



THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY
MATTER NO. IRC 120 OF 2020

In the dispute between:

CRISPIN GONDWE.....APPLICANT

-AND-

ROADS AUTHORITY.....RESPONDENT

CORAM: **TAMANDA C. NYIMBA** : Acting Chairperson
 Kondwani Susuwele-Banda : Counsel for the Applicant
 Mphatso Rose Iphani : Counsel for the Respondent
 Rosemary Msimuko : Court Clerk

JUDGMENT

1. In this action, the applicant alleges unfair dismissal and unfair labour practices which claims the respondent contests. As per his Amended Statement of Claim, the applicant seeks the following reliefs: compensation for unfair dismissal, damages for unfair labour practices, the respondent's contribution to his pension and severance allowance.
2. Inevitably, the matter proceeded to a full hearing following the parties' failure to find common ground or wholly settle the dispute at the Pre-hearing Conference stage. The applicant testified on his own behalf. The respondent, on the other hand, called two witnesses, namely, Mr. Diffrey Diverson Matamba (the respondent's Internal Audit Manager) and Mr. Chesterfield Phiri (the respondent's Human Resource and Administration Manager).
3. While much was adduced by way of evidence, it is unnecessary to detail the testimony in its entirety. The following summary distils the most pertinent evidence from the applicant and the respondent's witnesses as garnered from their examination-in-chief, cross-examination and re-examination.
4. The applicant averred that he was employed by the respondent in September 2001 as a Maintenance Engineer handling road construction projects. The events leading

to his dismissal occurred around October 2018. The applicant testified that he withheld payment certificates for a contractor, Kelch Construction (managed by Mr. Kelvin Manda), because the contractor attempted to bribe him to certify works without the procedural requirement of joint verification

5. He further averred that he reported this fraudulent conduct to the Internal Audit Manager, Mr. Matemba. The applicant's initial report – that Mr. Manda had pressured him to issue the certificate without joint measurements – was verified by the respondent's Technical Auditor, Mrs. Innocencia Mbisa, who produced a report confirming that the contractor had indeed prepared certificates without conducting joint measurements¹. The applicant testified his belief that his reporting of Mr. Manda's fraudulent activity did not sit well with certain members of the respondent's management. He alleged that Mr. Manda was an agent for these management members who were personally financing the projects as private business ventures through Kelch Construction.
6. Conversely, the respondent's evidence, adduced through Mr. Matemba, was that the applicant had unlawfully withheld certificates for Kelch Construction for 22 days thereby halting construction works. Mr. Matemba investigated the matter based on a complaint from Mr. Manda alleging that the applicant had solicited a bribe. An audit investigation report² prepared by Mr. Matemba recommended that the applicant be removed from the regional office and reassigned to a desk job at the Head Office where he would have minimal contact with contractors and limited opportunities to demand bribes.
7. The applicant's testimony regarding the contents of the audit report is that the wrongdoing alleged therein was fabricated and that the report was actually a retaliatory measure by his superiors who were dismayed by his initiative to expose Kelch Construction's improprieties.
8. Subsequently, through a notice issued on 10 January 2019, the applicant was summoned to a disciplinary hearing scheduled for 18 January 2019. He was to answer three charges which included the unauthorized soliciting of a gift from a client. Specifically, it was alleged that on 8 October 2018, the applicant solicited a cash gift of MK3,000,000.00 from Mr. Manda.

¹ See exhibit CG 3.

² See CG 4.

9. On 10 January 2019 – the very day he received the notice of the disciplinary hearing – the applicant addressed a memo³ to the respondent’s Administration and Human Resources Manager requesting 20 specifically outlined documents to enable him to prepare his defence. At the hearing on 18 January 2019, the applicant raised the preliminary issue of the requested documents. Upon noting that the respondent had not supplied them, the Disciplinary Committee stood the hearing over to allow the respondent time to provide the documents. No date was set for the reconvened hearing.
10. Following the adjournment, the applicant wrote memos to the respondent on 21 March 2019⁴ and 23 July 2019⁵ following up on the hearing and expressing concern over the protracted delay in concluding his disciplinary matter. It was not until 14 August 2019 that the applicant received a response. This came in the form of a memo from the respondent’s Chief Executive Officer asking him to respond to allegations contained in a revised audit investigation report which maintained the previously preferred charges⁶.
11. Thereafter, on 29 August 2019, the applicant received a memo⁷ from Mr. Phiri in reply to the applicant’s initial 10 January 2019 documents request. This memo stated that the Disciplinary Committee had determined that of all the documents requested, only one was relevant to the hearing being a report on the Joint Measurement Exercise for the 2 Nsuwadzi Bridges in Thyolo District (under Contract Nos. 157UD/BR/SR/TO/17 and 158UD/BR/SR/TO/17).
12. When the hearing reconvened on 5 September 2019, shortly after the charges were read, the applicant informed the Committee that he still required the 20 documents to properly answer the charges contending that a defence was virtually impossible without them. The Committee nonetheless resolved that Mr. Matemba should proceed with his evidence against the applicant. Although the applicant was subsequently invited to cross-examine Mr. Matemba, he maintained that he could only do so once furnished with the requested documents. At this juncture, the Committee resolved to proceed and render its decision based solely on Mr. Matemba’s testimony.

³ See exhibit CG 6.

⁴ See exhibit CG 8.

⁵ See exhibit CG 9.

⁶ See exhibit CG10.

⁷ See exhibit CG 15.

13. Following the 5 September 2019 disciplinary hearing, the applicant received a letter on 10 February 2020 (dated 4 February 2020) informing him of his summary dismissal from employment effective 10 February 2020⁸.
14. The foregoing constitutes the abridged and relevant evidence in this matter.
15. I must commend learned Counsel for both parties for their comprehensive written submissions. I assure the parties that I have meticulously evaluated all arguments and legal authorities canvassed therein. Accordingly, the absence of an express reference to any specific submission within this judgment must by no means be construed as a failure by this Court to have considered it.
16. Having considered the evidential matrix and the submissions from both learned Counsel, the issues for this Court's determination are: (a) whether the applicant was unfairly dismissed; (b) whether the respondent's conduct amounted to unfair labour practices; and (c) whether the applicant is entitled to the remedies sought.
17. This being a civil action, the burden of proof rests with the party asserting the affirmative⁹, namely, the applicant. The applicable standard of proof is the balance of probabilities. The meaning of this standard is best illustrated by contrasting the requirements for succeeding versus failing to meet it. In *Miller v. Minister of Pensions*¹⁰ Denning J had this to say:

“If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”
18. This Court has a tradition of not placing parties in what I term “gratuitous suspense” regarding the final determination reached upon evaluating the evidence in light of the applicable law. Accordingly, for the reasons I shall set out hereunder, it is my decision that – on a preponderance of probabilities – the applicant's action must succeed and his claims be upheld. My reasoning follows.
19. I begin with the first issue, namely, *whether the applicant was unfairly dismissed by the respondent*.

⁸ See exhibit CG 16.

⁹ *Chipiliro Banda v. Southern Bottlers Ltd* [2012] MLR 53 (HC).

¹⁰ [1947] 2 All ER 372.

20. First, I outline the core legal principles. For an employment termination to be considered fair, it must satisfy the requirements of both substantive and procedural justice. A failure in either area is invariably terminal and results in a dismissal that is legally indefensible or unfair. Substantive justice is concerned with the reason for dismissal while procedural justice relates to the manner in which the dismissal occurred.
21. Section 57(1) of the Employment Act provides that 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 requirement of the undertaking. The burden of showing that the reasons for dismissal are valid is on the employer¹¹.
22. Section 57(2) of the Employment Act provides that 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.
23. Section 61(2) of the Employment Act provides that in addition to proving that an employee was dismissed for reasons stated in section 57 (1), an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.
24. In the case at hand, the respondent dismissed the applicant based on allegations that he, without authorisation, solicited a gift from a client and conducted himself in a disorderly manner. Evidently, the dismissal was grounded on conduct. Bearing the nature of the applicant's dismissal in mind, this Court proceeds to determine whether the respondent accorded both procedural and substantive justice to the applicant.
25. I shall first examine the first limb, namely, procedural justice, which encompasses the manner in which the dismissal occurred. Appreciating the testimony extracted from the witnesses in this matter, it is clear that the respondent manifestly failed to accord procedural justice to the applicant. As a starting point, the evidence demonstrates that the applicant formally requested 20 documents from the

¹¹ Section 61(1) of the Employment Act; *Mangulama v. Raiply Malawi Limited* Matter No. IRC 254 of 2003 [Unreported].

respondent on 10 January 2019 to frame his defence against the allegations. However, the respondent unilaterally determined that 19 of those documents were irrelevant and refused to disclose them. It must be emphasized that the respondent's witnesses did not testify that the 19 documents were unavailable. The indisputable evidence before this Court is simply that the respondent unilaterally resolved that they were immaterial to the charges. Quite frankly, it is unjust for the very persons framing a case against an employee to unilaterally decide which documents are relevant to the accused person's defence. It is this Court's considered view that, in its capacity as a primary workplace tribunal, the Disciplinary Committee could have properly determined the relevance – or lack thereof – of the requested documents only after appreciating how the applicant intended to use them in his defence.

26. Further compounding this failure is the fact that the Disciplinary Committee did not call the primary accuser, Mr. Manda of Kelch Construction, into the hearing room to testify. Instead, it relied entirely on the hearsay evidence presented by the Internal Audit Manager, Mr. Matemba. Mr. Matemba specifically testified that Mr. Manda was, in fact, available to be questioned but remained in a different room. That after he (Mr. Matemba) finished his presentation, he left the hearing room and was unsure whether Mr. Manda was subsequently called in. Mr. Matemba also conceded that under the circumstances where Mr. Manda did not enter the hearing room, he could not be considered a witness at all.
27. Here, this Court respectfully adopts and reiterates the observations made in ***Khoswe v. National Bank of Malawi***¹², where it was observed that a compromise of the principles of natural justice – including failing to avail documentation and denying the accused an opportunity to cross-examine those who rendered conflicting reports – could render a dismissal unfair and unlawful.
28. By depriving the applicant of the requested documents, coupled with the failure to invite his primary accuser into the hearing room to testify before the panel, the respondent failed to extend procedural justice to the applicant. I therefore find that the applicant was unfairly dismissed.
29. I turn now to the second limb, substantive justice, which concerns the validity of the reason for dismissal. In matters where the Court must determine if an

¹² Civil Cause number 718 of 2002.

employer's reason for dismissal is fair or valid based on the facts known at the time, the Court examines the cited misconduct to ascertain if the termination was justified. If the reason is not supported by evidence, the Court may conclude that there was no justification for the dismissal¹³.

30. The respondent asserts – in its letter summarily dismissing the applicant – that he was dismissed for the unauthorized solicitation of a gift from a client and for disorderly conduct. The question is whether this allegation is sufficiently supported by evidence to enable this Court to conclude that the dismissal was justified. The evidence reveals that Mr. Matemba chose to believe the contractor's narrative based merely on a "sequence of events," admitting during cross-examination that he had "surmised" (supposed or assumed) the applicant's guilt.
31. Crucially, Mr. Matemba completely ignored a technical audit report by Mrs. Innocencia Mbisa which corroborated the applicant's initial complaint that the contractor was attempting to flout joint verification procedures. It is undisputed that the applicant was the initial whistleblower who reported the contractor to the respondent. In these circumstances, dismissing the applicant based on assumptions and an uncorroborated counter-accusation by a contractor, while ignoring an exonerating report from the respondent's own Technical Auditor, falls drastically short of establishing a valid reason for dismissal. This Court finds that the respondent lacked a valid reason to dismiss the applicant; thus, substantive justice was not satisfied.
32. All things considered, in terminating the applicant's contract of employment, the respondent failed to treat him with justice and equity contrary to the dictates of section 61(2) of the Employment Act. Collectively, the sum of the foregoing considerations fortifies this Court's determination that the respondent unfairly dismissed the applicant.
33. I now shift attention to the applicant's claim for damages for unfair labour practices. The evidence demonstrates that the respondent adjourned the disciplinary hearing in January 2019 and left the applicant in anxious suspense for seven months compelling him to take his own initiative to follow up on his pending matter in March and July of 2019. The respondent only replied to his January 2019 document request in late August 2019. This inordinate delay, alongside the

¹³ *Mahowe v. Malawi Housing Corporation* Civil Cause No. 3687 of 2000 (HC) [Unreported].

unilateral suppression of the applicant's requested defence documents, in no way reflects good industrial relations. The respondent's actions and omissions in this regard cannot be described as even handed, reasonable, acceptable and expected from the standpoint of employer, employee and all fair-minded persons looking at the unique relationship between employee and employer and good industrial and labour relations¹⁴. The respondent's conduct crossed the threshold into unfair labour practices in contravention of section 31(1) of the Constitution of the Republic of Malawi.

34. Finally, having established that the termination of the applicant's employment was both procedurally and substantively unfair and that the respondent committed unfair labour practices, the applicant is entitled to compensation for unfair dismissal¹⁵, damages for unfair labour practices¹⁶, the respondent's contribution to his pension and severance allowance¹⁷.
35. On computation of the remedies, I note that neither party specifically addressed the Court in the course of trial on quantum of the reliefs. In point of fact, while it is efficient to deal with liability and assessment in an omnibus fashion, the parties were not heard on the precise topic of reckoning of the reliefs. Given that the right to be heard is a fundamental tenet of our justice system, the parties would be unfairly prejudiced were I to proceed to assess quantum without allowing them to adduce evidence or make submissions regarding the same. Accordingly, I shall defer the assessment of the reliefs. In the interim, I direct as follows:
- (a) The parties are at liberty to agree on quantum of the reliefs within 14 days from the date hereof;
- (b) Failing such agreement, this Court shall preside over a remedy hearing to assess the reliefs on a date and at a time to be fixed following the filing of assessment papers by both parties and a notice of hearing by the applicant.
36. This was a modularized trial with determination of liability concluding the first instalment. Pursuant to the authority of *JTI Leaf (Malawi) Limited v. Kad Kapachika*¹⁸, this decision is inchoate for purposes of appeal. It may only be

¹⁴ *Kalinda v Limbe Leaf tobacco Ltd* Civil Cause No. 542 of 1995 [Unreported].

¹⁵ See section 63 of the Employment Act.

¹⁶ See section 31(1) as read with sections 46(2)(a) and 46(4) of the Constitution of the Republic of Malawi.

¹⁷ See section 35(1) of the Employment Act.

¹⁸ MSCA Civil Appeal No. 52 of 2016 [unreported].

escalated to the High Court once this Court renders its order on assessment of reliefs or the parties reaching an out of court settlement. To avoid confusion, while the right of appeal subsists under Section 65(2) of the Labour Relations Act, it is currently stayed pending the conclusion of the relief proceedings or the parties reaching agreement on the same.

37. It is so ordered.

Pronounced this 3rd day of August 2026 at IRC, **PRINCIPAL REGISTRY**

Tamanda Chris Nyimba
ACTING CHAIRPERSON