

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 3687 OF 2000**

**BETWEEN:**

O. J. MAHOWE.....PLAINTIFF

- and -

MALAWI HOUSING CORPORATION .....DEFENDANT

**CORAM: CHIMASULA PHIRI J.**

Mr Mwantisi of Counsel for the plaintiff.

Mr Nkuna of Counsel for the defendant

S. P. Moyo - Official Interpreter.

Mrs Katemana – Court Reporter

**JUDGMENT**

*Chimasula Phiri J,*

The plaintiff's claim is for a declaration that the defendant's allegation of deceit is an unfair and unsafe labour practice and a breach of the plaintiff's constitutional right. The plaintiff further claims damages for wrongful dismissal and loss of legitimate income expectations. The plaintiff also claims costs of this action.

By a Statement of Claim dated 24th November 2000 the plaintiff pleaded as follows:-

1. *The plaintiff was at all material times an employee of the defendant in the post of Acting Engineering Manager.*
2. *In or about July, 1999 th plaintiff bought motor vehicle registered number 3 SC 65 during a staff auction sale of scrap vehicles at the defendant's head office.*
3. *At all material times the organisation of the said auction sale was under the charge of the Deputy General Manager. The Deputy General Manager had by circular addressed to all members of staff dated 24th June 1999 advised that the sale of vehicles at the Head Office in Blantyre was going to take place on 2nd July 1999 and attached to the circular the schedule of all the scrap vehicles describing the make, type, age, condition, location and remarking on the state of the engine and other special features.*
4. *All members of staff interested in bidding for the vehicles and those who were to conduct the auction sale had occasion to view the listed vehicles before the date of the auction.*
5. *Wrongfully and in breach of the plaintiff's constitutional rights and also in breach of the plaintiff's contract of employment with the defendant, the defendant wrongfully dismissed and/or wrongfully terminated the plaintiff's employment on grounds of unfounded allegations of deceit, and non-disclosure of information during the said auction sale, and also on grounds of an unsustainable allegation that he had attempted to smuggle the ceased engine for motor vehicle 3 SC 65 and the plaintiff has suffered damage and loss of legitimate income expectations.*

## **PARTICULARS**

- a) Loss of salary up to normal retirement date (K17,102.80 per month).

- b) Professional allowance up to normal retirement date (K6,000.00 per month).
  - c) Loss of housing allowance up to normal retirement date (K18,400.00 per month).
  - d) Loss of use of company car up to normal retirement date.
  - e) Loss of expected pension and/or gratuity.
6. The plaintiff has served the defendant corporation for not less than 28 years.

The defendant pleaded back through a Defence dated 12th December 2000 as follows:

1. *Paragraph 1 of the statement of claim is admitted.*
2. *Paragraph 2 of the statement of claim is denied.*
3. *The defendant admits paragraph 3 of the statement of claim. The advice contained in the circular was based on the information passed on to the Deputy General Manager in an advisory capacity as Engineering Services Manager.*
4. *The defendant admits paragraph 4 of the statement of claim. The plaintiff had already, fraudulently, and with a deceitful intent removed an engine from the said vehicle.*
5. *The plaintiff bid for the vehicle without the engine and bought the same. He subsequently collected the vehicle but was intercepted by the defendant because he had fraudulently collected it with an engine which was not sold to him with the vehicle.*

6. *The plaintiff was told about the allegations and accorded an opportunity to defend himself and subsequently had his contract of employment terminated for the offences of deceit and attempted theft of a motor vehicle engine.*
7. *The plaintiff's contract of employment was lawfully and constitutionally terminated and paragraph 5 of the statement of claim is denied entirely.*
8. *Save as expressly admitted herein the defendant denies each allegation in the statement of claim as if each was separately set out and traversed seriatim.*

*In addition, the defendant prays that the claims be dismissed with costs.*

#### **ISSUES FOR DETERMINATION**

The issues for the court's determination in this matter are as follows:-

*Whether the defendant was in breach of the plaintiff's constitutional right to fair and safe labour practices?*

*Whether the defendant discharged the burden of providing the plaintiff with a substantial and valid reason for the plaintiff's dismissal from employment?*

*Whether the defendant's act dismissing the plaintiff from employment is justified on the facts of the case?*

*Whether the defendant's act dismissing the plaintiff from employment was reasonable and in accordance with the substantial merits of the case?*

*Whether on the facts of the case the defendant fully complied with the rules of natural justice?*

*If the answer to any of the issues above be in the negative what damages are recoverable by the plaintiff from the defendant?*

## **THE EVIDENCE**

The plaintiff called two witnesses to prove the claim. Owen January Mahowe testified that he resides at Likuni in Lilongwe and currently works for Chapita Consulting Engineers as an Engineer/technician.

He was employed by the defendant on July 17, 1972 as an engineer/technician.

He worked for the defendant for not less than 28 years. At the time of termination of his employment, he was Acting Engineering Services Manager of the defendant.

During his 28 years of service with the defendant he did not commit any act of employment misconduct warranting disciplinary action.

The circumstances leading to the termination of his employment were as follows: In March 1999, the management of the defendant decided to dispose of all scrap motor vehicles.

The classification of the scrap motor vehicles to be disposed was carried out by the Senior Mechanical Engineer, Mr J. B. Chilemba. The classification was under the charge of the Deputy General Manager, Mr V. Robo.

By a circular dated June 24, 1999, the management of the defendant advertised that there was going to be a sale of scrap vehicles by auction. A photocopy of the said circular is attached.

Attached to the circular was a schedule of scrap vehicles to be sold at the auction specifying the scrap vehicles description, age, condition, and remarks etc. One of the vehicles

listed on the schedule was a Hino Water Bowser registration number 3 SC 65. The remarks on the schedule was that the vehicle had a ceased engine. A copy of the schedule is attached.

The plaintiff attended the auction on July 2, 1999. He won a bid at the auction over motor vehicle registration number 3 SC 65 which was classified in the schedule as a Hino Water Bowser with a ceased engine. The blue book of the vehicle was handed over to the plaintiff.

*In March 2000 he instructed Mr Chipeta, a motor vehicle mechanic to tow the vehicle out of the defendant's yard. During that period the plaintiff was away in Lilongwe on duty. The vehicle was however intercepted at the gate by the defendant's security guards.*

*On April 14, 2000 the plaintiff received a letter suspending him from the defendant's employment without pay. The letter of suspension alleged that he had attempted to smuggle a motor vehicle engine from the defendant's yard. A copy of the letter of suspension is attached.*

*On April 20, 2000 he was called before a panel of defendant's management to defend himself against the allegations made against him. He explained to members of the panel that the vehicle in issue was listed in the schedule as having a ceased engine. And that the said engine was the one that was being taken out of the yard together with the vehicle.*

*The plaintiff received a letter from management of the defendant on April 20, 2000, requesting him to show cause why a disciplinary action was not to be taken against him. A copy of the said letter reads as follows:-*

*Dear Mr Mahowe*

***ENGINE FOR MOTOR VEHICLE 3 SC 65***

*You will recall that on 20th April 2000 you appeared before a panel specifically appointed to investigate allegations that you had attempted to convert for your personal use a Hino Engine belonging to the Corporation. For purposes of record, I should mention that the panel comprised the Deputy General Manager, the Assistant General Manager, the Financial Controller, the Corporate Secretary, the Human Resources Manager and the Security Services Manager.*

*The panel has concluded that you had indeed attempted to convert for your personal use a Hino engine formerly a part of motor vehicle number 3 SC 65. It is therefore the panel's intention to recommend disciplinary action against you.*

*In arriving at its conclusion, the panel has been influenced by the following findings:-*

- 1. On the date that MHC was auctioning vehicles in July 1999, the vehicle s SC 65 was clearly offered to bidders without an engine. Your bid was lucky at K10,000 and the same was subsequently enhanced to K20,000 to match the reserve price.*
- 2. The vehicle has been lying within MHC yard for 9 months until 21 March 2000 when you decided to move it. After being queried by Security Department, you have voluntarily given up the engine and have instead willingly collected the vehicle at the same price but without an engine.*
- 3. You have been an Acting Engineering Services manager from June 1999 to the present. The mechanical section falls under your headship.*
- 4. The Board's approval for sale of 3 SC 65 clearly describes it as a scrap vehicle.*

*The panel intends to submit its report with recommendations on 28th April 2000.*

*The purpose of this letter is to request you to show cause within 7 days from the date of this letter why the panel should not recommend disciplinary action.*

P. J. Chitosi

**HUMAN RESOURCES MANAGER**

*On April 26, 2000 the plaintiff wrote a letter addressed to the Human Resources Manager of the defendant explaining that the motor vehicle in issue was listed as having a ceased engine and that there were other vehicles which were also listed as having a ceased engine and the owners collected the vehicles together with the ceased engines. A copy of the said letter reads as follows:-*

*Dear Sir,*

**ENGINE FOR MOTOR VEHICLE 3 SC 65**

*I refer to the above mentioned matter and to your letter Ref No MP178 dated 20th April 2000 by which you asked me to show cause why recommendation for disciplinary action against me should not be made and I write to show the same.*

- 1. The finding that the subject vehicle was clearly offered to bidders without an engine is erroneous. What was offered to bidders was a vehicle with a ceased engine. It is because it included an engine albeit ceased one, that it was called a vehicle. If the Corporation wanted to offer for sale just an chassis and wood, they should have specified so. In that case they would not be selling a "motor vehicle" . To vindicate my understanding, after I paid for the subject vehicle, I was given a blue book recording the chassis and engine numbers. These are the core parts of a motor vehicle. Further it is not only 3 SC 65 that was sold with engine and other parts separate from the hood and chassis. The vehicle in similar conditions were 3 SC 109, 3 SC 118 and 3 SC 43.*



2. *It is not true that I voluntarily gave up the engine upon being queried. In fact when the vehicle was being towed out of the corporation's premises I was not personally present. But when I got a phone call that someone was querying the engine, I gave instructions that it is possible they could leave the engine behind which I would collect after clearing the queries. In no way did I say that I would get the hood and chassis at the same price I was going the vehicle. In fact I have not waived my contractual rights. The word "scrap" does not mean hood and chassis of motor vehicle without an engine. It describes the condition of the vehicle. In fact when you talk about the scrap value of a vehicle you talk of the value of everything on the vehicle in its damaged or dilapidated state inclusive of its damaged and ceased or knocked engine.*

*I trust the above clearly shows that there is no good reason why disciplinary action should be recommended against me.*

*Yours faithfully,  
O. J. Mahowe*

*His services with the defendant were terminated on July 19, 2000. The reason given for the termination of his employment was that he did not disclose to the auctioneers and the other bidders that motor vehicle registration number 3 SC 65 had an engine. The reason for the termination of his employment was thus different from the reason given suspending him from employment. A copy of the letter of termination reads as follows:*

*Dear Mr Mahowe,*

***TERMINATION OF EMPLOYMENT***

*I am writing with reference to our letter reference MP/78 dated 14 April 2000 suspending you from duties for attempting to smuggle a motor vehicle engine.*

*Management has carefully considered the report that has been submitted by the investigating panel which you met on 20 April 2000 together with your written defence dated 26 April 2000. Management is convinced and has concluded that the way you won the bid over motor vehicle registration number 3 SC 65 was surrounded by deceit. You did not disclose to the auctioneers nor to other bidders that the hoods which were being auctioned for vehicle registration 3 SC 65 which you bought and that for 3 SC 43 which was bought by Mr Chipeta your subordinate had engines which had been removed and kept elsewhere. As head of Engineering Department you could have disclosed the information.*

*Consequently, it is clear that the vehicles were sold without engines and attempting to take the engine for 3 SC 65 the way you did was tantamount to attempted smuggling.*

*Management views this as misconduct and has therefore decided to terminate your services with the Corporation with effect from 14 April 2000 the date of your suspension.*

*You will be paid three months salary in lieu of notice plus pay in lieu of any outstanding leave days as at 14 April 2000. Arrangements are being made to withdraw you from the pension scheme. All monies owed by you to the Corporation will be recovered from your terminal benefits and pension benefits. If you have overdrawn your leave the overdrawn days will be recovered from your benefits.*

*The vehicle has been re-valued by the Regional Road Traffic Officer(South) taking into account that it has an engine. The valuation price is K80,000.00 (Eighty thousand kwacha) only. Our records show that you have not yet paid any deposit even towards the original purchase price. We would therefore be grateful if you could let us know within ten days from the date of this letter how you intend to pay the K80,000.00. A copy of the Regional Road Traffic Officer (South)'s valuation is enclosed for your perusal and retention.*

*By copy of this letter, the Financial Controller and the Human Resources Manager are requested to take note of the contents of this letter and act accordingly.*

*Yours sincerely,*

*V. A. Robo*

***DEPUTY GENERAL MANAGER***

***for: GENERAL MANAGER***

The letter of dismissal further stated that the motor vehicle had been re-valued and that its valuation price was K80,000.00. However, copy of the revaluation report referred to a completely different vehicle altogether, motor registration number 3 SC 43.

The reason given for termination of plaintiff's employment is being challenged because:

- He was never involved at any point in time in the classification of scrap motor vehicles earmarked for sale by the defendant.
- The reason given was not truthful neither was it correct since he had not committed any deceit when buying the subject motor vehicle. He honestly attended the auction and won a bid over the subject motor vehicle.
- Other defendant's members of staff bought motor vehicles which were classified in the schedule as having ceased engines. Such staff members were permitted to take the motor vehicles with their ceased engines and no action was taken against them by the defendant.
- The act complained of was not grave enough to justify his dismissal, having worked for 28 years without committing any employment misconduct.
- He was not given a right of hearing or an opportunity to defend himself matching the allegations levelled against him and the decision consequently reached to dismiss him. Having regard to the length of his service with the defendant and the

fact that he had never committed any employment misconduct more was required in giving him a chance to defend himself.

The plaintiff honestly believed that the decision to terminate his employment was already reached somewhere and that the reason given to dismiss him was just a pretext reason.

The plaintiff honestly believed that the department's action dismissing him from employment was wrongful, unfair, unlawful and in breach of his constitutional rights

In cross examination the plaintiff stated that he secured employment at Chapita Engineering about 2 months after his dismissal at MHC. His current salary is K50,000.00 per month from around K30,000 when he just joined. When he left MHC his salary was around K17,000.00 per month. He stated that the head of the Engineering Department in March 1999 when classification was done was Mr Ndaferankhande. The plaintiff was made to act as head of Engineering Department in June 1999. The plaintiff stated that Mr Chilemba was Senior Mechanical Engineer and that their offices were about 50 metres apart but in the same building. Although they were friends, the plaintiff did not know about the classification until the vehicles were internally advertised for disposal. The plaintiff said he did not know about the values of the scraps until on the day of the auction. He stated that the remarks "*engine ceased*" were understood by him to mean that the vehicle has an engine but in a ceased state. The schedule did not show where the engine was. He stated that prospective bidders were shown the stripped parts of the engine in the workshop. He recalled that Longwe was one of the auctioneers. There was a committee entrusted to oversee the auction. He stated that the stripped off engine of 3 SC 65 was in the workshop. He stated that he did not know when it was stripped off and put in the workshop. During the auction, the auctioneer did not make reference to the engine only but the vehicle. He said that parts of the dismantled engines were clearly labelled in the workshop. He explained that it took him a long time to tow the vehicle away because he had no suitable vehicle to tow. He was not ready for 9 months. The plaintiff said Mr Chipeta had a flat lorry which was suitable for towing. He requested Mr Chipeta to tow it. The time was convenient because Mr Chipeta had time to do the work and the vehicle was not engaged in other business. The plaintiff stated that he was not restricted at the disciplinary hearing and he had no problem with the composition of the panel.

In re-examination the plaintiff confirmed that he had a good relationship with Mr Chilemba. He stated that in the pre-auction period, Mr Chilemba who knew where parts of dismantled engines were in the workshop, was showing any prospective bidders such dismantled parts. Equally, where the vehicle had no engine, he would inform the prospective bidder accordingly.

The second witness for the plaintiff was Joel Ben Chilemba of Area 25 in Lilongwe. He is presently unemployed but previously he was employed by the defendant on 7th October 1998 as a Senior Mechanical Engineer. He held that position up to 10th July 2000 when his employment was terminated.

As a Senior Mechanical Engineer he was in charge of all the defendant's workshops in Malawi.

He knew the plaintiff, Mr O. J. Mahowe who was the Acting Engineering Manager of the defendant and they worked together for some time at the defendant's organisation.

The circumstances leading to the dismissal of the plaintiff were as follows: In March 1999, the General Manager of the defendant requested Mr Chilemba to classify scrap motor vehicles which were to be put on sale by auction.

He duly classified the vehicles, On March 21, 1999 he sent a memorandum to the General Manager of the defendant indicating the vehicles classified and to be earmarked for sale.

There were 25 vehicles which were classified and earmarked for sale, 4 vehicles had ceased engines and the engines were removed, stripped, inspected and stored inside the workshop. One such vehicle was a Hino Water Bowser registration number 3 SC 65.

The management of the defendant on June 24, 1999 issued a circular to all bidders and auctioneers informing them of the proposed sale of scrap motor vehicles. Attached to the circular was a schedule which contained information relating to the make, description, age, condition and general remarks of each of the motor vehicles to be auctioned by the defendant.

All bidders and auctioneers were given 8 days to view the scrap vehicles as per the circular. The bidders and auctioneers were to confirm the information which was contained in the schedule and marry it with the particular vehicle in issue.

The sale by auction took place on July 2, 1999 and several members of staff won bids over the advertised motor vehicles. The sale was thus a success.

Almost 9 months later on April 18, 2000, Mr Chilemba was requested by the management of the defendant to provide the defendant's management with information relating to the suspension from employment of the plaintiff and Mr C. Y. Chipeta, a motor vehicle mechanic, on allegations that the two attempted to smuggle out an engine from the defendant's yard. He appeared before panel formed by the defendant and explained to the panel that the engine parts in issue, which were in the Hino Water Bowser, registration number 3SC 65, were that of a ceased and dismantled engine of the said vehicle which were being stored in the workshop.

He received another letter from management of the defendant dated April 20, 2000. The letter alleged that he had failed to manage the mechanical engineering section of the defendant. The letter further stated that he misled auctioneers and bidders at an auction held on July 2, 1999, by failing to disclose that some of the vehicles sold had engines. He was requested to show cause why a disciplinary action was not to be taken against him.

On April 26, 2001 Mr Chilemba wrote a letter addressed to the General Manager of the defendant responding to the letter of April 20, 2000. He explained in the letter that the motor vehicle in issue, Hino Water Bowser registration number 3 SC 65 was so properly classified, because it was a scrap vehicle with a ceased engine removed, stripped and stored inside the workshop. He further explained that the auctioneers and bidders were able to view the subject motor vehicle and dismantled parts.

The plaintiff was later dismissed by the defendant. The reason given for the dismissal was that the plaintiff had failed to disclose to bidders and auctioneers that motor vehicle registration number 3 SC 65 had an engine which was kept somewhere.

Mr Chilemba was not dismissed from the defendant's employment, although the allegations implicated him.

The witness stated that the reason given for dismissing the plaintiff from employment was not a valid one because:-

- The plaintiff was not involved in the classification of the vehicles which were earmarked for sale by auction.
- The reason was not correct neither was it truthful, because the subject motor vehicle was classified as having a ceased engine. This was indicated in the schedule attached to the circular issued by management on June 24, 1999.
- The bidders and auctioneers were given an opportunity to view the classified motor vehicles and their dismantled parts. The subject motor vehicle was one of the vehicles viewed by the auctioneers and bidders together with its dismantled parts.



- The act alleged did not justify dismissing summarily the plaintiff who had worked for the defendant for 28 years.

He stated that he verily believe that the decision to dismiss the plaintiff had already been reached somewhere and the reason given was just a cover up.

He honestly believed that the defendant's action of dismissing the plaintiff from employment was wrongful, unfair, unlawful and in breach of the plaintiff's constitutional rights.

He explained that motor vehicle 3 SC 65 was a scrap which meant that most of the parts in that vehicle had been removed e.g. lights, tyres, window panes and other related body parts. The engine had ceased which meant that the crank shaft and bearings were totally worn out hence it could not be re-assembled unless a new engine were fitted. In cross-examination he informed that court that he has a Bachelor of Science in Mechanical Engineering. He stated that the vehicle bought by the plaintiff was one of the worst scraps – its engine had ceased.

He indicated that he assisted Mr Longwe in conducting the auction sale. He indicated that the remarks in the schedule for scraps was meant to assist bidders to know the state of condition of the scraps. He explained that ceased engine means dead engine. He did not buy a vehicle during the auction but he knows that Mr Chipeta bought 3 SC 43. He said he was involved in taking prospective bidders to view the scraps and the dismantled engines. He said the dismantled engines were labelled.

In re-examination, he stated that there was no vehicle in the list which had not engine completely i.e. the vehicles had engines which were functioning or were serviceable or had ceased (whether stopped off or not). He was adamant that if any scrap vehicles were sold without engine, the remarks column would have shown "without engine". He stated that a ceased engine is serviceable as long as one gets a crankshaft, bearings and pistons. Further that a ceased engine can either be on the vehicle in that state or it can be removed and be stripped and remain ceased.

The defendant called 2 witnesses. The 1st witness was Peter Jovito Chitosi, Regional Manager at defendant's Zomba Office.

He joined the services of the defendant in May 1999 as a Human Resources Manager. In 1999 he was serving the defendant in the capacity of Human Resources Manager at the defendant's Head Office in Blantyre. He knows the plaintiff in this action. They worked together at the defendant's until his services were terminated. The plaintiff was working as an acting Engineering Services Manager.

The termination of the plaintiff's services with the defendant was connected to the auction sale that occurred on 2nd July 1999. A classification of vehicles earmarked for sale compiled by the engineering department. This is the department where the plaintiff was working. The classification was forwarded to the office of the General Manager. Following this classification the General Manager's office issued a circular dated 24 June 1999 advising members of staff of the auction sale scheduled for 2 July, 1999. The circular attached a schedule of scrap vehicles proposed for sale.

The schedule which was attached to the above circular contained the a description of the vehicles and remarks. Motor vehicle registration number 3 SC 65 was one of the vehicles on the schedule. It was described as a Hino Water Bowser. The remarks on this vehicle were "Engine ceased".

The auction sale was conducted by Mr G. W. S. Longwe who was also one of the members of staff for the defendant. Motor vehicle registration number 3 SC 65 had not run sometime. The engine was removed and dismantled and was kept separately in the workshop.

Come the date of the auction sale, the plaintiff made a bid for the vehicle and his bid succeeded at K10,000. It was enhanced to K20,000 just to meet the reserve price.

After the sale the plaintiff did not organise the towing of the vehicle until the 21st March 2000 about some 9 months later.

On 30th March, the General Manager received a report dated 28th March 2000 from the Security Services Manager reporting that on 21st March, 2000, Mr Chipeta the Mechanical Superintendent approached the Security Services Manager and for requested a gate pass to enable him tow the vehicle off the mechanical yard where it was. He was given this gate pass. When the guards were searching the towed vehicle it was realised that the engine of the vehicle was included. The engine was reportedly to be in a dismantled state. The engine was detained by the security guards.

