

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

LILONGWE REGISTRY

MATTER NO. 6 OF 2000

BETWEEN:

DAVISON TCHETE.....APPLICANT

-and-

SAFEGUARD SERVICES.....RESPONDENT

CORAM: HON. M.C.C. MKANDAWIRE, CHAIRMAN

Applicant presented (unrepresented)

Mr. C. Salima – Respondent's Representative

Mr. Lora – Official Interpreter

J U D G M E N T

This matter is brought by Davison Tchete the applicant. It is brought against Safeguard Services the Respondent. In his Statement of Claim, the Applicant has raised a trade dispute of dismissal. He is accordingly praying to this Court that he be awarded money for the outstanding 4 years service from 1985-89, 5 days unpaid annual leave and reference letter from 1985 to 1989.

The Respondent has filed in a defence. In their defence, the Respondent say that the Applicant after termination of service was paid his long service award from 1989 to 1999. As for the period from 1985 to 1989, the Applicant was under the employment of Mr. Bowler who later on sold Safeguard Services to Mr. Busilley. All those who were employed under the Management of Mr. Bowler got their dues from 1985-89 respectively including the Applicant.

The Applicant gave evidence first. He told the Court that he got employed by Safe Guard Services in 1985 as a security guard. He performed very well and he rose through the ranks up to the rank of Senior Operations Officer. Sometime in July, 1999, he fell sick. He went to Paula Private Clinic within Blantyre where he was treated and put on 3 days sick leave. He tendered the medical report as App Ex No. 3. He sent a message through his wife to inform the authorities at his place of work about this sickness and everything was well recorded in the occurrence book. As he was home sick, he got a message that his sister was very sick in Zomba. Later on, his father followed him to Blantyre with a sad

message that his sister had died. He again sent word to his place of work through the father about the death of his sister. Although he had not fully recovered, he went to attend the funeral of his dear sister. When he came back from the funeral, he decided to report for work although he had not fully recovered. To his amazement, on day one of reporting, he was even barred from attending a meeting at his place of work. Later on, he was served with a letter of termination of services which he tendered as App Ex 1. He was later on paid severance allowance from 1989 to 1999 i.e. 10 years. He tried to argue for the period from 1985-89. But he was told that for that period, the company was under Mr. Bowler and since he had sold it to Mr. Bussilley, new management under Mr. Bussilley was not responsible for the payment for the period between 1985-89.

The Applicant insisted that he was not aware of sell of the company to Mr. Bussilley as well as change of management. He was informed only at the time when he was pursuing this payment from the Respondent.

The Applicant further referred to the reference letter which was later on given to him. He said that the reference letter refers to the period from 1985 to 1999 as being the period of employment by the Respondent. He said that the reference letter does confirm that he had been employed from 1985 and not 1989. If he were employed in 1989, the Respondent would have given a reference to that effect.

The Respondent gave evidence through Mr. Charles Salima the Personnel and Administrative Manager. Mr. Salima explained that the Respondent's company having been bought by Mr. Bussilley in 1989, all the employees were made ware of this development. There was an agreement between Mr. Bowler the previous owner and Mr. Bussilley the current owner that Mr. Bowler would settle all the liabilities with the former employees from 1985 to 1989. That, Mr. Bowler did. Thus Mr. Salima said that for the 10 years from 1989-99, the Applicant was paid. As for the period between 1985-89, it is Mr. Bowler's responsibility.

The two parties were involved in a lengthy cross-examination by each side. The Applicant insisted that he was not aware of the sale of the Company to Mr. Busilley. He thus requested the Respondent representative if he could produce evidence that the former employees were paid for the period between 1985-89. He also wanted evidence from the Respondent if they could produce letters of re-appointments in 1989 if at all the period between 1985-89 was a closed chapter.

Finally, the Applicant wanted evidence that the Company was sold and what agreement was there between old and new management.

