



**IN THE MALAWI SUPREME COURT OF APPEAL**

**BLANTYRE REGISTRY**

**MALAWI SUPREME COURT OF APPEAL CIVIL CAUSE NO 71 OF 2021**

**(Being Civil Appeal case NO 19 of 2021 at the High Court Principal Registry)**

**BETWEEN**

**BLANTYRE WATER BOARD-----APPELLANT**

**AND**

**ANNIE CHIPAKA AND TWO OTHERS-----RESPONDENT**

**CORAM: HON. JUSTICE M.C.C. MKANDAWIRE JA.**

**D. Mlauzi, Counsel for the Appellant**

**L. Mikeyasi, Counsel for the Respondent**

**Mrs. Chimtande, Court Interpreter**

**RULING**

**1.** This is an inter-partes application by the Respondents to set aside order for stay of execution/enforcement. The application is supported by an affidavit made by Luciano Macdonald Mickeus. The application is opposed by the appellant. There is an affidavit in opposition to application to set aside order for stay of enforcement/execution made by Dominic G. Mlauzi.

**2.** This matter initially commenced at the Industrial Relations Court (IRC) where the Respondents were Applicants. In that matter the Respondents through IRC Form 1 claimed for unfair dismissal and sought several reliefs one of which was re-

instatement to employment. A default judgment was entered by the Industrial Relation Court on 6<sup>th</sup> of August 2021. The Applicant was re-instated to her employment with the Appellant.

**3.** On the 5<sup>th</sup> of October 2021, the Industrial Relations Court set aside the default judgment after having heard both parties. In coming to his conclusion, the Deputy Chairman of the Industrial Relations Court observed that this case raises some fundamental issues which in his view need thorough and comprehensive canvassing at trial. The Deputy Chairperson highlighted a few of them namely:-

i) Can a remedy of re-instatement be granted by way of default judgment in view of section 63 of the Employment Act?

ii) If an employer is directed by the Ombudsman to terminate an employee's contract as was the case in this matter, is the employer still obliged to comply with section 57 of the Employment Act?

**4.** Having said the above, the Deputy Chairperson of the Industrial Relations Court set aside the default judgment on two conditions. One of the conditions was that the applicants be deemed to have been re-instated up to the date of this order. This entailed that the Appellant does pay them salaries and benefits, if any, within 14 days from the date of this order.

**5.** On 8<sup>th</sup> November 2021, the Industrial Relations Court declined to issue a stay to the Appellant. On the 19<sup>th</sup> of November 2021, the High Court also declined to grant a stay. On 6<sup>th</sup> December 2021, I granted a stay of execution of the order pending appeal. I however further ordered that there should be an inter-partes hearing hence this hearing today.

**6.** The Respondents in this application have largely focused on paragraph 8 of their affidavit in support. In this paragraph, the Respondents say that it is not true that the terms under which the regular judgment herein was set aside has the effect of granting the Respondents the relief they are seeking in the substantive claim. That the re-instatement herein applies from 5<sup>th</sup> June, 2021 the date when the Respondents were dismissed to the 5<sup>th</sup> of October, 2021 the date when the ruling was made as such the re-instatement is valid for 4 months only. As such the re-instatement is not valid until the conclusion of the matter. The Respondents say

that the Appellants did not demonstrate any meritorious ground to warrant grant of the order of stay of execution/enforcement herein as such the order lacks merit.

**8.** The Appellant in response to this application says that even if the order of re-instatement is only for 4 months, it does not change the fact that it is an order of re-instatement. The Appellant submits that an order of re-instatement could not be made before the court finds that the complaint of unfair dismissal is well founded, that is after the merits of the case have been heard by the court.

**9.** The Appellant also stated that exhibit LM2 attached to the Respondent's affidavit is not the one which the Appellant used for an application for stay in this court. The correct one which the Appellant used is dated 3<sup>rd</sup> December 2021 and is part of the court record. As such paragraph 9 of the Respondent's affidavit is misleading.

**10.** The Appellant says that it would suffer an utter injustice if an order of stay is not granted because it would be made to reinstate and pay the Respondents their salaries and benefits when the hearing of the case as to whether the Respondents were unfairly dismissed or not and should therefore be reinstated has not taken place.

**11.** The Appellant further stated that it applied for a stay order on the basis that the appeal which the Appellant has filed against the order of the Industrial Relations Court has reasonable prospects of success because the Industrial Relations Court re-instated the Respondents and ordered the Appellant to pay them their salaries and benefits when the same court had set aside the default judgment which had ordered that the Respondents to be re-instated. The Appellant says that clearly this order had no legal basis.

**12.** Coming to the enjoyment of fruits of litigation, the Appellant says that it is not correct that the stay which was granted by this court stops the Respondent from enjoying fruits of their litigation. The Respondents have not yet been successful with their litigation. Rather the Industrial Relations Court set aside the default judgment so as to allow litigation to take place in order to determine whether the Respondent should be reinstated or not.

**13.** It is the Appellant's conclusion that the interest of justice and balance of convenience weighs in favour of maintaining the stay order until the appeal against the Industrial Relations Court order is determined.

**14.** I have looked at the skeleton arguments submitted by both sides. I am so indebted to both counsel for the industry shown. This matter should not be deliberately complicated. It is clear from the word go that when the Respondents had filed the case in the Industrial Relations Court, one of the remedies they had sought was reinstatement. This remedy is governed by section 63 of the Employment Act. For avoidance of doubt, section 63(1)(a) of the Employment Act provides:

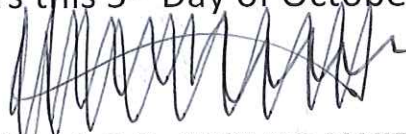
“(1) If the court finds that an employee's complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies-

(a) an order for reinstatement whereby the employee is to be treated in all respects as if he had not been dismissed.”

**15.** My understanding of section 63(1)(a) above is that reinstatement can only be awarded as a remedy after the court has made a finding that an employee's complaint of unfair dismissal is well founded. In the instant case, the Industrial Relations Court had set aside its default judgment meaning that there was no finding by the court. It therefore becomes mind boggling for the same court to attach a condition of reinstatement yet it is the very remedy that is in issue. Whether the reinstatement is for only four months is neither here nor there.

**16.** I have looked at the totality of the facts in this matter. I am satisfied that the balance of convenience in this case tilts in favour of the Appellants. I therefore order that the stay that I had ordered on 6<sup>th</sup> December 2021 is hereby sustained. The application to set aside the order for stay of execution/enforcement is accordingly dismissed with costs.

Delivered in Chambers this 5<sup>th</sup> Day of October 2022 at Blantyre



**JUSTICE M.C.C. MKANDAWIRE JA.**