

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

Civil Cause No. 1792 Of 1995

Between

W. M. PHOSO

Plaintiff

And

WHEELS OF AFRICA (MALAWI) LIMITED Defendant

**CORAM: D F MWAUNGULU, JUDGE**

Kauka, a legal practitioner, for the plaintiff

Kainja, a legal practitioner, for the defendant

Chaika, official recording officer

**Mwaungulu, J**

**JUDGMENT**

In this action Mr. Phoso, an employee, sues Wheels of Africa (Malawi) Ltd, his employers. The defendants, Wheels of Africa (Malawi) Ltd, employed Mr. Phoso in 1988 and terminated the plaintiff's employment in 1995. When Wheels of Africa (Malawi) Ltd terminated the employment, Mr. Phoso was working in Mombassa, Kenya, for Wheels of Africa (Kenya) Ltd. The effect of Mr. Phoso' working for another subsidiary company in Kenya is contested. Just as there is a dispute about who terminated Mr. Phoso's employment. Both Wheels of Africa (Malawi Limited) and Wheels of Africa (Kenya) Limited are, at least were, companies of a larger company or companies named, on documents in court, Wheels of Africa Limited or Sabot Haulliers. Two things concerning the plaintiff's action happened in the bigger company simultaneously.

First, disruption in the transport business triggered undersizing the company's operations and staff retrenchment. This necessitated the second event: Wheels of Africa Limited had to be sold. The plaintiff had stark choices. He could, upon terminating employment with Wheels of Africa Limited or, and there is a bit of uncertainty here, the parent company,

agree with the buying company. The plaintiff did not opt for that. It is not for this Court to investigate the reasons. The second possibility, the one the plaintiff chose, of course after some piecemeal jobs in Mombassa with the buying company and other concerns interested in his services, was to return to Wheels of Africa (Malawi) Limited. On the second possibility, he risked retrenchments occurring in the parent company and its subsidiaries like Wheels of Africa (Malawi) Limited. Wheels of Africa (Malawi) Limited arranged to pay retrenched employees based on the years served in the company worked at the employee's current salary. Wheels of Africa (Malawi) Ltd. calculated Mr. Phoso's entitlements on a salary he received when working for Wheels of Africa (Malawi) Ltd. in Malawi. Mr. Phoso's salary changed considerably when working for Wheels of Africa (Kenya) Ltd. Mr. Phoso thinks, and Wheels of Africa Malawi Ltd., vehemently object, that whatever the nature of payment Wheels of Africa Malawi LTD gave when the employment contract ended, Wheels of Africa (Malawi) Limited should calculate the entitlement on the salary the plaintiff earned at Wheels of Africa (Kenya) Ltd. Wheels of Africa Malawi Ltd.'s refusal to pay on that basis prompted this action.

In the writ issued on the 28th September 1995, Mr. Phoso claims US\$ 10,498.33 representing the shortfall based on the Kenyan salary. The crux of the action is that Wheels of Africa Malawi Ltd. erroneously calculated his terminal benefits. Wheels of Africa (Malawi) Limited, Mr. Phoso alleges, overlooked the plaintiff's last earnings as on 15th March 1995. Mr. Phoso contends Wheels of Africa Malawi Ltd. should have calculated based on the salary and allowances as at that date. In his statement of claim Mr. Phoso computes the entitlement's dollar value of his earnings providing for Wheels of Africa Malawi Ltd.'s payment.

Wheels of Africa (Malawi) Limited deny they seconded the plaintiff to the Wheels of Africa (Kenya) Limited. The defendant alleges they transferred the plaintiff, the plaintiff consenting, to Wheels of Africa Kenya Ltd. on 9th February 1995. The defendant contends that, after Wheels of Africa (Kenya) Limited employed Mr. Phoso, Mr. Phoso's terms and conditions of employment were those of Wheels of Africa (Kenya) Limited. The defendant further alleges that between the 9th January 1 and 15<sup>th</sup> March, 1995, Wheels of Africa (Kenya) Limited paid Mr. Phoso's salary. Wheels of Africa (Malawi) Limited allege that in March 1995 they retrenched employees. The plaintiff, having worked for Wheels of Africa (Malawi) Limited for approximately seven years, the defendant says, in spite that the plaintiff was Wheels of Africa (Kenya) Ltd.'s employee paid him benefits the defendant paid to all retrenched employees who worked for the defendant by the 9th of January, 1995. The defendant contends that, like for all the other employees, the plaintiff's payment base on the salary he received in Malawi. The defendant, therefore, contends the calculations were correct. If anything, the defendant contends, the payment was gratuitous and Wheels of Africa Malawi Ltd had no obligation to pay the plaintiff.

The facts, but for the inferences, drawn from the facts, are easy to follow. This matter hinges on what happened when Mr. Phoso left Wheels of Africa) Limited Malawi for

Wheels of Africa Kenya Limited and who between the parent company and Wheels of Africa (Malawi) Limited, transferred the plaintiff. The starting point should be a letter Mr. Chris Jackets, the Group Administration Executive for Wheels of Africa Ltd, wrote Mr. Phoso on 19th December, 1994. Quite some detail of this letter, because of the many crucial inferences to be made to resolve this matter, is important.

Mr. Phoso's move to Wheels of Africa (Kenya) Ltd. followed discussions between Mr. G. Miller, of Wheels of Africa Malawi Ltd, Mr. Phoso, an employee of Wheels of Africa Malawi Ltd, and Mr. Chris Jackets, of Wheels of Africa Ltd. This letter is on Wheels of Africa (Kenya) Ltd.'s letter head. It is clear though Mr. Chris Jackets worked for the parent company and used different letter heads wherever he made the decisions from. The use of different letter heads appears repeatedly in the evidence concerning Mr. Jackets and other officials of the company. Whatever forms the discussions took, the transfer was reduced to writing. Mr. Chris Jackets and Mr. Phoso, whose signature was to be witnessed by two others, signed.

Many issues emerge from this letter. First, the letter itself is headed "transfer to Kenya". In it Mr. Chris Jackets writes to Mr. Phoso, "this letter serves as an official notification of your transfer from Blantyre to Mombassa and to outline the agreements of the said discussions..." Right at the outset therefore, there is no suggestions that Mr. Phoso is being transferred from one company, namely, Wheels of Africa Malawi Ltd, on the one hand, to another, Wheels of Africa Kenya Ltd, on the other. The transfer is indicated as being between places rather than between institutions. There is a paragraph 'c' which reads, "Your transfer shall be with effect from the 9th January 1995 and be in for a minimum of one year or terminated at the management discretion." It is significant that in this clause, just as in the ones mentioned earlier, the word used is transfer. What is important about this clause however is that the transfer is for a fixed period. This is important for the inference that I want to make which is that the letter does not suggest Mr. Phoso's employment is being terminated. For if it was, being terminated, it would be unreasonable for Mr. Phoso, though not impossible, to accede to an arrangement where he leaves a permanent employment for one determinable at the whims, rather discretion, of management. The inference must be that, this, as the two earlier statements show, was a transfer between places. The termination in the letter relates only to the transfer not to the employment. This is confirmed by that in paragraph 'd' there is reference to remunerations payable to Mr. Phoso in Malawi and Kenya and that in Kenya Mr. Phoso would receive a stipulated taxable allowance. The part where his Malawi income is stipulated is crossed out. The inference must be that he would receive a different salary in both countries. Then there is a long paragraph which, in my judgment, does not even suggest that Mr. Phoso would be working for Wheels of Africa Kenya Ltd as an employee of Wheels of Africa Kenya Ltd. All the paragraph covers are Kenyan Immigration requirements for employees working in that country. This letter, for all intents and purposes refers to the transfer of staff. It scarcely suggests cessation of employment between Wheels of Africa Malawi Ltd and Mr. Phoso or resumption of a new contract of employment between Wheels of Africa Kenya Ltd and Mr. Phoso.

The letter Mr. G W Miller of Wheels of Africa Malawi Ltd. of 15th March, 1995 wrote to Mr. Phoso confirms that there was no termination of employment of between Mr. Phoso and Wheels of Africa Malawi Ltd. There is a lengthy discourse about problems of Wheels of Africa Malawi Ltd and other companies. The letter suggests retrenchment and Mr. Phoso's possible retrenchment. The letter suggests arrangements made for various employees: those who served the company for less than 36 months will receive 50% of one month's salary for every year served and those, like Mr. Phoso, who served for over 36 months, a full month's salary. Other aspects in the letter do not concern this application.

What, in my judgment, is important in this letter is the heading of the letter; it refers to retrenchment of staff. What is equally important is it is written to Mr. Phoso. What is the most important, however, is what it says in the first paragraph: "It is with sincere regret that we advise that your duties in this company have been made redundant with effect from today." This statement is inconsistent with that Mr. Phoso's employment with Wheels of Africa Malawi Ltd. ended. It is also incongruous with the pleadings that the payment to Mr. Phoso was gratuitous because Mr. Phoso ceased working for wheels of Africa Malawi Ltd and was at the time of the letter employed by Wheels of Africa Kenya Ltd. Wheels of Africa (Malawi) Ltd. could not write this letter to a person who ceased to be its employee many months before.

One little aspect of this letter needs noting because of earlier comments and inferences made for this decision. Mr. Miller signs this letter for Wheels of Africa Malawi Ltd and Sabot Hauliers (Property) Ltd. Sabot Hauliers (Property) Ltd either belongs to wheels of Africa Ltd or has taken over Wheels of Africa Ltd. This underlines the complication referred to earlier about Mr. Phoso's transfer. It leaves the impression that he, like Mr. Chris Jackets, a Senior Official of the parent company, Wheels of Africa Ltd, was transferred any where in the subsidiary companies. G W Miller was terminating Mr. Phoso's employment in that same vent using Wheels of Africa (Malawi) Ltd,'s letter head unlike Mr. Chris Jacket who used a Wheels of Africa Kenya Ltd.'s letterhead.

The first reference to secondment is in Mr. Chris Jackets' letter on 21st March, 1995. The letter is not particularly directed to Mr. Phoso. Mr. Phoso received this letter because it affects him. The letter is directed "to all secondment staff from Zimbabwe and Malawi." It is significant that in this letter all employees are referred as belonging to Wheels of Africa Ltd. There is no specification to a particular subsidiary company. It is important to quote what Chris Jackets wrote in this letter:

"...you will be required to continue to serve the East African Operation where arrangements are made to return to either Zimbabwe or Malawi, from where you were seconded. On arrival at your home the best and applicable reduction of staff will be

applied.”

Once again the inference is that, at least for Mr. Phoso, there was no cessation of employment with Wheels of Africa Malawi Ltd. This letter was followed by Chris Jackets letter of 23rd March, 1995 written, this time around, on Sabot Hauliers (Property) Ltd letter head. This letter is the second where Mr. Chris Jackets refers to secondment. The letter is to “all Wheels of Africa employees in Kenya and Uganda.” It relates to the request of African Marketing Services Ltd, the new owners of the East Africa Company and Wheels of Africa Ltd, to continue employing Wheels of Africa Ltd staff at the East African Company. There is an important clause in the letter relating to the contention that Mr. Phoso now raises that his salary is not what Wheels of Africa Malawi Ltd used to calculate his entitlement under the redundancy settlement. Mr. Chris Jackets wrote: “your conditions of services, wages bonuses, etc., will remain the same and Wheels of Africa will return you to Harare within the next few weeks.” Mr. Chris Jackets then refers to that continuing with African Marketing services, would, for purposes of employees from Zimbabwe, and as we shall see later, Malawi, be secondment. As we saw with other letters, Mr. Jackets wrote this letter on Sabot Hauliers Ltd.’s letterhead.

The other documents have little significance to liability. There is a document of 24th March 1995 under which the money based on the disputed wheels of Africa Malawi Ltd.’s calculations was received. Two important issues arising in the oral evidence should be captured. From oral evidence, Mr. Phoso’s brother received money, as was done with the Malawi payments, from Wheels of Africa Malawi Ltd. Secondly, Wheels of Africa (Malawi) Ltd. paid Mr. Phoso himself or by proxy on the following terms: “I the undersigned accept the amount dated above hereon as full and final settlement from Wheels of Africa Malawi Ltd and its associate companies.” All along Mr. Phoso disputed the calculations. He on 4th April, 1995 wrote Mr. Jackets indicating the correct payments under the redundancy agreement. Little in the oral testimony improves on matters the documentary evidence covered.

The first point taken for Wheels of Africa (Malawi) Limited concerns whether Wheels of Africa Malawi Limited still employed Mr. Phoso when he left for Kenya. Mr. Kainja argues that, by signing the letter of 5<sup>th</sup> January 1995, the plaintiff accepted new employment and under the terms and conditions of the new company, Wheels of Africa (Kenya) Limited. Mr. Kainja argues, relying on *Shutter Bridge Cooperation v Lloyds Bank Limited* [1970] Ch 62, that the two corporate entities, even if they be holding, permanent or subsidiary, companies, are separate. Mr. Kainja argument is that Mr. Phoso’s employment with Wheels of Africa (Malawi) Limited ended and a new contract of employment commenced with Wheels of Africa (Kenya) Limited. Mr. Kainja argues, relying on *Shaba v Agricultural Development and Marketing Corporation Civ. Cas. No. 1194 of 1992*, unreported, that Mr. Chris Jacket’s instructions effecting the transfer were normal and never affected the legal position. He cites *Mkandawire, J.*, where the judge said:-

“It is true the department of statutory bodies did lay down procedure which all statutory bodies like the defendant had to follow...The laying down of those procedures would not minimise the fact of employment as between the plaintiff and the defendant. It is true that there was no letter of appointment, but that in my considered view, cannot change the factual position. My finding on the matter is that the plaintiff’s employment was governed by Agricultural Development and Marketing Corporation staff terms and conditions of service but subject to the directions and instructions which the department of statutory bodies gave from time to time.”

On the factual premises laid earlier, I have real difficulties to find that Mr. Phoso’s employment with Wheels of Africa (Malawi) Limited terminated. I introduced excerpts to show that the picture could not be one now contended. I demonstrated that Wheels of Africa (Malawi) Limited letter sent to Mr. Phoso could only be on the assumption, clearly demonstrated in that letter, that Mr. Phoso was an employee of Wheels of Africa (Malawi) Limited. The letters show that Mr. Phoso’s situation is distinguished from Mr. Shaba’s in the case Mr. Kainja cited. There Government issued a letter transferring Mr. Shaba from Malawi Housing Corporation to another corporation, Agricultural Development and Marketing Corporation. Nothing in that letters suggested transfers between two sister entities. The letter points to a transfer between places. In many passages in the two letters, it is clear Mr. Phoso retains his employment with Wheels of Africa (Malawi) Limited.

The passage from the Shaba case Mr. Kainja cites, in my judgment lays down no principle. Justice Mkandawire relied on the evidence to draw the emphasis and conclusions made about Mr. Shaba. I would think that, as to parent and subsidiary company, while it is important to separate the legal entities for purposes of employment, it is a question of fact, not law, whether transfer of employees affects a particular contract of employment. This proposition supports Justice Mkandawire’s findings in the Shaba case. It would be wrong in principle to suggest that a transfer between a parent and a subsidiary company terminates employment. It is a question of fact in each case depending on the understanding and intention of the parties of the agreement, oral or written, between them. On this principle, the fact of who pays salary may be determinative but certainly not conclusive. All depends on the intention of the parties.

Mr. Kainja argues further for Wheels of Africa (Malawi) Limited that Mr. Phoso was not seconded to Wheels of Africa (Kenya) Limited. Mr. Kainja submits that, normally, on a secondment, the seconding company pays the employee’s salary. The receiving company refunds the seconding company salaries and benefits paid to the employee. He argues that the contention Mr. Phoso’s salary should be computed on the Kenyan Company’s salary is a strange argument for two reasons.

First, Mr. Kainja contends it is not Wheels of Africa (Malawi) Limited that

seconded the plaintiff to Kenya. Mr. Kainja submits that the Malawi Company instructed the parent company identify an employee for the Kenyan company. He argues that there is in fact a contract between Mr. Phoso and the Kenya company. Secondly Mr. Kainja argues that the Kenyan company, not the Malawi company, paid Mr. Phoso's salary. It would, he argues, be unfortunate to require the Malawi company to pay on the Kenyan company's salary.

On the first aspect, it is inaccurate that the question of secondment arises from the Kenyan company. As seen, secondment arises in the letter Mr. Jackets wrote to many employees in the eastern company. I concluded that the letter referred to suggests a transfer between places. Nothing in it suggests assignment of the employment contract or a transfer. Nothing in it suggests a new contract was created. Apart from earlier observations, this new agreement only stipulated the allowances, not the salary, Mr. Phoso would receive in course of his transfer to Nairobi. This subsequent letter shows there was no termination of employment between Wheels of Africa (Malawi) Limited and Mr. Phoso.

My understanding is that it is a lack of this new contract between Mr. Phoso and Wheels of Africa (Kenya) Limited that prompted Mr. Jackets to refer to Mr. Phoso's new arrangement, indeed the other arrangements, as secondments. If, as Mr. Jackets suggests, the transfers were secondments the effect in my judgment would be that the earlier contract of employment with Wheels of Africa Malawi Limited subsisted uninterrupted by the secondment. The result would be exactly as I have suggested that there was no employment contract between Mr. Phoso and Wheels of Africa (Kenya) Limited.

This is enough to dispose of Mr. Kainja's first argument on the point that Wheels of Africa (Malawi) Limited had no power in the secondment of Mr. Phoso to Wheels of Africa (Kenya) Limited. It is far true, as the letter of transfer demonstrates that the Malawi Company simply helped identify an employee who the Kenyan Company employed. Mr. Jackets refers to conversation between Wheels of Africa (Malawi) Limited and Mr. Phoso. In that letter Mr. Chris suggest this was a transfer where a Kenyan company was looking for somebody to employ. On the second point Mr. Kainja relied on the Shaba case for that where a new employer pays salaries to a seconded or transferred employee, the employer enters into a new contract with the receiving company. Justice Mkandawire decided purely on the facts. On the facts of that case, the appropriate inference was that the employee entered into a new contract with the receiving company. That inference cannot be drawn on the facts of this case.

Mr. Kainja submits for Wheels of Africa Malawi Ltd that, if anything, Mr. Phoso should be grateful that Wheels of Africa Malawi Ltd paid him the sum Mr. Phoso now disputes. He submits that, in spite that the contract between Mr. Phoso and Wheels of Africa Malawi Ltd did not provide for a redundancy payment, Wheels of Africa Malawi Ltd went all the way to apply the terms under the new Employment Act providing for

redundancy or severance pay. He submits that under the former Wages and Condition of Employment Act severance pay provisions never applied to Mr. Phoso because his earnings were higher than those to which the Act applied. He relies on the case of *New Honda Centre v Sagawa* [1984-86] MLR 212. There this Court decided that the employee is only entitled to the benefits stipulated in the contract. So, the argument goes, there being no redundancy pay in the contract of employment between Phoso and Wheels of Africa Malawi Ltd, Wheels of Africa Malawi Ltd were under no obligation to pay even what they paid. Consequently, the payment here is *ex gratia*.

In England, and now in Malawi, statutes regulate redundancy payments. At common law a contract could provide for redundancy at termination of employment. The parties could agree such terms of employment before hand, during or, at any right, just before termination of the employment. Consequently, courts will, like here enforce contracts for redundancy payments where parties agree subsequent to the initial contract on ways to terminate the employment. This aspect distinguishes this case from *New Honda Centre v Sagawa*. This is not the case of somebody claiming for something in the terms of contract of employment. This is somebody relying on a new contract between employer and employee on terms agreed to terminate the employment relationship.

Moreover this situation is equally distinguished from those cases in England where courts are reluctant to enforce such a contract for compromise of statutory rights in the Employment Act and the Industrial Relations Act. At common law courts respect and enforce contracts which are genuine agreement to terminate the employment relationship in this way and are arrived at after considering possible imbalances between the employer and employee or threats from the employer. Construction of the agreement and circumstance around the agreement determine whether courts enforce the agreement. Without redundancy rights now created by statutes, Mr. Phoso can, at common law, rely on an agreement conferring such rights. This court would be duty bound at common law to enforce the agreement.

I would add that the common law is not as slow to respond to changing situations as is imagined. The common law responds effectively to all changes in common society. The Legislature introduced redundancy laws to regulate anomalies in the common law. The time could come, and it is now, that the common law responds to problems of employees when employers terminate contracts where there are no redundancy laws. There may be difficulties at common law with calculating damages for redundant employees. Where parties, like here, have agreed on a mode of payment, the common law should clothe such arrangements with legality. I, even sitting in my common law jurisdiction, would not resist temptation to take the lead by the legislature pinning the remedy to payment for a number of years served.

The other point taken for the defendant is that Wheels of Africa (Malawi) Ltd. can



only be liable for what they agreed to pay to the plaintiff under the employment contract with them. The point is made, relying on the Sagawa case, referred to earlier, *Dudha v. North End Motors* [1984-86] MLR 425 and *Msiska v Malawi Dairy Industries*, Civ. Cas. No. 1034 of 1995, unreported, that there was no agreement between Wheels of Africa (Malawi) Limited and Mr. Phoso for a salary of US\$ 800 per month and living allowances of 35,000 shillings per month that Mr. Phoso received in Nairobi. On this point, Mr. Kainja revives matters covered earlier and that there was no agreement for redundancy pay in the contract of employment between Wheels of Africa (Malawi) Limited and Mr. Phoso.

I have covered the latter point exhaustively. I can only repeat that, while there was indeed no provision for redundancy pay in the original employment contract, Wheels of Africa (Malawi) Limited and Mr. Phoso agreed to terminate their contract under terms referred to earlier. This court will enforce that. Wheels of Africa (Malawi) Ltd argues repeatedly in the trial and submission that Mr. Phoso is not entitled to 800 US\$ and 35 Shillings per month because the contract of employment between Mr. Phoso and Wheels of Africa (Malawi) Limited never provided for the payments. I understood this argument to mean Mr. Phoso was eventually employed by Wheels of Africa (Kenya) Limited when he went to Mombassa under the letter we considered several times. That letter shows there was no termination of employment for reasons indicated earlier.

What is very important here, however, is what arose in course of the trial. Defence witnesses, officials from Wheels of Africa (Malawi) Limited, told this court on oath that Mr. Phoso continued to receive his Malawi salary from Wheels of Africa (Malawi) Limited. It is accepted that Mr. Phoso also received US\$ 800 per month as a salary in Kenya. This to my mind shows that, while Mr. Phoso was in Kenya, he was for all intents and purposes under a contract of employment with Wheels of Africa (Malawi) Limited. This discounts the defendant's contention that they paid Mr. Phoso the month's salary simply because of sympathy because he worked for the company before. Indeed as we saw before, the letter written to Mr. Phoso, who was still an employee of Wheels of Africa (Malawi) limited, informs us the salary paid to Mr. Phoso on this transfer.

I have referred to the particular provision previously. There is no harm however in repeating Clause (d) reads:-

“Your remunerations payable in Malawi and Kenya shall with effect from 1<sup>st</sup> January 1995 be in Malawi you shall receive the taxable income of Malawi Kwacha K1875.00 per month in Mombassa you shall receive taxable allowances of 35,000 Shillings per month.”

From this provision, Mr. Phoso's was paid in Malawi and in Kenya. That bit referring to the remuneration paid in Malawi has been deleted. It has not been substituted with any

payment in Malawi or payment in Kenya or payment in Malawi and Kenya. In my judgment, it is on the course of this provision that Wheels of Africa (Malawi) Limited continued to pay Mr. Phoso the salary in Malawi. It is very clear however that Mr. Phoso was entitled to remuneration in Malawi and Kenya. From this it can be strongly inferred that Mr. Photo's salary comprised of sums payable in Malawi and Kenya.

Paragraph (d) of the main draft, as we saw earlier, was typed in with the reference to remuneration in Malawi deleted. It might be useful to recast the paragraph without the cancellation just mentioned. Recast it would mean there is no prevision for salary in this letter. The salary payable in Malawi and Kenya has therefore to be proved by the plaintiff. The plaintiff has shown in his evidence that he earned K 3750 per month in Malawi as salary. He earned US\$ 800 per month as salary and 35,000 Shillings as allowances in Kenya. His total earnings therefore were K3, 750, US\$ 800 and KS 35,000 per month.

These payments being part of the conditions of service agreed with Mr. Phoso and at the time of leaving Nairobi were guaranteed by Wheels of Africa Ltd. In the letter that Mr. Jackets wrote to all seconded staff from Zimbabwe and Malawi on 21st March, 1995, referred to earlier, Mr. Jackets does not refer to the conditions of service as being agreed upon with Wheels of Africa Kenya Ltd on whose letter head the letter was written. He refers to those conditions as those "agreed previously between Wheels of Africa and yourself." In that letter Mr. Jackets thanked all employees on behalf of management of Wheels of Africa. In the letter two days latter to all Wheels of Africa employees in Kenya and Uganda, Mr. Jackets informs them about the desire of African Marketing Services to retain some employees. Mr. Jackets informs all, including Mr. Phoso that "your conditions of service, wages, bonuses, etc will remain the same..." He then emphasizes that Wheels of Africa not Wheels of Africa Kenya Ltd, "will guarantee your payments until you return to Harare." This letter is written on Sabot Hauliers (Property) Ltd.'s letter head. The point in all this is that the matter of Mr. Phoso's salary has not been shown to have been in a matter of concrete agreement. Mr. Phoso's salary was being negotiated from time to time. In fact Mr. Phoso introduced another communication to Mr. Jackets suggesting changes of expatriate salaries. On the facts in this Court to which there is no dispute, Mr. Phoso's salary was K 3,750 and US\$ 800 and allowances of KS 35,000.

The other point taken for Wheels of Africa (Malawi) Ltd is that Mr. Phoso, having accepted the money in full and final settlement, is estopped from claiming any more monies beyond what he accepted. Mr. Kainja relies on *Sembereka v City of Blantyre* [1984-86] MLR 372. Mr. Kainja relies on the statement of Mtegha, J., as he then was, at page 381:

"Mr. Msisha has submitted that since the plaintiff has received all that he contributed and all that the defendant contributed, there is no more money from which his gratuity and

pension could emanate. In any case, he is estopped from claiming a gratuity and pension. I agree with this submission. The plaintiff cannot approbate and reprobate. Only one could be chosen and the source of his gratuity and pension was exhausted by the plaintiff himself accepting both his own and the defendant's contributions."

The case of *Sembereka v City of Blantyre* can be distinguished. The question there was whether the plaintiff could claim pension after he received gratuity. From the regulations, he could have either gratuity or pension. In this case the question is whether the plaintiff can recover at all having signed the sort of undertaking he did. In principle and on clear authority such agreement, subject to what I say shortly, binds the parties. Courts, including this Court, refuse to enforce such undertakings where they sense unfairness based on inequality or imbalance, particularly where parties agree without advise from counsel. Where the parties are balanced, the risks of unfairness based on inequality are subsumed.

In *Manda and others v City of Blantyre* [1992] 15 MLR 228, Unyolo, J., as he then was, approved the following statements by Somervell, L.J., in *Biggin & Co Ltd v Permanite Ltd* [1951] 2 All ER 191 at 196:

"The law, in my opinion, encourages reasonable settlements, particularly where, as here strict proof would be a very expensive matter. The question in my opinion is: what evidence is necessary to establish reasonableness? I think it is relevant to prove that the settlement was made under legal advice."

Lord Justice Singleton said at 199:

"It is a matter of consideration that the settlement was arrived at under advice, the more so as the party settling may be quite uncertain whether he can recover anything against someone."

This court, English Courts and legal commentators agree that in a normal employer, employee relationship, where the employer is not a small employer, the balance tilts against the employee. There is a risk, when the employer with appropriate legal advice forces agreement on an employee acting on the agreement without legal advice. In this particular case the plaintiff was acting without legal advice. More importantly, as the evidence shows, Mr. Phoso acted through a proxy and there was undue pressure for him to sign because *Wheels of Africa Malawi Ltd* was under pressure to effect and close books. In my judgment it would be contrary to principle and justice to stop Mr. Phoso from questioning the payment where, as he argues, the computation would have been based on a different payment.

Even if the approach in the previous paragraph is incorrect I would be very slow in refusing Mr. Phoso the chances to question this payment. Mr. Phoso is not querying the principle of the payment which, as the evidence shows, is an agreement between an employee and employer for redundancy. The agreement stipulated that the payment would be based on Mr. Phoso's salary. Whether that salary is wrongly computed, unless it is shown clearly that the parties agreed on that wrong salary, this court could as a matter of principle do justice to bring a just end to that error.

I do not know of any principle against the principle just stated. The problem in this case as I understand it is what under the redundancy agreement made with Mr. W Phoso the correct salary for purposes of payment is. The agreement bases on the letter of 15th March, 1995. Whatever the payment, it is based on the substance of that letter and the payments stipulated there.

The only aspect of the payment arrangement concerning us here is stipulation in (a) in the letter. Mr. Phoso worked for over 36 months and (a) (ii) applies to him. (A) (ii) provides:

“If you have served the company for over 36 months then you have been given one month's salary for every year served.”

Mr. Phoso's disputed payment depends on this provision. It is important to notice that this letter refers to payment to Mr. Phoso so as to include the time Mr. Phoso worked in Nairobi for Wheels of Africa Kenya Ltd. This, as has been said repeatedly confirms that there was no severance of the contract. Wheels of Africa Malawi Ltd include in their calculations the whole period from when Mr. Phoso started work with Wheels of Africa Malawi Ltd up to 15th March, 1995. Let me dispose of the mentioned problem this provision refers to salary and other provisions in the letter refer to other possible payment to Mr. Phoso. There is no reference in the letter that the calculation could be based on allowances. This means, assuming Wheels of Africa Malawi Ltd have to pay for the payments Mr. Phoso received in Kenya; they cannot pay for allowance in Kenya. It remains therefore to determine the salary Mr. Phoso is entitled to as at 15th March, 1995.

The defendant's vehement contention Mr. Phoso is entitled to K3, 750 per month and only as ex gratia payment, can only be premised on severance of the contract of employment into two namely the contract of employment with Wheels of Africa Malawi Ltd and another with Wheels of Africa Kenya Ltd. Severance, on the evidence, is untenable for reasons earlier expressed. Even if there was severance, it will not, in my judgment, on the evidence before me, disentitle Mr. Phoso's claim to the 800 US\$ as basis for calculating his entitlement. On the letter of 15th March 1995, I concluded that the letter written to Mr. Phoso was written by Wheel of Africa Ltd and not Wheels of Africa Malawi Ltd, although it is written on the letter head of Wheels of Africa Malawi

Ltd. This is abundantly clear when reading the first paragraph through to the 5th paragraph. Therefore, Mr. Miller signed this letter on behalf of Wheels of Africa Malawi Ltd and Sabot Hauliers (Property) Ltd, the wider company with or under Wheels of Africa. More importantly, if the severance advocated was the case, Mr. Miller would have paid Mr. Phoso up to the end of December when the said severance occurred. Mr. Miller was acknowledging Mr. Phoso's contribution to Wheels of Africa Ltd or Sabot Hauliers (Property) Ltd as a whole as well as Wheels of Africa Malawi Ltd. So much so that the reason why Mr. Phoso's entitlement extend to 15th March, 1995 because Mr. Phoso was while working for Wheels of Africa Kenya Ltd part of the wider company. This letter therefore is written on behalf of Wheels of Africa Malawi Ltd and Sabot Hauliers (Property) Ltd. The latter, of course, stand for Wheels of Africa Ltd.

On receipt of this letter Mr. Phoso must have understood, correctly for that matter, that Wheels of Africa Malawi Ltd and Sabot Hauliers will pay him on the basis of a month's salary for every year served. That salary, in my judgment, means what he was earning as at 15th March 1995 which, as we have seen, is the amount he was receiving in Malawi and the amount he was receiving in Kenya K3,750 and 800 US\$ respectively. There is nothing in Mr. Miller's letter that Mr. Phoso's payment was going to be based on the Malawi's salary or the salary received in Malawi to the exclusion of the salary received in Kenya.

There are problems with the severance submission. It suggests that Mr. Phoso's contract with Wheels of Africa Malawi Ltd ended. Consequently Mr. Phoso had another contract of employment with Wheels of Africa Kenya Ltd. This new contract had no conditions. We now know that the contract of employment with Wheels of Africa Kenya Ltd ended. It follows that for all practical purposes Mr. Phoso is not employed. In the whole of this process there is Mr. Jackets. He is responsible for the end of employment contract between Mr. Phoso and Wheels of Africa Malawi Ltd. He is there at the assumption of the contract of employment between Mr. Phoso and Wheels of Africa Kenya Ltd. He is also at the end of the contract between Mr. Phoso and Wheels of Africa Kenya Ltd. At the end of this last arrangement, he writes that Mr. Phoso should go back to Wheels of Africa Malawi Ltd. If, as it is argued, there was severance at all, Mr. Phoso has to renegotiate his salary. It cannot be said that he is to receive the salary at Wheels of Africa Malawi Ltd., the contract of employment was concluded. Mr. Chris Jackets having offered 800 US\$ to Mr. Phoso in Kenya cannot on any principle of fairness transfer the employee to Wheels of Africa Malawi Ltd on the old salary. It would be inconceivable to compel Mr. Phoso to receive the reduced salary. There is no suggestion that the old salary was offered on this new contract after Mr. Phoso left Wheels of Africa Kenya Ltd. There is no doubt that Mr. Jackets who had earlier transferred Mr. Phoso to Nairobi indicated that Mr. Phoso should return to Wheels of Africa Malawi Ltd. If Mr. Phoso was transferred to Wheels of Africa Malawi Ltd by Mr. Jackets, on the severance argument Mr. Phoso's salary is uncertain. The assumption must be that Mr. Jackets will have to accept Mr. Phoso's salary in Kenya as the basis of entry into the new contract with Wheels of Africa Malawi Ltd. So much so that even if we accept the severance concept it is not escapable that US\$ 800 per month would be Mr. Phoso's salary as at

15th March 1995 and that should be the basis of the calculations in the letter that Mr. Miller wrote to Mr. Phoso on behalf of the Wheels of Africa Malawi Ltd and the wider company on 15th March, 1995.

There is therefore the proper basis for Mr. Phoso's action that US\$ 800 be the basis on calculating his salary under the redundancy pay agreement between Wheels of Africa, not Wheels of Africa Malawi Ltd and Mr. Phoso. It matters less in my judgment that Wheels of Africa Malawi Ltd were not responsible for the US\$ 800 paid to Mr. Phoso. As far as Mr. Phoso was concerned his salary included K3,750 paid in Malawi by Wheels of Africa Malawi Ltd and 800 US\$ paid to him by Wheels of Africa Kenya Ltd. Wheels of Africa Malawi Ltd cannot properly escape their agency for both wheels of Africa Ltd and Wheels of Africa Kenya Ltd.

As the letter written by Mr. Jackets to Mr. Phoso upon transfer to wheels of Africa Kenya Ltd shows, Wheels of Africa Malawi Ltd in the person of G.W. Miller was involved in all the arrangements concerning Mr. Phoso's transfer to Wheels of Africa Kenya Ltd. It is evident that there were tripartite arrangements that Mr. Phoso on the one hand of wheels of Africa Ltd, Wheels of Africa Malawi Ltd and Wheels of Africa Kenya Ltd on the other. What happened after these arrangements clearly indicates this tripartite transaction in that it is Wheels of Africa Ltd through the person of Mr. Jackets who introduced the transfer of Mr. Phoso from Wheels of Africa Malawi Ltd. The latter continue to pay Mr. Phoso even contrary to what is suggested by severance; Mr. Phoso assumed work at Wheels of Africa Kenya Ltd. The contract itself indicated that the transfer, not the employment with Wheels of Africa Malawi Ltd, could be terminated at the discretion of management, whatever management was. The contract therefore provided for allowances while Mr. Phoso was away from his base.

Mr. Phoso's action, therefore, succeeds with costs. The defendant can appeal against the judgment.

Made in Open Court this 21<sup>st</sup> Day of November 2003

D. F. Mwaungulu

**JUDGE**