When the General Manager received this report he organised a panel of investigations comprising the Deputy General Manager, Mr V. A. Robo, the Corporate Secretary, Mr V. Harawa, the Assistant General Manager, Mr M.S.S. Ndaferankhande, the Financial Controller, Mr H. Mwala, the Security Services Manager, Mr M. K. F. Mtenje and Mr Chitosi as the Human Resources Manager.

They carried out investigations. They interviewed Mr Mahowe and Mr Chipeta for their side of the story. They also interviewed other people who were knowledgeable of the issue including the Senior Mechanical Engineer, Mr Chilemba, and the Principal Accountant, Mr Longwe, who had the responsibility of conducting the auction, Mr Malala, the Stores Supervisor, Mr Sikiya a mechanic and Mrs Chimbalanga a security guard.

During the interview the plaintiff, Mr Chipeta and Mr J. B. Chilemba informed the panel that the vehicles were sold with parts of engines.

Mr Longwe who was responsible for conducting the auction contradicted this assertion by saying that he was not informed about the engine or engine parts. He told the panel that what was sold at the auction was what was inspected by the bidders and this did not include the engine.

Mr Chitosi stated that at the end of the interviews it was established that –

- Motor vehicles 3 SC 43 and 3 SC 65 were sold without engines or parts of engines.
- Motor vehicles 3 SC 65 was taken out of the yard by Mr Chilemba after Mr Mahowe had told him that he (Mr Mahowe) would take the hood only because he had bought the hood only.
- The two vehicles had not been moving for the almost seven years yet during these year, some spare parts were being bought for them but were not fitted.
- The mechanical engineering section had their own stores for spare parts which were not being controlled officially and this could easily have been made to get out some spare parts.
- Mr Chipeta was in charge of the store room mentioned above and was the same person who was giving out spare parts. He also got his spare parts from the same stores.
- Mr Chilemba looked defensive throughout the interview and his testimony appeared colluded.
- Engine parts for the two vehicles were full engine.

After a detailed discussion at the end of the interviews, the panel unanimously concluded that the two officers deceived management and prospective bidders by showing, during the actual sale, hoods only and failing to disclose that engines were available but had been kept somewhere.

The concealing of this vital information meant that some prospective bidders did not bid fearing that they would spend more money buying engines if they bought the hoods. If there were more bidders the selling price could have been higher.

It was observed that the plaintiff and Mr Chipeta had used their positions and the privileged knowledge which they had by virtue of their positions for their own personal benefit. They were held guilty of "knowingly making a false return, report or statement with reference to themselves or any person employed by the corporation or in connection with any aspect of corporation working or administration, or neglecting to make or send and report which it was his duty to make or send under Clause 9(iii)(m) of the Corporation's Conditions of Service."

The panel made some recommendations to management. They recommended that the plaintiff be demoted as a punishment. Management however looking at the gravity of the offence advised that the plaintiff's services be terminated thus a letter was written on 19th July, 2000 terminating the plaintiff's services.

Before his services were terminated management ordered that the vehicle which was purchased by the plaintiff be re-valued and re-auctioned. The Road Traffic Department was engaged and a valuation report dated 5th July 2000, was issued. The value of the vehicle was put at K80,000.

He tendered a report dated 28th March 2000 on the subject of theft of motor vehicle engines. It reads as follows: -

*Sir,*

*On 21st March 2000, Mr Chipeta, the mechanical superintendent approached me and requested for a gate pass to enable him tow a scrap vehicle out of the mechanical yard. This scrap vehicle registration number 3 SC 65 was bought by the Acting Engineering Manager, Mr O. Mahowe sometime last year (1999).*

*Although I gave him the gate pass I also advised my men at the gate to be alert. I ordered them to tighten security operations by instituting vigorous checking and*

*searching at the main gate and intensify surveillance over the mechanical workshop. This followed a tip from reliable sources that Mr Chipeta was intending to smuggle out a motor vehicle engine.*

*When Mr Chipeta arrived at the main gate he declared to the guards and signed a security control form that he was towing a scrap vehicle without engine only to be discovered during search that he was actually ferrying out a complete engine which had been dismantled. He failed to convince the guards at the gate and the contra band was detained at the main gate.*

*When asked to comment on this Mr Mahowe admitted having bought a scrap without engine but he said that Mr Chipeta had later told him that a complete engine for the vehicle was available and so they agreed to take it together with scrap vehicle and mount it on the vehicle out of the yard.*

*Apparently, during the auction there were two vehicles which were sold as scraps without engines i.e 3 SC 65 bought by Mr Mahowe and 3 SC 43 bought by Mr Chipeta. It only took less than a month Mr Chipeta's vehicle was on the road in perfect condition. Through interrogation Mr Chipeta admitted having dismantled an engine and took it out together with his scrap in a similar style he intended to do with Mr Mahowe's. He confessed to have mounted the stolen engine on his vehicle.*

*It should be pointed out that these vehicles were sold at low prices because they were declared scraps basing on the advice from the same people – Mr Mahowe and Mr Chipeta as mechanical experts.*

*They in fact cheated management that the vehicles were scraps without engines when they had deliberately dismantled the engines just to discourage others from bidding higher. Yet other non-runner vehicles of similar types with engines were sold at much higher prices in excess of K100,000.00.*

*What Mr Mahowe and Mr Chipeta did as Engineering Manager (Ag) and Mechanical Superintendent respectively proves that they are not honest. They have compromised their professional integrity by conspiring to steal motor vehicle engines placed under their care. The two officers have therefore committed a serious misconduct contrary to MHC Conditions of Services clauses 13(iii)(n). This is tantamount to a criminal offence which may result in criminal conviction in a court of law contrary to Clause 13(iii)(p) of the Conditions of Service which govern the Malawi Housing Corporation.*

*Such acts are extremely detrimental to the economic prosperity of any organisation and cannot be allowed to go scot free in the corporation. I have therefore recommended that the two engines be returned for re-auction. Meanwhile the engine for vehicle number 3 SC 65 has already been recovered save for the one mounted on Mr Chipeta's vehicle number 3 SC 43 awaiting management direction.*

*I also recommend that the two officers be charged for misconduct and be severely punished as a deterrent measure to other would perpetrators.*

*Submitted for management decision.*

Mr Chitosi tendered a report on enquiries made on allegations of theft. The recommendations in the report were as follows:-

*The panel agreed that all the three officers, namely Mr O. J. Mahowe, Mr F. Y. Chipeta and Mr Chilemba were guilty of misconduct and agreed to recommend to management the following disciplinary action against them:*

1. Mr O. J. Mahowe

*Mr Mahowe be demoted to grade M4 at his present M3 salary personal to holder. He will lose all benefits accruing to him at M3 and as Acting Engineering Services Manager.*

*The panel recommends that his salary should be maintained as the reduction in grade and loss of benefits is humiliating and this is enough punishment for him.*

*Demotion be with effect from the date of suspension which is 14th April 2000.*

2. *Mr F. Y. Chipeta*

*Mr Chipeta be demoted to grade IIIB where he will be mechanical supervisor.*

*The panel recommends that he should retain his salary on personal to holder basis.*

*Demotion to be with effect from the date of suspension which is 14th April 2000.*

3. *Mr J. B. Chilemba*

*Mr Chilemba be warned in writing for inefficiency. The letter should ask him to submit to management his proposals for improving the performance of the mechanical workshop so that at no point in time should the corporation ordinarily have more than 25% of its fleet in the garage.*

4. *Audit*

*The Audit Department should be asked to submit written proposals on how to improve the overall control systems in the mechanical workshop.*

He also tendered part of the Conditions of Service of the defendant company. In cross examination the witness stated that the remarks "engine ceased" meant that the vehicle was being



sold because the engine had ceased and not necessarily that the engine was there. He admitted that he did not see for himself if the engine was in the workshop. He stated that during the interviews, the panel did not ask Mr Mtenje the source of his information that Mr Chipeta intended to smuggle an engine. He stated that the General Manager was free to accept or ignore the recommendations of the panel. He stated that the reason for terminating the employment of the plaintiff was that vital information of the state of these 2 vehicles which were bought by the plaintiff and Chipeta was not disclosed. Mr Mahowe and Mr Chipeta were under a duty to disclose to the auctioneers and other bidders that these 2 vehicles had engines somewhere. He indicated that he never saw the valuation report for 3 SC 65 from the Road Traffic Commission. In re-examination he stated that he was not part of management in relation to the termination decision.

The second witness for the defendant was Godfrey W. S. Longwe, currently, a businessman resident at Kanjedza in the City of Blantyre.

He worked with the defendant from September 1968 to 1st May 2002 when he retired. In 1999 he was a Principal Account for the defendant based at the defendant's head office in Blantyre.

He knows the plaintiff in this action very well. They worked together for a long time until his services were terminated in the year 2000. He recalls and can recount clearly circumstances that led to his dismissal from the employment of the defendant in 2000.

In 1999 management sought to dispose of some scrap vehicles and other various items. The procedure normally was to source services of public auctioneers for the exercise. This time in a bid to save expenses management decided to hold it internally. He was first approached and asked whether he could manage to run such an exercise.

He was identified because during the previous auctions carried out by public auctioneers, he used to accompany the auctioneers in all the defendant's branches where the auctions were

carried out. For this reason he was considered to have the necessary experience coupled with his auditing experience.

In March 1999 the Engineering Department was requested to come up with a classification of the motor vehicles for purposes of identifying which ones were to be sold.

The plaintiff was in this department as a Principal Engineer but the classification was carried out by the Senior Mechanical Engineer, Mr Chilemba with the assistance of his colleagues including Mr Chipeta.

After completion of the classification a report was made to the General Manager outlining all the vehicles.

On 24th June 1999, the General Manager's office issued a circular advising all members of staff of the auction sale in all the centres of Blantyre, Mzuzu and Lilongwe. The sale in Blantyre was scheduled for 2nd July 1999.

The circular attached a schedule of the scrap vehicles proposed for sale and in the schedule motor vehicle s SC 65 was identified as a Hino Bowser, scrap of 20 years old. On the remarks section were "engine ceased".

Before the date of the auction sale all employees were given chance to view the vehicles and other items earmarked for sale. The other items included doors, batteries, tyres and various parts of motor vehicles.

Mr Longwe as an auctioneer and the interested bidders depended on the information from the Engineering Department on the condition of the vehicles.

As an auctioneer, he was taking people around to various vehicles and items proposed for the sale. He was accompanied on this exercise by the Senior Mechanical Engineer, Mr Chilemba who could largely explain every vehicle and at times give advice to potential bidders.

Some of the vehicles had engines in them while others did not have. He can remember two vehicles which had no engines because of what transpired later these are 3 SC 43 Hino, flat bed and S SC 65, Hino Water Bowser.

The two vehicles referred to above were viewed without engines and during the entire viewing process there was no mention of the availability of the engines.

As an auctioneer, Mr Longwe did not know that the engines were kept somewhere, what he had in mind was that the engines might have been dismantled with parts used on other vehicles. This used to happen a lot at Malawi Housing Corporation.

On the day of the auction the procedure was to go from one vehicle to the other as they were positioned in the yard.

Mr Mahowe bid for motor vehicle 3 SC 65, Hino Water Bowser whose value was pegged at K20,000.

He won the bid at K10,000 but the price was enhanced to K20,000 the reserve price.

Mr Chipeta bid for motor vehicle 3 SC 43 Hino flatbed.

Trouble started with Mr Chipeta after the auction sale, towed his vehicle out.

Within one week of towing the vehicle out he had managed to assemble the engine and put the vehicle back on the road.

Management was suspicious considering that the vehicle while at Malawi Housing Corporation could not be maintained by the same engineer/mechanic who had bought it and managed to put it on the road within one week.

Management queried Mr Chipeta and the whole engineering department including Mr Chilemba. Mr Chipeta was ordered to surrender the vehicle which was later re-valued.

Mr Mahowe, the plaintiff took time to tow the vehicle out of the yard. The vehicle lay on the yard for about 9 months. There was suspicion as to why this was the case with rumour that the vehicle was being fitted with new parts from the stores.

Finally Mr Chipeta came to tow the vehicle on 20th March 2000. The vehicle was intercepted at the main gate on the ground that it was found with parts which did not form part of the sale.

The engine was also in the vehicle which was not sold to the plaintiff at the auction sale.

This vehicle was also re-valued by the Road Traffic Department together with 3 SC43.

Management convened a panel to investigate what Mr Mahowe had done in arranging the towing of the vehicle with parts which were not sold to him.

Mr Longwe was summoned by the panel to give evidence as to how the auction was conducted and what exactly was sold. The panel also considered the case of Mr Chipeta and Mr Chilemba as the head of the mechanical engineering section.

Mr Longwe explained to the panel that he was not aware of the availability of the engine for 3 SC 65 such that the whole process of the auction proceeded on the understanding that the sale was not inclusive of the engine.

Mr Mahowe was found guilty and dismissed from employment by management.

In cross-examination he said that top management in Engineering Department were the plaintiff, Mr Chilemba and Mr Chipeta. He stated that some of the vehicles in group A did not have engine at the viewing stage as well as auctioning date.

He stated that the vehicles which were won by bidders were immediately removed from the yard on "as is basis". When the plaintiff's vehicle was being towed using 3 SC 43, it had been packed with engine and other new accessories which were not sold on the day of the auction. This prompted the security personnel to report to management. In re-examination the witness stated that remarks "engine ceased" meant that the engine was in the vehicle. He was never shown the engines in the workshop or elsewhere. He alleged that Mr Chipeta engineered the concealment of the engines. He could not tell the court what arrangements were made between Mr Chipeta and the plaintiff regarding towing of 3 SC 65 but was done after 9 months. This marked the end of the evidence in this matter.

## **THE LAW**

Section 31(1) of the Constitution provides that every person shall have the right to fair and safe labour practices and to fair remuneration.

Section 43 provides for administrative justice as follows:

43. Every person shall have the right to -
- (a) *Lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and*
  - (b) *be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known.*

Section 211 of the Constitution provides for application of international law as follows-

- (2) *International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.*

Section 11 of the Constitution provides as follows –

- (2) *In interpreting the provisions of this Constitution a court of law -*
- (c) *where applicable, have regard to current norms of public international law and comparable foreign case law.*

The defendant has contended that the Employment Act 2000 which became law on 14th May 2000 is not applicable. I agree. However, the provisions of Section 211(2) made the termination of Employment Convention – Article 4 to apply to Malawi. Under this Article 4 of the Convention, the employment of an employee shall not be terminated 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. This provision of the convention is what became to be Section 57 of the Employment Act 2000.

- (1) *The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.*
- (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.*

Article 4 of Termination of Employment Convention was part of our law in Malawi before the coming in of the Employment Act. In **Kalinda vs Limbe Leaf Tobacco Limited** (civil cause number 542 of 1995 (unreported)) Mwaungulu J said:

*"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 the employers not to terminate the employment of an 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....."*

In establishing whether the reason given for dismissing the employee was a substantial and valid reason, the court looks into several factors. The factors include *inter alia* the gravity of the conduct given as a reason for dismissal and the duration of the employment of the employee. In **Granger Nkhwazi vs Commercial Bank of Malawi** civil cause number 233 of 1999, the position was put thus by the court:

*"where the employer explicitly or tacitly terminates for misconduct, the employer's election to terminate according to the contract or to afford the employee procedural and substantive fairness under the contract must depend on principle and the circumstances of the case. The principle must be one leaning towards affording the employee procedural and substantive fairness. The employer can then say to all and sundry that she has done the right and fair thing. The circumstances are difficult to circumscribe. They will reflect the gravity of the conduct, the nature of information between the parties and the duration of the employment. The list is not exhaustive".*

The rule was further extended in **Kalinda vs Limbe Tobacco Limited** thus:

"Requiring reasons, because of the right to natural justice, becomes, as this court pointed out in **Nkwazi vs Commercial Bank**, stringent where, on the facts the employer as here and in

the Nkwazi case terminated 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....."

## JUSTIFICATION FOR DISMISSAL

Sometimes the employer can terminate the employment of an employee due to a single act of misconduct. In such a scenario the issue will involve around whether the servant's breach of contract was repudiatory. Whether it was sufficiently serious to justify dismissal. That depends on the circumstances. See: **Laws – vs London Chronicle (Indicator Newspapers) Ltd** [1959] 2 ALLER 285. **Wilson vs Racher** [1974] ICR 8. And if not justified the dismissal is wrongful. In **Clouston & Co. Ltd vs Corry** [1906] AC 122, Lord James of Hereford delivering judgment of the privy Council said:

*"Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.....It is clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious nature".*

The court usually examines the reason given for termination of employment and the act of misconduct and try to find out if the termination is justified. If the reason is not supported by the evidence the court may conclude that there was no justification for the plaintiff's dismissal. This was the case in **Mvula vs Norse International Ltd** 15 MLR 331, at p.336 to 337 per Makuta CJ:



*"In the instant case, plaintiff was dismissed because of misconduct. The first particular of misconduct is that he used the defendant's transport without permission. Throughout the trial there was no evidence which was adduced to substantiate this allegation. No vehicle was mentioned. Not even the slight allusion to misuse of a vehicle was made. This allegation is therefore without substance.....in view of the foregoing, I am of the opinion that, on the balance of probabilities, there was no justification for the plaintiff's dismissal. The dismissal was wrongful".*

The court in determining whether the reason for dismissal is justified may examine if the plaintiff was the one who was in charge of the transaction alleged to be the reason for his dismissal. In **Nkwazi vs Commercial Bank of Malawi Limited** the court said:

*".....Moreover, the reason is not reasonable in the circumstances. The evidence shows nothing to associate the fraud with the plaintiff. The plaintiff was a data capture clerk.*

*He was responsible for ledgers where the forged cheque transaction occurred. Somebody else handled the crucial aspect of the particular transaction.....The employer, could at common law have raised and proved another reason at the trial. The employer had not, in my judgment raised any here".*

It is for the employer to show the reason for dismissal. If there is more than one reason he must show the principal reason for the dismissal. The reason must be a substantial reason of a kind such as to justify the dismissal and it is for the court to determine whether the employee has acted reasonably in dismissing for the reason which is determined in accordance with equity and the substantial merits of the case. **Smith vs Hayle Town Council** [1978] 1LR 996.

The employer needs to show a reason for dismissal, and the reason must be a substantial one. This test "is designed to deter employers from dismissing employees for some trivial or unworthy reason". **Gilham v Kent County Council** (No 2) (1985) 1LR 233 per Griffiths L.J.

What needs to be established is the factual basis for the dismissal. The legal classification usually follows quite easily. If the factual basis cannot be explained then there is a real problem. Carlin vs St Cuthbert's Co-operative Association Ltd [1974] 1RLR 188.

Although sometimes an employee has been given a right of hearing questions might arise whether the hearing was sufficient in light of allegations made and also the length of length of the employee's career with the employer. The employer is thus under an obligation to abide with the principles of natural justice matching the allegation levelled against the employee. In **Kalinda vs Limbe Leaf Tobacco Malawi Limited** Mwaungulu J put, the rule thus:

*The question Counsel poses entails considering the effect of the common law rule that an employer 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....."*

The learned judge then continued to analyse the facts of the case vis-à-vis the right of hearing as follows:

*"On the facts of the case, it is clear to my mind that the letter terminating the employment gave a reason for terminating the terms of contract. It is clear, however, from the letter preceding the 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 the company on the premises of Limbe Leaf Tobacco Limited. 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 then more should have happened.....What I understand Mr Kalinda to be complaining about is that he was not given an opportunity to answer the allegations,.....and consequential as these have been shown to be, made against him. The unfairness therefore 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 is whether as the employee contends Limbe Leaf Tobacco Limited did abide with principles of natural justice matching the allegation against Mr Kalinda".

The court then concluded that Limbe Leaf Tobacco Limited did not accord Mr Kalinda a right to be heard matching the allegations made against and the consequent decision to dismiss him.

#### **APPLICATION OF THE LAW TO THE EVIDENCE**

1. Whether the defendant was in breach of the plaintiff's constitutional right to fair and safe labour practices?

My short answer is – Yes. The two witnesses for the defendant did not seem to have a right and proper meaning of the remarks "engine ceased". Naturally it is an engineering jargon meaning dead engine and not without engine. It should have been the duty of Mr Longwe to ask where the engine was but because he did not himself understand the terminology, he did not bother to ask about the whereabouts of the ceased engine since it was not mounted on the vehicle.

2. Whether the defendant discharged the burden of providing the plaintiff with a substantial and valid reason for the plaintiff's dismissal from employment?

Again on the evidence, the defendant failed to do so. It is clear from the evidence of the plaintiff and his witness that the plaintiff was not involved in the classification of the scraps and fixing values. He was not involved in the auction preparatory committee. He is being unfairly accused simply because he was in the Engineering Department. The burden is on the defendant to prove that the plaintiff abused his position and that he cheated. The ill feelings and suspicions which the defendant had on the transaction with Mr Chipeta were transferred to the plaintiff.

3. Whether the defendant's act dismissing the plaintiff from employment is justified on the case?

The defendant has failed to justify dismissal.

4. Whether the defendant's act dismissing the plaintiff from employment was reasonable and in accordance with the substantial merits of the case?

The defendant acted unreasonably particularly to their long serving member of staff having a clean record for 28 years. Even, if it were correct that there was deceit on his part, which is not the case here, the recommendations of panel were more reasonable than the management decision to dismiss the plaintiff. The decision of management lacked merit and finds no support in the evidence.

5. Whether on the facts of the case the defendant fully complied with the rules of natural justice?

These rules are wide encompassing so that justice must not only be done but be seen to have been done. Although the plaintiff did not have problems with the panel that interviewed him, bias can be detected from the composition of management team which made the decision to dismiss the plaintiff because some of the very same members who investigated the matter were in the decision

making body. Management was not totally independent of the investigations body so as to avoid appearance of bias and prejudice.

## **CONCLUSION**

This court is convinced that the defendant as a public body should not have rushed into making a harsh decision without proper observation of principles of natural justice. Further, constitutional provisions ought to have been observed and particularly where an International Labour Convention clearly provided for a duty on the defendant to be reasonable before dismissing an employee. I hereby declare that the defendant's act of dismissing the plaintiff on unfounded allegation of deceit or mere suspicion that the plaintiff was deceitful is an unfair labour practice and a breach of the plaintiff's constitutional right.

## **DAMAGES**

Since the plaintiff landed into a better paying job than his employment at MHC, the court can only order nominal damages. However, without undermining the humiliation and suffering which the plaintiff underwent particularly to his reputation and also considering the length of service he honestly and with dedication gave to the defendant, a small sum of K150,000.00 would be sufficient award. The defendant is also condemned in costs of this action.

**PRONOUNCED** in open court at Blantyre this 31st day of August 2004.

Chimasula Phiri

**JUDGE**