IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 684 OF 2001

BETWEEN:

ARMSTRONG KAMPHONI.....PLAINTIFF

and

MALAWI TELECOMMUNICATIONS.....DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr Kasambara, of Counsel for the Plaintiff

Mr Singano, of Counsel for the Defendant

Mr Balakasi, Official Interpreter/Recording Officer

Kapanda, J.

RULING

Introduction

There are three separate Originating Summons brought before this court by the Plaintiff viz Armstrong Kamphoni, Mary Kaunde and Noah Chimpeni. The first two plaintiffs have taken out the said Originating Summons in Civil Cause Numbers 648 of 2001 respectively, where they are seeking reliefs against the Malawi Telecommunications Limited. The other Plaintiff, Noah Chimpeni has, by way of Originating Summons, commenced proceedings against Malawi Television (MTV) Ltd. These latter proceedings are in Civil Cause No. 695 of 2001.

The Defendants, in all the three causes, filed their respective notices of intention to defend the proceedings so commenced by the Plaintiffs herein. Although the matters before me were taken out separately I will deal with them together because of the reasons that will become clear later in this ruling. As a matter of fact the reasons for the findings of fact in one cause apply with equal force in respect of the other matters. It is for this reason that I have found it convenient to write one opinion and adopt same in connection of the other two matters.

The Plaintiffs have filed and sworn affidavits in support of their respective applications. On the other hand the Defendants have filed affidavits in opposition to the Plaintiff's and application. The affidavits in opposition have been sworn by Counsel for the Defendants.

The Originating Summons

In the Originating Summons, issued on 15th March 2001, the Plaintiffs are seeking this courts' determination on questions. Indeed, the Plaintiffs have sought the following reliefs and/or declarations:-

A. Armstrong Kamphoni -vs- Malawi Telecommunications Ltd

(1) That the Defendant, has wrongfully and unlawfully terminated the Plaintiffs contract of employment;

(2) That the Plaintiff is entitled to compensation for the wrongful and unlawful termination;

(3) That the Plaintiff is entitled to be paid the sum of MK3,204,626.00 as underpayment for terminal benefits under contract of employment;

(4) That the Defendant do pay 15% of the sum due to the Plaintiff as collection charges;

(5) That the Defendant do pay costs of these proceedings.

B. Mary Kaunde -vs- Malawi Telecommunications Ltd

(1) That the Defendant has wrongfully terminated the Plaintiff's contract of employment;

(2) That the Plaintiff is entitled to compensation for wrongful and unlawful termination of the contract of employment;

(3) That the Plaintiff is entitled to severance pay in addition to compensation for wrongful and unlawful termination of employment;

(4) That the Defendant be condemned to pay costs.

C. Noah Chimpeni -vs- Malawi Television (MTV) Ltd

(1) That the Defendant wrongfully and unlawfully terminated the contract of employment between the Plaintiff and the Defendant;

(2) That the Plaintiff is entitled to compensation for the wrongful and unlawful termination of the contract of employment;

(3) That the Plaintiff is entitled to severance pay in addition to compensation for wrongful and unlawful termination of the employment;

(4) That the Defendant be condemned to pay costs;

(5) That the Plaintiff is entitled to repatriation package.

Even though the Plaintiffs have not indicated that their applications are brought under the Employment Act it has transpired during arguments that their applications are made under the Act No. 16 of 1996 - The Employment Act. Indeed, the essence of the applications is that the Plaintiffs are relying on the provisions of the said Employment Act and they want to enforce the remedies that are available to an employee, under the said Employment Act, if he claims that his rights and/or freedoms under the said Act have

been infringed.

Evidence

The evidence in all the three cases is by way of affidavit. The deponents were not cross-examined on the matters of fact deponed to in the said affidavits in support and in opposition to the applications herein.

I would like to point out, though, that the affidavits in opposition, as rightly put by learned Counsel for the Plaintiffs contains hearsay evidence. This is so because in the affidavits of learned Counsel for the Defendants it is conspicuously clear that the matters they are stating are based on information given to them by the Defendants. This type of evidence is not acceptable in a free standing action if such action is brought to a court like this one - The State -vs- The Commissioner General of Malawi Revenue Authority exparte Nazir Omar t/a Spider Corporation MISC. Civil Cause No. 3 of 2001 (unreported); Order 41 rule 5 of the Rules of The Supreme Court. But this rely on same evidence, as correctly submitted by Mr Mhone of Counsel, could be admitted in proceedings before the Industrial Relations Court in terms of Section 7(2) of the Labour Relations Act provides that:-

"The Industrial Relations Court shall not be bound by the rules of evidence in civil proceedings."

And in pursuant to Section 71(3) of this said Labour Relations Act the said Industrial Relations Court may receive hearsay evidence which is otherwise inadmissible in a court of law.

Issue For Determination

It has already been observed that the Plaintiffs want to enforce their rights, and obtain remedies, as provided for under the Employment Act. This is revealed in both the viva voce submission and the skeleton arguments of learned Counsel for the Plaintiffs. The question, that immediately comes to mind, and requires this court's adjudication is whether or not the Plaintiffs have chosen the right forum by coming to the High Court and seek to enforce their said rights, and obtain remedies under the said Employment Act. As a matter of fact Mr Mhone of Counsel raised this issue of the choice of forum during submissions in Noah Chimpeni case. I wish to note that any finding on this issue of the forum will determine whether this court should adjudicate on the matters raised in the Originating Summons herein.

Law and Finding

It is common cause that the Plaintiffs are relying on the provisions of the Employment Act and are desirous of getting remedies under the said Employment Act. It is clear in my mind that under the said Employment Act the court that is competent to deal with complaints under the said Employment Act is the Industrial Relations Court - Section 3 as read with Section 7, 62, 63 and 64 of the Employment Act. Indeed, the said Employment

Act has provided that the Industrial Relations Court is the Court that should entertain and hear applications for the enforcement of the fundamental rights provided for under the said Act No. 16 of 1996. Further, the tenor of the provisions of Section 64 as read with Section 65 of the Labour Relations Act are, in my view, a clear testimony of the fact that the High Court will hear labour related matters when such cases are brought before it on appeal from the Industrial Relations Court which has original jurisdiction to hear and determine all labour disputes.

It was argued by learned Counsel Kasambara that the High Court has original unlimited jurisdiction therefore it can hear and determine labour related disputes like the present case. I wish to concede that indeed the High Court has such jurisdiction. However, it is trite knowledge that only cases that can not be brought before a subordinate court, like the Industrial Relations Court, should be taken before the High Court. To do otherwise would mean that the High Court flood gates will be opened so wide and it will be indurated with lots of labour related cases thereby suffocating it and making it fail to deliver on deserving cases that should rightfully be brought before the High Court. An instructive case authority on how the High Court should conduct itself if faced with the question of jurisdiction is that of Beatrice Mungomo -vs- Brian Mungomo and Others Matrimonial Cause No. 6 of 1996 where Unyolo, J., as he then was had this to say when dealing with a question of forum of proceedings:-

"Next, learned Senior Counsel contended that this court is competent to hear the petition on the basis of Section 108 of the new Constitution of the Republic of Malawi, which provides that the High Court "shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law." The section is very clear and I would agree with learned Counsel that with such extensive jurisdiction and powers conferred upon it by the Constitution, which is the supreme law of the land, the High Court is competent to hear divorce petitions, even in cases involving a customary marriage as in the present case.

It is to be observed, however, that although this is the position, the High Court has to look at the matter from a practical point of view. In my judgment, it would be both inappropriate and wrong for the High Court to proceed and assume jurisdiction over proceedings which fall within the jurisdiction of a subordinate court simply because the High Court has, as we have just seen, unlimited original jurisdiction. Such an approach would create confusion, as parties would be left to their whims to bring proceedings willy-nilly in the High Court or in a subordinate court, as they pleased. This would also open the flood gates for trivial cases to come before the High Court. In short, the High Court should recognise the subordinate courts and decline jurisdiction in matters over which the subordinate courts have decline jurisdiction in matters over which the subordinate courts have jurisdiction, unless exceptional circumstances exist which necessitate or require its intervention, that is, the intervention of the High Court.

As to what would amount to exceptional circumstances, that should, in the final analysis, depend on the facts of the particular case; things like if the case were shown to be too complicated for the subordinate court, or that the cost of having the case tried in such

courts would be unduly excessive, or that the trial of the case would inevitably be delayed if undertaken in such subordinate court, may amount to exceptional circumstances which might justify the intervention of the High Court to exercise original jurisdiction. The examples here are not exhaustive.

As I have already shown, the Traditional Courts now-turned Magistrate's Courts have exercised jurisdiction over divorce petitions involving customary marriages for a long time. There is nothing complicated, in my view, about the present case. The appropriate Magistrate's Court should be able to handle the case easily and expeditiously, and perhaps cheaply too.

I have considered Section 41(2) of the Constitution which gives every person in this country the right to have access to any court of law. With respect, I don't think that in saying the petitioner should bring her petition before a subordinate court, she is thereby being denied this right, since, as I have shown, there are competent lower courts with powers and jurisdiction over this type of cases. Indeed, this court would still be available later on in the event of an appeal. In short, I am unable to find any exceptional circumstances in the instant case such as would justify the intervention of this court. I would, therefore, dismiss the petition on this score, leaving the petitioner to bring up the petition before the appropriate subordinate court, if she will be so minded."

It has not been demonstrated, and I am not satisfied if there was such an attempt, that there are sufficient reasons, or exceptional circumstances, for bringing these proceedings in the High Court. There are no good reasons to support the Plaintiff's choice of the High Court when the Employment Act clearly states that an application for the enforcement of the remedies under the said Employment Act shall be brought before the Industrial Relations Court. The fact that the High Court has unlimited original jurisdiction must not be allowed to detract us from the clear provisions of the Employment Act as read with the Labour Relations Act which categorically puts it that the Industrial Relations Court is the court that shall deal with labour related matters and that the said Industrial Relations Court shall have the original jurisdiction to hear and determine all such labour related disputes - Section 3 of the Employment Act; Section 64 of the Labour Relations Act.

It is therefore my order that these proceedings shall be taken before the Industrial Relations Court. If any of the parties is not satisfied with the decision of the Industrial Relations Court such party will be at liberty to appeal to the High Court.

Finally I wish to observe that the choice of the court before which to commence labour related proceedings is an important one because it has a bearing on the question of recovery of costs as well as on the rules of procedure and evidence. In this regard Section 71(2) and 72 of the Labour Relations Act are pertinent. It is, therefore, my view that since no costs are recoverable in the Industrial Relations Court, except in certain specified circumstances, it would be an abuse of process if a person is permitted to commence labour related proceedings in the High Court where costs of proceedings are recoverable. Further, as earlier alluded to above in proceedings before the Industrial Relations Court the rules of evidence are flexible in that hearsay evidence is admissible. Now I do not

think that it will be proper and/or in the interest of justice for this court to proceed with the hearing of these cases, which are brought under the Employment Act and thereby deny the Defendants the opportunity of using hearsay evidence when same would have been allowed in the Industrial Relations Court.

It is therefore my order, for the reasons discussed above, that these proceedings should be taken before the Industrial Relations Court. If any of the parties is not satisfied with the decision of the said Industrial Relations Court such party will be at liberty to appeal to the High Court.

Costs

In view of the fact there is no adverse order made against the Plaintiffs in respect of their substantive applications, and due regard being had to the fact that ordinarily there would have been no order as to costs if these proceedings were brought before the appropriate court, I make no order as to costs of, and occasioned by, these proceedings before me. Each party shall bear its own costs. It is so ordered.

Pronounced in Chambers this 18th day of May 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE