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IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

CIVIL APPEAL NO 2 OF 2006
(Being Civil Appeal No 70 of 2004)

Between:

Malawi Telecommunications Limited..Appellant

- and –

Makande...1st Respondent
Omar..2nd Respondent

BEFORE: THE HONOURABLE JUSTICE MTEGHA, SC, JA
THE HONOURABLE JUSTICE TAMBALA, SC, JA
THE HONOURABLE JUSTICE TEMBO, SC, JA
Chokotho, Counsel for the Appellant
Ngwira, Counsel for the Respondents
Selemani, Official Interpreter/Recording Officer

JUDGMENT

TEMBO, SC, JA

Messrs Makande and Omar (the respondents) had commenced an action against the Malawi Telecommunications Limited (the appellant) in the Industrial Relations Court in respect of which that Court had found, and therefore decided, that the termination of the employment of the respondents by the appellant was unfair in that the procedure adopted by the appellant in doing so was not in compliance with the applicable law and practice The appellant was dissatisfied with that decision It, therefore, brought an appeal before the High Court By the decision of the learned Justice Kamwambe, which was delivered on 15th August, 2005, the High Court dismissed the appeal and, thereby, upheld the judgment of the Industrial Relations Court which, therefore, had been mandated to assess damages in accordance with section 63(c) of the employment Act

The appellant again did not have joy in the outcome of its appeal before the High Court. In the circumstances, this is its appeal against the judgment of the High Court. There are four grounds of appeal, namely, that the learned Judge erred in law (a) by finding that it is logical and acceptable to seek guidance from other foreign laws or conventions/treaties so as to fill any apprehensible lacunae in our law, (b) by applying ILO Convention Number 158 (otherwise cited as "Termination of employment Convention, 1982") for the sake of transparency in a democratic Malawi without further considering whether the said convention was or is applicable in Malawi; (c) by fully adopting the decision in the case of **Bristol Channel Ship Repairs –v- O'Keefe** (1977)2 All ER 258 without considering that the decision in that case was based on the provisions of statutes which are not applicable in Malawi; and (d) in that having found that the 2nd respondent, Omar, had indicated that he was made aware, through the Workers Union, of the fact that the retrenchment would target non-performers, the learned Judge nonetheless rejected that there were any consultations done or made with the employees. In the circumstances, it is the prayer of the appellant that we should reverse the decision of the High Court that the termination of employment was unfair.

To begin with, we should expressly observe that there is no dispute among the parties, hereto, as to the brief relevant facts in the case. These are clearly set out in detail in the judgment of the Industrial Relations Court and have been well summarized in the High Court judgment, now appealed against. Thus, the respondents were employed by the appellant as Hotel Manager and Accounts Assistant on 4th July, 1989 and 26th April, 1997, respectively. By 8th February, 2001, the date on which their employment was terminated, the respondents held the positions of Senior Human Resources Officer and Senior Auditor, respectively. It is therefore evident that both of them had quite significantly risen through the ranks by then. The grounds for termination were that the appellant was going through a process of restructuring which had necessitated the termination of employment contracts of some employees, including those of the respondents. The respondents challenged the termination in that they thought that their services were still required at and by the appellant corporation.

It was in evidence, before the court of first instance, that the restructuring process including the procedure, criteria, duration and consequences of retrenchment were not discussed with the employees in general except members of senior management who were involved in the making of recommendation and selection of employees whose employment contracts had to be terminated thereby. The Court of first instance also found as a fact that the appellant did not comply with fair

procedure for effecting redundancies; and indeed that the appellant did not even comply with the minimum requirements demanded as a matter of the prevailing practice in accordance with the policy statement issued by the Ministry of Labour in 1994 and revised in the year 2000. It was in the light of the foregoing facts that the Court of the first instance found, and therefore decided, that the termination of employment of the respondents was unfair and that the procedure adopted by the appellant in doing so failed to comply with the applicable law and practice. This is the decision which the High Court upheld.

We are grateful for the relevant and lucid legal arguments, written and oral, which counsel for both parties have made before us as to the applicable law respecting the determination of the issues raised by this appeal.

We first consider grounds of appeal (a) and (b) together. In that respect and at the outset, we observe that a consideration of the applicable law in the instant appeal ought to commence with a glance at and an examination of relevant constitutional provisions in question. These must be read and examined together with section 2(2) of the Labour Relations Act and relevant public international law, in particular respecting the law of treaties.

Thus sections 199, 200 and 211 of the Constitution are apposite in that regard and they, respectively, prescribe as follows –

> 199 This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution;
>
> 200 Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and pursuance of this Constitution,
>
> 211 (1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament
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> (2) Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic.

The Constitution came into operation on 18th May, 1994. It repealed and replaced the earlier Constitution which was established by section 4 of and set forth in the Second Schedule to the Republic of Malawi (Constitution) Act. In its article 2 (1) iii, the repealed and replaced Constitution prescribed as follows-

"The Government and the people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights, and of adherence to the law of Nations."

Besides the foregoing, it is expedient that we also expressly set out herein the provisions of Section 2(2) of the Labour Relations Act, as follows-

"This Act shall be interpreted so as to give effect to the Constitution and the observation of any international treaty, including any international Labour Conventions entered into and ratified by Malawi."

Any appropriate and accurate discussion of the law of treaties ought to commence with a glance at and an examination of the International Convention on the Law of Treaties which was signed in 1969 at Vienna and came into force in 1980. Suffice it to mention that Malawi is a party to that Convention. About the **1969 Vienna Convention on the Law of Treaties,** Malcolm N Shaw in his book entitled **"International Law"** Forth Edition at page 633, says the following –

"The 1969 Vienna Convention on the Law of Treaties partly reflects customary law and constitutes the basic framework for any discussion of the nature and characteristics of treaties. Certain provisions of the Convention may be regarded as reflective of customary international law. Others may not be so regarded, and constitute principles binding only upon state parties

The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith. This rule is known in legal terms as ***pacta sunt*** **servanda** and is arguably the oldest principle of international law. It was reaffirmed in article 20 of 1969 Convention, and underlies every international agreement. It is not hard to see why this is so. In the absence of a certain

> minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other."

It is expedient for us to also expressly state and note what the learned author has written in that book at pages 636 to 641 on the subject of the making of treaties, in particular on issues of consent by signature, consent by exchange of instruments, consent by ratification and consent by accession, as follow: Treaties may be made or concluded by the parties in virtually any manner they wish. There is no prescribed form or procedure, and how a treaty is formulated and by whom it is actually signed will depend upon the intention and agreement of the states concerned. Where precisely in the domestic constitutional establishment the power to make treaties is to be found depends upon each country's municipal regulations and varies from state to state. In the United Kingdom, the treaty making power is within the prerogative of the Crown, whereas in the United States it resides with the President with the advice and consent of the Senate and the concurrence of two-thirds of the Senators.

Be that as it may, there are certain rules that apply in the formation of international conventions. Once a treaty has been drafted and agreed by authorized representatives, a number of stages are necessary before it becomes a binding legal obligation upon the parties involved. A consent of the states parties to the treaty in question is obviously a vital factor, since states may (in the absence of a rule being also one of customary law) be bound only by their consent. Treaties are in this sense contracts between states and if they do not receive the consent of the various states, their provisions will not be binding upon them.

There are, however, a number of ways in which a state may express its consent to an international agreement. It may be signaled, according to article 11 of the 1969 convention, by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession. In addition it may be accomplished in any other means, if so agreed.

A state may regard itself as having given its consent to the text of the treaty by signature where the treaty provides that signature shall have that effect or where it is otherwise established that negotiating states were agreed that signature should have that effect, or where the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations. Although consent by ratification is probably the most popular of the methods adopted in practice, consent by signature does

retain some significance, especially in light of the fact that to insist upon ratification in each case before a treaty becomes binding is likely to burden the administrative machinery of government and result in long delays. Accordingly, provision is made for consent to be expressed by signature. This would be appropriate for the more routine and less politicized of treaties. However, where the convention is subject to acceptance, approval or ratification, signature will become a mere formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection. In such cases and pending ratification, acceptance or approval, a state must refrain from acts which would defeat the object and purpose of the treaty until such time as its intentions with regard to the treaty have been made clear.

Article 13 of the 1969 Convention provides that the consent of states to be bound by a treaty constituted by instruments exchanged between them may be expressed by that exchange when the instruments declare that their exchange shall have that effect or it is otherwise established that those states had agreed that the exchange of instruments should have that effect.

The device of ratification by the competent authorities of the State is historically well established and was originally devised to ensure that the representative did not exceed his powers or instructions with regard to the making of a particular agreement. The rules relating to ratification vary from country to country. In the United Kingdom, although the power of ratification comes within the prerogative of the Crown, it has become accepted that treaties involving any change in municipal law, or adding to financial burdens of the Government or having an impact upon the private rights of British subjects will be first submitted to Parliament and subsequently ratified. Different considerations apply in the case of the United States. However, the question of how a State effects ratification is a matter for internal law and outside international law.

Article 14 of the 1969 Vienna Convention notes that ratification will express a State's consent to be bound by a treaty where the treaty so provides; it is otherwise established that the negotiating States were agreed that ratification should be required; the representative of the State has signed the treaty subject to ratification or the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during negotiations.

Within this framework, there is controversy as to which treaties need to be ratified. Some writers maintain that ratification is only necessary if it is clearly contemplated by the parties to the treaty, and

this approach has been adopted by the United Kingdom. On the other hand, it has been suggested that ratification should be required unless the treaty clearly reveals a contrary intention. The United States, in general, will dispense with ratification only in the case of executive agreements.

Finally, consent by accession is the normal method by which a State becomes a party to a treaty it has not singed. Article 15 of the 1969 Convention notes that consent by accession is possible where the treaty so provides, or the negotiating states were agreed or subsequently agree that consent by accession could occur in the case of the State in question.

Article 2 of the 1969 Convention defines a reservation as –

> "A unilateral statement, however phrased or named, made by a State, when signing, ratifying, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

This means generally that where a State is satisfied with most of a treaty, but is unhappy about one or two particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement. To constitute a reservation that word itself need not be used in the written communication in question. What is clearly required is the intention to modify the legal effect of a particular provision and this should not be too generously interpreted

Respecting entry into force of a treaty, it is important for us to note that even though the necessary number of ratifications has been received for the treaty to come into operation, only those States that have actually ratified the treaty or who have acceded to it will be bound. The treaty will not bind those States that have merely signed it, unless of course, signature is in the particular circumstances regarded as sufficient to express the consent of the State to be bound

Malcolm Shaw's statement, at pages 661 to 662 of his book cited above, on the effect of municipal law respecting invalidity of treaties, is quite instructive. A State cannot plead a breach of its constitutional provisions as to the making of treaties as a valid excuse for condemning an agreement. There has been for some years disagreement amongst international lawyers as to whether the failure to abide by a domestic legal limitation by, for example, a Head of State in entering into a treaty, will result in rendering the agreement invalid or not. The Convention took the view that in general it would not, but that it could in certain

circumstances. Thus article 46 of the 1969 Vienna Convention provides that –

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

Violation will be regarded as manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice, and in good faith. It should also be noted that a State may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation. This is a general principle of international law whose application in the law of treaties is by virtue of article 27 of 1969 Vienna Convention.

Before considering the case authorities cited in the course of the hearing of the instant appeal, we would like to first and briefly focus on the status of the ILO Convention No. 158, thus the convention concerning termination of employment at the initiative of the employer. The Convention was ratified by or entered into by Malawi on 1st October, 1986. In accordance with its article 16 (3), the Convention, therefore, came into force for Malawi twelve months after the date on which Malawi's instrument of ratification had been registered with the Director General of the International Labour Office. The Convention, in its Part IV, on Final Provisions, does not prescribe any other conditions precedent to the effectiveness of the Convention for Malawi except the lapse of a period of twelve months after the registration of its instrument of ratification with the Director General of ILO. By then, the instrument of ratification was executed either by the Life President of Malawi or the Minister of External Affairs. It is important to note that the Life President was then his own Minister of External Affairs.

It is important to note that although under section 18(1) of the 1966 Constitution the legislative power of the republic was vested in the Parliament, consisting the President and the National Assembly, the determination as to whether to enter into or accede to treaties and conventions was the prerogative of the Life President or the Minister of External Affairs. Essentially, this was an executive act. The 1966 Constitution did not have equivalent provisions to those in section 211 (1) of the Constitution, which had been introduced in the Constitution by way of amendment enacted by Act No. 13 of 2001. So, until that amendment had been introduced, then, there had not been any express constitutional or statutory requirement to the effect that any international agreement entered into would only form part of the law of

the Republic if so provided by or under an Act of Parliament. Until the 2001constitutional amendment, in that regard, there was no general requirement for a domestic legislation as a condition precedent for the effectiveness or operation of a treaty in Malawi. In fact, the 1966 Constitution was completely silent on the matter and the 2001 amendment to the Constitution is further testimony that the law was other than what the amendment (Section 211(1)) in fact introduced in that regard. So regarding any particular treaty, then, it depended on the wishes of the negotiating State parties and indeed the particular provisions of each treaty or any international agreement concerned if they so expressly required. Otherwise, generally, it was not a prescribed requirement to be observed in entering into or acceding to any international agreement. This explains why any glance at the list of Statutes of Malawi, does not give the impression that Malawi is a party to quite a considerable number of international agreement. Besides, a perusal of the Treaties and Conventions Publication Act, (Cap. 16:02) clearly bears out that position.

That statute was not then and is not currently designed for the purposes of S 211(1), in that regard, as it is quite manifest from its Section 4; but it is merely and principally intended to effect dissemination of the information respecting treaties and conventions to which Malawi is a party. It is an unrealized attempt at aiding or facilitating the production of an uptodate information material akin to what would have been a treaty series of Malawi, were there to be any such publication.

In the circumstances, this Court's decision in **Chakufwa Tom Chihana –v- The Republic, MSCA Criminal Appeal No. 9 of 1992 (unreported)** and the High Court decision in **Guwendi –v- AON Malawi Limited Miscellaneous Civil Cause No. 25 of 2000 (unreported)** to the extent that they purportedly indicated that the law on the point then was as it is after the amendment of 2001 to Section 211(1) were wrong and should be and are overruled. In the circumstances, it is our considered view that the learned Judge did not commit an error in law when he applied ILO Convention 158. For the avoidance of doubt, that Convention should be considered as being applicable to Malawi under Section 211(2) of the Constitution. It should be observed and pointed out that there is no Act of Parliament, at the meantime, which has provided to the contrary. We, therefore, have dismissed grounds (a) and (b) accordingly.

We now revert to the consideration of ground (c), as to whether the learned Judge erred in law in adopting the decision in the case of **Bristol Channel Ship Repairs –v- O'Keefe** case without considering that the decision in that case was based on the provisions of statutes which do

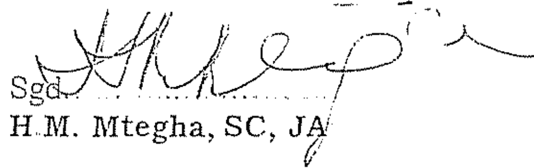
not apply to Malawi. It is quite clear to us that the learned Judge was well aware of the fact that that decision did not have any binding force. He expressly observed that the decision merely had persuasive force or authority. In our considered view the learned Judge was quite correct in his observation and he cannot be faulted. We so decide, and ground © is dismissed accordingly.

Finally, we revert to ground (d) which is also the last ground of appeal, namely, whether having found that the 2nd respondent had indicated that he was made aware through the workers union that the retrenchment would target non-performers, the learned Judge erred in law by rejecting that consultations were done with employees. To begin with, as to whether or not any consultations had been done with employees was a question of fact to have been decided by the learned Judge in the light of the evidence on the record and also against the background of the requirements under articles 13 and 14 of ILO Convention respecting procedure for fair termination where an organization is conducting mass dismissals or terminations. A glance at the record as to the evidence before the Industrial Relations Court on this point, quite abundantly shows that the appellant had not complied with the said procedure for effecting redundancies. Besides, the appellant did not even comply with the minimum requirements in accordance with the prevailing practice as per the policy statement issued by the Ministry of Labour in that regard. Thus, the record clearly shows that there were no consultations with employees. We accordingly share the sentiments of the learned Judge that indeed the consultations must in fact entail a genuine engagement of the employees in the process of restructuring. It should not merely be a purported attempt at effecting a unilateral notification from the employer to employees, in a manner which does not at the same time seek a feed back from the employees. In the instant case, the respondents were not, thus, communicated to and it was in evidence that only members of senior management were engaged in the making of the selection and recommendation of the number of employees whose employment contracts had to be terminated thereby.

Such having been the state of affairs in the instant case, we cannot fault the learned Judge in his considered view that there were no consultations between the employer and the employees. We have accordingly dismissed ground (d).

In the circumstances, we dismiss the appeal in its entirety, and we consequently and accordingly order that the matter reverts to the Industrial Relations Court for the assessment of damages

DELIVERED in Open Court this 7th day of May, 2007 at Blantyre.



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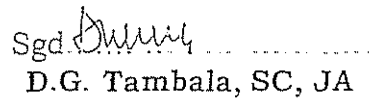
H.M. Mtegha, SC, JA



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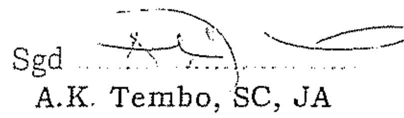

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