JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
IRC CIVIL APPEAL CASE NO 26 OF 2014

BETWEEN:

HANNOCK NG'OMA ..... APPELLANT

-AND-

CONTINENTAL DISCOUNT HOUSE LIMITED ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Chibwe, of Counsel, for the Appellant
Mr. Msuku, of Counsel, for the Respondent
Mr. O. Chitatu, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is an appeal from the Industrial Relations Court (lower court) against an Order of Assessment of Compensation dated 24th June 2014, in which it dismissed the Appellant's prayers for several reliefs [hereinafter referred to as "OAC"]. The appeal is strongly opposed by the Respondent.

In a nutshell, the background facts are that the Appellant commenced an action against the Respondent in the lower court claiming compensation for unfair dismissal. After a full hearing, judgment was entered in favour of the Appellant and a date was appointed for assessment of compensation.

The lower court sitting with member panelists found for the Appellant and awarded him the sum of K18, 042.821.76 as compensation. The Respondent was not happy with the decision and applied for re-hearing on assessment. The Chairperson of the lower court sat alone to re-hear the assessment and awarded the Appellant compensation in the sum of K1,677,577.70.

The Appellant seeks a reversal of the order of the Chairperson of the lower court and that he be awarded compensation that would resonate with the requisite applicable principles of law. The Appellant has put forward the following six grounds of appeal:

> *"a) The Court erred in law in determining matters of fact in the absence of panelist;*
>
> *b) The Court erred in law failure to take into account the actual loss suffered by the Applicant.*
>
> *c) The Court erred in its application of the onus on the duty to mitigate loss.*
>
> *d) The Court erred in law in holding that the Applicant did not suffer future loss.*
>
> *e) The award is glaringly on the lower side and unjusticiable on the applicable principles.*
>
> *f) The Order is against the weight of evidence."*

Before considering (if at all) the grounds of appeal, there is a preliminary issue which the Appellant has raised. The preliminary issue has been crafted out of Ground of Appeal No. 1 and it is "whether the Chairperson/Deputy Chairperson can assess compensation without panelists?"

The preliminary issue has to do with s. 67 of the Labour Relations Act (Act), which is couched in the following terms:

> *"(1) Subject to subsection (3), a sitting of the Industrial Relations Court shall be constituted by the presence of the Chairperson or the Deputy Chairperson and one member from the employee's panel and one member from the employers' panel as chosen by the Chairperson.*
>
> *(2) Subject to subsection (3), the decision of a majority of the members in a sitting shall be the decision of the Industrial Relations Court.*
>
> *(3) Where the dispute involves only a question of law, a sitting of the Industrial Relations Court may be constituted by the presence of the Chairperson or Deputy Chairperson sitting alone.*
>
> *(4) Every decision, including and dissenting opinion, shall be issued to the parties within 21 days of the closing of the final sitting on the matter."*

It is clear from a reading of s. 67 of the Act that the only time the lower court may be constituted by the presence of the Chairperson or Deputy Chairperson sitting alone is where the dispute involves a question of law. The all-important question then becomes whether or not assessment of compensation only involves a question of law.

Counsel Msuku submitted that the answer to the posed question has to be in the positive. He placed reliance on s. 63 (2), (3) and (4) of the Act which provide as follows:

> "*(2) The court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.*
>
> *(3) Where the court finds that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.*
>
> *(4) An award of compensation shall be such an amount as the court consider just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.*

It is apposite to set out the Appellant's submissions on this point in full:

> *"3.8 It is clear from the subsection above that the court also considers the facts of the case at hand in deciding what remedy to award. Such facts have the effect of either enhancing or reducing the award.*
>
> *See Kamasa v Bata Shoe Company Limited. Matter No. IRC 235 of 2003.*
>
> *Chiume v S S Rent-A-Car. Matter No. 149 of 2000.*
>
> *Kaduya v Midway Filling Station, Matter No. IRC 62 of 2002, where the court said the court could assess compensation at nil where the evidence showed that the employee suffered no conceivable injustice.*
>
> *3.9 We submit in the circumstances that the assessment of damages has to be done before the court – the Chairperson/Deputy Chairperson sitting with panelists."*

Counsel Msuku contended that the effect of the court sitting when it is not quorate is that the decision can be declared a nullity and of no legal effect. To buttress his contention, he cited the case of **Phiri v. Shire Bus Lines (2008) MLLR 259** for the following observations by Chikopa J, as he then was:

> *"The Act provided for two scenarios only. Where the only issue(s) to be determined was/were question(s) of law the Chairperson/Deputy Chairperson can sit alone. Where the other issues other than law arise he/she must sit with two other appropriate persons"*

Counsel Chibwe's response on this issue is also very brief and succinct. He submitted that the Appellant is not sincere in raising this issue at this stage. He invited the Court to note that the assessment of compensation in the lower court was done without any objection on the part of the Appellant. In Counsel Chibwe's view,the preliminary issue ought to have been raised before the lower court. In this regard, Counsel Chibwe contended that the Appellant acquiesced to the jurisdiction of the lower court. It was thus argued by Counsel Chibwe that the Court should not entertain the preliminary issue as the Appellant was simply trying to abuse court process.

In his reply, Counsel Msuku invited the Court to note that acquiescence by parties to a court that is not quorate does not accord the court jurisdiction: **Humphrey Mvula v. Shire Bus Lines Ltd, Misc. Civil Appeal No. 179 of 2006 (unreported).**

I have considered the submissions by both Counsel and I am inclined to agree with Counsel Msuku that the matter before the lower court, that is, assessment of compensation, raised questions of both fact and law. This is clear from a reading of the OAC and a quotation of one or two relevant parts therefrom might not be out of place.

At page 1 of the OAC:

> *"This court has now reheard both parties*
>
> ***Evidence on Assessment***
>
> *... Through his witness statement the applicant told the court that ...*
>
> *The respondent called two witnesses from the subsequent employments of the applicant..."*

At page 2 of the OAC:

> *" In deciding what is just and equitable, the court must consider whether the applicant mitigated or tried to mitigate his loss through seeking of alternative employment ...*

At page 3 of the OAC:

> *"Depending on the circumstances of the case and the evidence before the court, the court can assess several heads of compensation..."*

It is clear from the foregoing that the assessment of compensation undoubtedly also involved questions of fact. According to s.67 of the Act, the only time the Chairperson or the Deputy Chairperson can sit alone is if the decision is on a point of law only. This was not the position in the case before the lower court. As such, the assessment had to be determined not just by the Chairperson or the Deputy Chairperson sitting alone but by a quorum constituted pursuant to s. 67(1) of the Act which requires the presence of the Chairperson or his/her Deputy and one member from the employees' panel and one member from the employers' panel.

In so far as the assessment raised factual disputes, the case should have been decided with panelists. As the case was decided without panelists, the OAC is a nullity for lack of a proper quorum. I am fortified in my decision by three cases, namely, **Phiri v. Shire Bus Lines Ltd**, supra, **Gustino v. Auction Holdings Ltd, IRC Matter No. 206 of 2004, Principal Registry (unreported)** and **Village Headman Chakweza v. Village Headman Mponda, MSCA Civil Cause No. 38 of 2006 (unreported)**.

In **Phiri v. Shire Bus Lines Ltd**, supra, the appellant brought an action in the lower court against the respondent, his former employer. The ground of appeal was that because the decision in the lower court was made by the chairman sitting alone and not by a quorum constituted pursuant to s. 67(1) of the Act, the decision was not a valid reason. In allowing the appeal, the High Court held that the lower court was clearly not quorate as the case involved questions of law and facts and the lower court was, therefore, incompetent to hear and decide on the matter. The decision of the lower court was declared a nullity and of no legal effect. The High Court further held that that the violation of the quorum requirement was in breach of substantial provisions of the law: *"provisions that go to the very root and establishment of the IRC. They could not be wished away in the name of achieving substantial justice. To do so would be to allow the IRC to proceed without due regard to the law."*

Gustino v. Auction Holdings Ltd, supra, is authority for the proposition that where there is need for facts to be assessed by hearing evidence then the matter must go for full hearing before the lower court sitting with member panelists.

Village Headman Chakweza v. Village Headman Mponda, supra, is authority for the proposition that proceedings conducted before a Court which is not competent by reason of lack of jurisdiction have to be set aside. In the words of the Supreme Court of Appeal at page 2:

"We agree with Mr. Wadi learned Counsel for the Appellant that the moment that the learned Judge came to the conclusion that the Magistrate had no jurisdiction to hear and determine the issue relating to ownership of land his duty was simply to set aside the proceedings in the Magistrate's Court and any order or judgment made by that Court. We also agree that it was not open to the learned Judge to consider the evidence which was adduced before a tribunal without jurisdiction and proceed to give judgment based on that evidence. The Judge should have treated the proceedings before the Magistrate as non-existent. He could have directed the Respondent to commence fresh proceedings before a tribunal which possesses jurisdiction over land dispute.

We are therefore, unable to support the learned Judge in the course of action he took after it became clear to him that the proceedings before the Magistrate's Court were a nullity.

We are also unable to support his decision which was reached in reliance on the evidence taken during proceedings which turned out to be a nullity.

In the circumstances, we set aside the judgment of the learned Judge in the Court below. We direct that the Respondent is at liberty to commence fresh proceedings in the High Court."

To sum up, as the lower court had no jurisdiction to assess compensation in the absence of panelists, the proceedings before the lower court were a nullity. It is as if they never took place at all. In light of the foregoing and by reason thereof, the preliminary objection is sustained. Accordingly, the matter has to be re-listed for re-hearing before a properly quorate lower court (the Chairperson or the Deputy Chairperson sitting with member panelists) within 60 days from this date.

On costs, the Court would exercise its discretion by ordering each party to bear its own costs incidental to this appeal.

Pronounced in Court this 7th day of June 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE