IN THE MALAWI SUPREME COURT OF APPEAL
ATBLANTYRE

MSCA CIVIL APPEAL NO. 07 OF 2007

(Being High Court Civil Cause No. 1 76 *of 200* 1)

BETWEEN:

SUGAR CORPORATION OF MALAWI LTD
APPELLANT

- AND-

RON MANDA (Male)
RESPONDENT

BEFORE: HON. THE CHIEF JUSTICE HON. JUSTICE I.J. MTAMBO, SC, JA HON.

JUSTICE A.K. TEMBO, SC, JA

Tembenu, of Counsel for the Appellant Chirwa, of Counsel for the Respondent Selemani, Court Official

JUDGMENT

MTAMBO, SC. JA.

The appellant has brought this appeal against the judgment of the High Court in which it decided that the respondent was unfairly dismissed by the appellant from his employment and awarded him K264,192, being three months' salary, K2,OOO, being leave grant and K5,OOO, being long service award.

There are seven grounds of appeal. I t will however, become apparent as we consider each ground that they are all,

really, to the effect that the High Court erred in finding that the respondent's dismissal was unfair.

We would begin with ground one, which seems to us to be the main ground of appeal. It is that the High Court erred in law in holding that in terms of s. 61 (2) of the Employment Act (Act No.6 of 2000), the appellant's action in dismissing the respondent was not just and equitable although the respondent was given a fair hearing.

Before we deal with this issue we think that we should first reproduce some relevant parts of the judgment of the Court below in *extensio* because we believe that that will certainly help to comprehend the conclusion which we intend to reach. This is what the High Court said: *[The reference to ((the plaintiff' and to ((the complainant" in this and subsequent quotations means ((the respondent" and ((the representative of the appellant, " respectively]*

> *('The evidence shows that there were serious endeavors to follow the principles of nature justice in that the plaintiff after suspension was given ample time to study the charges levelled against him before the day of hearing. The charges presented the reasons why he was under suspension and why drastic disciplinary measures might follow after being found guilty. At the hearing he was given the opportunity to be heard and argue his case out.* He *had the opportunity to cross-examine company witnesses. The whole hearing including the appeal process was (sic) conducted in a fairly (sic) manner. However, I should hasten to say that it was wrong and unfair to the plaintiff to allow the complainant to attend the verdict deliberations whereas the plaintiff was refused such attendance. This* is *regardless of the fact that the chairman of the hearing panel says he was not, during the verdict deliberations, influenced by the complainant. It* is *said that justice should not just be done but must be seen to be done. "*

Whereupon the Court reasoned:

> *('The chairman may claim that he was not influenced in anyway by the complainant, but the plaintiff could not see*

> *justice if the complainant was part of the verdict forming process. The issue* is *how the plaintiff looked at such procedure. Certainly he would feel unjustly treated and ostracized. It was not enough for the chairman to say that he was not influenced by the complainant but he should have barred the complainant from attending the verdict. This would entail justice being seen to be done, "*

The Court then made a kind of a turnabout and said:

> *«Let* me *nevertheless point out that this irregularity* is *not* so *substantial as to nullify or discredit the whole process of hearing. However, mere presence of somebody in the decision making body* is *capable of indirectly influencing somebody. It* is *thus possible that the chairman was influenced by the mere presence of the complainant. "*

The Chairman is on record to have said that the evidence was very clear and that the presence of the representative of the appellant, during deliberation had not influenced him at all.

We think that we should next refer to the applicable provisions of the law. These are sections 57(1), 59 (l)(a) and 61 (2) of the Employment Act. The relevant part of s. 57 (1) is 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 conduct of the employee. Under s. 59(1) (a), an employer is entitled to dismiss summarily an employee where an employee is guilty of serious misconduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship. We would mention here that clause 16.2.1 of the Terms and Conditions of Employment regarding the present case is almost word for word with this provision. And under s. 61 (2), an employer is required, in addition to proving that an employee was dismissed for reasons stated in

s. 57 (1), to show that in all the circumstances of the case he acted with justice and equity in dismissing the employee.

Both learned counsel share the view that the phrase *((acted with justice and equity"* in s. 61 (2) introduces the application of equitable principles to the law of employment. It was thus argued for the appellant that this entails an exercise of discretion on the part of the Court and the consideration of all the facts of the case. It was submitted that there was a clear case of misconduct in the present case and, therefore, that acting with justice and equity cannot mean condoning the misconduct because, as the saying goes, he who comes to equity must come with clean hands. It was submitted that the respondent did not come with clean hands; he was guilty of fraud.

In response learned counsel for the respondent submitted that the inclusion of sub - s. (2) is to avoid the mischief whereby an employee who might have been of good conduct throughout his employment may be dismissed on a ground for which he could have been pardoned or given a lesser punishment. It was submitted that such was the case here. The respondent served the appellant for 23 years without fault or blame. It was contended that the appellant should have given due regard to the length of the respondent's service before dismissing him.

We agree with both learned counsel that the inclusion of sub - s. (2) introduces the application of principles of equity in the law of employment. We also agree with learned counsel for the respondent that the inclusion of the sub-section is to avoid the mischief whereby an employee who may have been of good conduct throughout his employment may be dismissed on a ground for which he could very well have been pardoned or given a lesser punishment than dismissal.

It is clear from reading the record of the proceedings that the respondent does not dispute to have submitted a false insurance claim in the name of the appellant for an employee

of the appellant who was injured while working for the respondent at the respondent's private residence. And of the claim, the High Court said:

> *((It* is *the view of this court that the plaintiff acted fraudulently in respect of worker's compensation* He *might have thought that he will get away with it."*

The Court then later said:

> *((Finally, this court* is *convinced that the plaintiff acted fraudulently in the process of awarding compensation ..... The circumstances themselves show that he had full knowledge of what was transpiring. It was not merely an act of negligence. This could warrant him dismissal and he was* so *dismissed. However, the hearing was unfair as the complainant was present in the verdict deliberations. "*

It appears to us that the High Court is saying that if it were not for the presence of the appellant's agent during the deliberation of the verdict, the dismissal of the respondent would have been a fair dismissal in that it would have been for a valid reason stated in s. 57 (1), and that the appellant would have been said to have acted with justice and equity. We have ourselves read the record and are of the view that the presence of the appellant's representative or agent during the deliberation of the verdict does not appear to have been of any effect on the result of the deliberation for the reason that the evidence of misconduct was very clear and that the respondent does not controvert the allegation made against him. And whether or not such presence would make a difference must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument. We do not think that the present appeal is one such case because it seems to us that the verdict would have been the same with or without the presence of the appellant's agent during the deliberation.

We would go further and say that this was a proper case for summary dismissal under s. 59 (1) (a). Under that section an employer is entitled to dismiss summarily an employee

where an employee is guilty of serious misconduct inconsistent with the fulfilment of conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship. In the case of **Meja - v - Cold Storage Company Limited** 13 MLR 234, which was cited with approval in **Benson Kusowera - vNational Bank of Malawi,** MSCA Civil Appeal NO.5 of 2005 (unreported) the High Court, concerning an earlier similar provision, said:

> *«Besides the statutory provision there is an abundance of case authority stating precisely the same thing that an employer is entitled to summarily dismiss an employee where the employee is guilty of misconduct or does anything wrong incompatible or inconsistent with the fulfilment of the express or implied conditions of his duties. "*

And there are several other decision to that effect, an observation this court also made in the **Kusowera** case ***(supra).***

Referring to the present case, it seems to us that an employee who falsifies a claim to the injury, damage or detriment of the employer, as was the case here, breaches a legal and an equitable duty to the employer such that he would be guilty of serious misconduct inconsistent with the fulfilment of the conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship. Accordingly, it should not have been necessary for the High Court to consider the matter any further, namely, whether or not the respondent's dismissal was fair, if it had come to this conclusion, and the principles of equity would not have been invoked in aid of the respondent's case because he cannot be said to have come to equity with clean hands - he was guilty of fraud.

That settles ground one of appeal which, if we . may repeat, is that the High Court erred in law in holding that in terms s. 61 (2) the appellant's action was not just and equitable although the respondent was given a fair hearing.

Grounds two and seven were argued together. Ground two is that having found as a fact that the respondent had committed misconduct by fraudulently submitting a claim for compensation the High Court erred in holding that the dismissal was nevertheless unfair. Ground seven is that the High Court erred in law in holding that the dismissal was unfair. Both of these grounds of appeal have been taken care of in what we have already said above. The High Court indeed erred in finding that the respondent's dismissal was unfair for the reason chiefly, that this was a proper case for summary dismissal under s. 59.

Ground three is that the High Court erred in law in holding that the mere presence of a representative of the appellant during the deliberation of the verdict constituted an irregularity which influenced the appellant to dismiss the respondent. This ground too has already been taken care of. The presence of the appellant's agent during the deliberation of the verdict was without consequence; it could not have influenced the result of the case for the reason that the evidence of misconduct was overwhelming and undisputed. What we are saying here is that a different conclusion from the one that was reached would have been unreasonable in the circumstances.

Ground four was not pursued. It was that the High Court misdirected itself on the evidence when it refused to find as a fact that the respondent was guilty of misuse of company property as a ground of dismissal. We have read the record of the proceedings and can only surmise that this ground was not pursued because it lacked merit. There is no evidence on which it could have been founded. It appears to us, therefore, that the High Court was right in the conclusion it reached.

Grounds five and six are abou t the jurisdiction of the Court regarding the reliefs it gave. It was argued under ground five that the court exceeded its jurisdiction in holding that the respondent should have been retired although it had

been proved that he was guilty of serious misconduct. We have already dealt with this ground of appeal. We have said t4at fraud is serious misconduct and, therefore, a valid reason for summary dismissal. Regarding ground six it was submitted that the reliefs awarded are outside the legal remedies awardable under the Employment Act. We have said above that the respondent was awarded K264,192.00, being three months' salary, K2,000.00, being leave grant and K5,000.00, being long service award. The question whether the court did not have jurisdiction to make the awards it made is now academic, having found that the respondent was guilty of serious misconduct and, therefore, that he should have been summarily dismissed. Suffice to say, however, that if the purpose, special purpose, for the Act is to be achieved, the remedies awardable are those stipulated under s. 63 thereof.

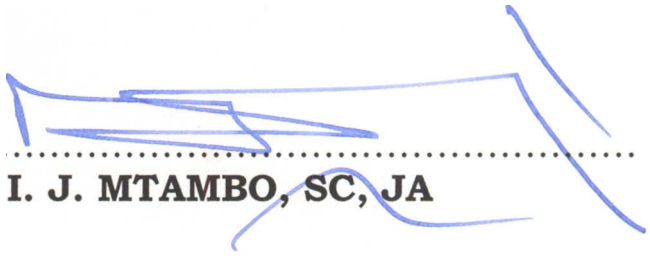
All in all, we allow the appeal. We order that each part will bear own costs.

DELIVERED in Open Court this 19th day of July 2007 at Blantyre.

Signed:

L. E. UNYOLO, CHIEF JUSTICE

Signed:



I. J. MTAMBO, SC, JA

Signed: **JA**

A. K. TEMBO, SC,