdemeanour." Harvey on Industrial Relations and Employment Law

Our Employment Act now introduces unfair dismissal and, in circumstances under consideration, termination of employment in accordance with the contract, although lawful and not a wrongful dismissal at common law, could be unfair under the Act. The statutory remedy of unfair dismissal was not there when this action commenced. The action however commenced after the 1994 Constitution. The 1994 Constitution creates in section 31 a right to fair labour practices.

The plaintiff's counsel contends that a contract providing termination of employment without reasons offends this right and is unconstitutional. The terms of this employment contract, contrary to what both counsel submit, do not provide termination without reasons. The contract is silent on the need or not for reasons. The three versions of the term produced in this Court have similar wording. One reads, "Either party can terminate the employment by giving the other 3 months notice in writing or in lieu of by payment of three months salary". The other reads, "either the employee or the company can terminate the employment by giving to the other party three moths notice in writing to that effect, or in lieu of by payment of three months salary." The last reads, "The employment may be terminated by either the employee or company giving to the relevant other party one months notice in writing to that effect or in lieu thereof of one month salary." All provisions do not provide that the employer or employee has or has not to give reasons for termination of employment.As stated earlier, terms, excluding rights to natural justice, and the ones here don't, would be contrary to public policy.

The question counsel poses entails considering the effect of the common law rule that an employee need not give reasons when terminating employment under contractual terms on an employee's right to fair labour practice under section 31. No problems arise from the innocuous part of the rule, namely, where the parties are ad idem. The problem arises where the employer's termination masquerades an unfairness which only a right to

natural justice can disgorge. Counsel submits the rule violates the right to fair labour practices and is unconstitutional.

The right to fair labour practice, however, is derogable. Law can limit it. Law here includes statute, common law or customary law. The common law rule should be understood as limiting the right to fair labour practices. The Constitution does not define 'fair labour practices.' The words entail practices that are evenhanded, reasonable, acceptable and expected from the standpoint of the employer, employee and all fair-minded persons looking at the unique relationship between the employer and employee and good industrial and labour relations. Laws limiting this right must, according to section 44 of the Constitution, be reasonable, not offend international human right standards and must not wholly abrogate the right. In my judgment a law, contractual or otherwise, that allows an employer not to give reasons for termination of employment where to all fair-minded people reasons should be given to enable challenge or principles of natural justice to run is unreasonable. It certainly offends international human right standards in article 4 of the Termination of Employment Convention, a body of international human right law. In my judgment where, like here, the employer terminates for misconduct, the reason for termination must be given. Terminating without giving reasons, in such circumstances, is an unfair labour practice, entitling the employee to remedies under section 44 of the Constitution.

Problems ensuing without the rule justify this conclusion. Not only are principles of natural justice undermined, without such a rule, an employer could successfully terminate purely on race, gender, political ethnic considerations, for example. That is why the Employment Act and international human right standards only accept the two reasons for termination, reasons related to capacity and conduct and demand the employer give the employee opportunity to answer the allegations. These principles are undermined by a rule not requiring reasons where in all fairness the employer should give reasons.

To the question whether after the 1994 Constitution introduced a right to fair labor practices and before the statutory remedy of unfair dismissal in the Employment Act an employer who terminates according to the contract could be liable to an employer, I answer in the affirmative. Where the employer acted fairly, cadit questio. Acting fairly means more than acting according to the law. The employer's action, even if lawful, could be contrary to fair labour practice. This Court has jurisdiction to test any practice for compliance with the Constitution and the human right regime under the Constitution and international human right law. In legal parlance, an employer who loses a wrongful dismissal action, could nevertheless succeed under section 31 where, for example, apart from contractual obligations, the employer terminates without giving the employer a fair opportunity of being heard or giving his explanation or putting his case. The employer is liable to the extent that she never acted fairly and congruous to fair labour practices. This rule is more applicable to matters after 1994 and before the Employment Act introduced the statutory remedy of unfair dismissal. After this Act, an employee who loses a wrongful dismissal action could nevertheless succeed in an unfair dismissal action. The

rule is however the more important where, in my judgment, an employer, in accordance with the contract, terminates with notice to suppress fairness considerations. Even without the Employment Act, the right to fair labour practice in the Constitution comports fairness in termination of employment. Even a lawful termination can be questioned for fairness. Consequently, a lawful dismissal can be questioned under the Constitution for fairness.

To the sequel question whether an employer, after the 1994 Constitution, which in section 31 introduced a right to fair labour practices, give reasons for terminating employment I also answer in the affirmative. I hasten to point out that an employer, who according to the terms of the contract of employment, terminates the contract of employment is giving reasons for termination of the contract. Where, therefore, the employer and employee are ad idem the termination is valid and coheres with the common law principle that the employer need not give reasons when terminating the contract.

The rule has to be reformulated where, as often happens and happened in this case, the employer is terminating because of the employees misconduct. In those circumstances, in my judgment, it is not enough that the employer terminates in accordance with the terms of the contract of employment. Principles of natural justice and fair labour practices require that the employee knows the underlying reason for termination of employment. Where the employer has acted fairly giving the real reason for termination is fair labour practice. Where the employer has not acted fairly as, for example, where the employer has overlooked procedural fairness, it is good industrial practice that the court investigates the fairness of the procedure and conclusion on the alleged misconduct.

It is for this reason that international human right standards and now the Employment Act require not only that reasons for termination be given but that the employee should be given a fair opportunity to answer to the allegations and present an explanation to the allegations. In the latter circumstances, in my judgment, a rule requiring the employer not to give reasons for termination of employment would be contrary to public policy because it undermines an employees right to natural justice. In my judgment I cannot countenance a contract that would, without criticism that it is contrary to public policy and unfair labour practice, contract out the right to natural justice. A rule not requiring an employee to give reasons would be an unfair labour practice to the extent that, even though the employer is within the terms of the contract, it overlooks fairness issues.

On the facts of this case, it is clear to my mind that the letter terminating the employment gave as a reason for termination the terms of the contract. It is clear however, from the letter preceding of termination and the events before this that Mr. Kalinda, who the evidence shows to have had a long and illustrious career with the employer company, was suspended because of an allegation that he stole cement from a company on the premises of Limbe Leaf Tobacco Ltd. In my judgment, given the nature of the allegation, Mr.

Kalinda's long and illustrious service with the company and the threat to Mr. Kalinda's livelihood and reputation, that more should have happened. It is true that in both the discussions before and the letter of suspension the employer brought the reason for termination to the employee. Admittedly, it is beneficial to the employee that the reason for termination is not put in the letter of termination. In my judgment, in this particular case, the reason for termination was put to the employee. What I understand Mr. Kalinda to be complaining about is that he was not given an opportunity to answer the allegations, serious and consequential as these have been shown to be, made against him. The unfairness therefore is not in that the employer never gave reasons for termination of employment. The unfairness is in that procedurally Mr. Kalinda was not given an opportunity to answer adequately to these serious allegations.

The original understanding of the concept of natural justice is based on public law and understanding that the procedural fairness required should be as close as possible to the juridical process. It is clear that rigidity need not be in cases of the nature this court is dealing with suffice to say that the extent to which the right to natural justice has been achieved in a particular case will depend on the nature of the allegation, the evidence in support and other surrounding circumstances. Obviously, more is required for serious allegations which affect the reputation and livelihood of an employee. The question in this matter therefore is whether, as employee contends, Limbe Leaf Tobacco Ltd did abide with principles of natural justice matching the allegation leveled against Mr. Kalinda.

For all we know, all that happened in this matter, in terms of providing Mr. Kalinda with an opportunity to answer adequately to the allegations against him was as follows. Mr. Kalinda, the driver and off-loader appeared before the Auditor and other Limbe Leaf officials. After the oral submissions the three, as required, made reports. There is very little evidence as to the conclusions reached at these meetings. Mr. Muhura, the company secretary, in his evidence stayed clear of suggesting that the subsequent decision to terminate the employment was in any way related to the findings of these or subsequent meetings. The company refused to investigate whether, as Mr. Kalinda requested all along, there was theft of cement at Mere Building Contractors who were on the company's premises. The employer has not established in this court that there was a reasonable ground for thinking that Mr. Kalinda stole the cement, if it was stolen at all. Mr. Kalinda was informed that investigations would continue. These were not continued until the letter of dismissal.

In my judgment, while the company did establish a modicum of investigations, Mr. Kalinda's complaint that he was not given an adequate opportunity to answer the serious and consequential allegations against him appeals to this court. Definitely Mr. Kalinda should have been invited to learn the conclusions of the investigations so that, if as it appeared to be, he was guilty of the misconduct which, in my judgment, justified

summary dismissal, he should have adequately answered to it. I come to the conclusion that the modicum of enquiry and treatment of Mr. Kalinda fell short of adequately providing the employee with an opportunity to answer the allegation of the nature made against him.

Once it is established that a right has been violated the citizen is entitled to an adequate remedy in a Court of law. Section 46 of the Constitution, apart from the Employment Act passed several years after commencement of this action provides for remedies for violation of fundamental rights such as the right to fair labour practices under section 31. Under section 46 (3) of the Constitution the Court can make such orders as entail full enjoyment of the right which, in the context of employment, include, before the Employment Act, reinstatement. In principle, in my judgment, reinstatement should be automatic where employment was terminated on grounds of discrimination on the basis of race, gender, political consideration or ethnicity where the employee wants to continue irrespective of what the employer was. Where the right violated is none other than discrimination, reinstatement should only be ordered where the employer and employee are willing to continue the employment relationship. Consequently, award of compensation under section 46(4) of the Constitution should be resorted in the majority of cases.

In my judgment, as demonstrated in Nkhwazi v Commercial Bank of Malawi, in assessing damages for violation of this right and unfairness dismissal under the Employment Act, wrongful dismissal decisions are irrelevant. There is, apart from Nkhwazi v Commercial Bank of Malawi, the English case of Norton Tool Co Ltd v Tewson [1973]1 All ER 145, followed in Treganowan (C.A) V Robert Knee & Co Ltd [1975] ICR 405.

The purpose of the award under section 46(4) of the Constitution for violation of fundamental rights under the Constitution should be to adequately compensate the victim. The award should meet the purpose this Court stipulated in Tembo v City of Blantyre (No. 2) Civil Cause No. 1355 of 1994:

“The policy behind damages is, where it is possible and money can do it, to fully compensate the victim for the new situation in which he is because of the wrong done to him… If the problem of remoteness has been overcome and it is decided that the victim is entitled to recover, courts endeavour to adequately compensate the victims.”

In my judgment the award for compensation under section 46(4) of the Constitution must be just and equitable in all circumstances of the case and, in relation to employment have regard to the loss sustained by the employee in consequence of the termination so far as that loss is attributable to the action of the employer which for now has been proven unfair.

The principles on which courts should award employees for unfair termination under section 31 of the Constitution have to be developed by the courts who must in my judgment consider all losses the employee has and may suffer as a result of the termination which now has been proven unfair. The matter has, of course, been made much easier after the Employment Act. The principles may not, in my judgment be any different.

In case of an unfair termination the immediate loss, in my judgment, is the loss of what the employee would have earned if for some good reason the employer would cease to operate or declare the employee o. This approach bases on Norton Tool Co Ltd v Tewson. In some cases this might mean, where there are redundancy statutes, redundancy payments and, where there are no redundancy statutes, what is due in those circumstances may be, as this court pointed out in Phoso v Wheels of Africa, Civil Cause No. 1792 of 1995 (unreported), a contractual consideration. The Employment Act, passed after the commencement of this action, provides for compensation for unfair dismissal in section 63. This action commenced before the Employment Act. Where there is no evidence that redundancy was a matter of contractual arrangements, this Court since Marriette v Sucoma Limited Civil Cause No 1341 of 1996 (unreported) and recently in Nkhwazi v Commercial Bank of Malawi Limited Civil Cause No. 233 of 1999 (unreported), bearing in mind, criticism against applying the Employment Act retrospectively, has been guided by the lead taken by Parliament.

Apart from this immediate loss the court must make a compensation award under sections 41 (3) and 46 (4) of the Constitution for violation of section 31 of the Constitution must address all possible future losses arising from an unfair termination of employment. For about three decades the loss has been restricted to financial loss: Norton Tool Co Ltd v Tewson. Lord Hoffman thought differently: Johnson v Unisys [2001] IRLR 279. Compensating for financial loss is a complex. It involves a speculation about the employee's future job prospects and all relevant circumstances that make the award equitable. In relation to future job prospects, few problems arise where the employee finds another job. In that case the award includes the losses, based on the employee's current earnings up to the commencing of the new job. Consequently, the employee would recover nothing if he immediately finds a job. Problems arise where the employee has not found a job because there it involves speculation as to when he might reasonably, depending on the current job market, find in new job. Where the employee cannot, taking all circumstances into account, find a job, adequate compensation entails that the court award for this loss bearing in mind that the award is made well before it is earned.

There are many circumstances apart from the speculation about the employee's future job prospects that the court has to consider bearing in mind of course that the onus of proof is on the employee to prove her losses and the requirement about mitigation of damages. In determining what is equitable, the court has to take into account the

question whether, but for the unfair termination, the employment would have continued, seized any way either because dismissal could have occurred immediately or shortly thereafter. There are many heads for losses arising from Magola v Press Corporation Ltd that for reasons expressed in that same case, the matter should be adjourned to chambers for assessment of damages.

Made in open Court this 21st Day of November 2003.

D.F. Mwaungulu

JUDGE