Before I do delve into these issues, I have an observation to make here in relation to the way the Applicant lost his job. There is unchallenged evidence from the Applicant that he was absent from work due to sickness. The medical report tendered in Court is not at all controverted by the Respondent. There is

again unchallenged evidence from the Applicant that news about his sickness was communicated to the Respondent. There is again unchallenged testimony that the Applicant whilst sick lost a sister. He had to attend the burial at all cost. A message was again sent to his office about this sad news. Mr. Salima for the Respondent did not at all challenge anything on these fundamental points. The Court therefore finds the action taken by the Respondent to have been extremely unfair. The Applicant had a valid reason as to why he could not report for work. If one is put on bed rest due to sickness, that is an automatic justification for absencing oneself from work. The death of the sister just followed the main event. The course of action the Respondent took was again extremely unfair. When the Applicant reported for work, he was not at all afforded an opportunity to be heard before being condemned. He was instantly served with a letter of termination without finding out from him as to what had happened.

This matter arose in July 1999 before the Employment Act, 2000 came into force which Act has stipulated the procedure that an employer has to follow before termination of employment. But although such is the case, this Court which stresses more on equity (fairness) than legalism has now and again invoked Section 31 of the Republic Constitution which says:-

"Every person shall have the right to fair and safe labour practices and to fair remuneration."

The term fair labour practices is indeed interpreted widely. This Court has now and again sought the aid of International Labour Convention of the ILO in trying to understand what fair labour practice is. More to that, Malawi has ratified a lot of ILO Conventions of which one is Convention 158 on termination of employment. This Convention which has been applicable to Malawi since around 1985 stipulates in Article 4 as follows:-

"The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity or conduct of the worker or based on operational requirements of the undertaking, establishment or service."

This ILO Convention has thus been time and again used to assist in interpreting what fair labour practice requires. Certainly it requires that there be a valid reason before an employer can terminate services of an employer. There was no valid reason here because the Applicant was sick. Had he been asked by the employer, he could have produced such evidence which he has today produced in Court.

The other limb to this Convention is Article 7 which deals with the procedure prior to or at the time of termination. This article provides:-

"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

This article is very clear and loud. The Applicant herein was not at all given any opportunity to be heard. All he got was a khaki envelope which had a letter of termination. This type of practice is very unfair.

In the case of **CHARLES MPONDA THUKUWA –VS- BLUEBIRD MOTEL LIMITED**, IRC Matter No. 28 of 1999 decided by the Industrial Relations Court at Blantyre-Limbe on the 25th of September 2001, this Court made a similar observation. On page of the judgment, the Court said:

"To put it in a nutshell, therefore, the applicant was fired without any reasons being given to him. Apart from that, the applicant was fired orally without any chance being given to him to defend himself."

I therefore find that the Respondent herein were in flagrant violation of the Labour rights of the applicant as enshrined in Section 31 of the Republic Convention echoed in the International Labour Standards of the ILO.

The Respondents were given 14 days to produce evidence that the Applicant was re-employed in 1989 that the Applicant was paid his dues for the period between 1985-89 and the take over agreement between old and new management. I am afraid to say that this has not been honoured. The documents are not forthcoming. The Court therefore concluded that failure to produce the said documents or evidence is clear testimony that they have none.

I therefore found that the Applicant was not at all paid his long service benefits for the period of 4 years from 1985-89. I thus order that the Respondent immediately pay him these benefits based on the calculations they used from 1989-1999. I also order that he be paid for the 5 days unpaid annual leave. As for the reference letter, I do find that he was given one after the commencement of this case. Thus there is no need to make an order on this point.

I have observed with deep concern that the Respondents greatly violated the labour rights of the Applicant. This has already been explained in the judgment. This Court is putting it on record that employers should be made to understand that gone are the days when an employer would dismiss an employee without affording an employee the chance to be heard. The dismissal should also be accompanied with valid reasons. Certainly, there was no justification here to terminate the services of the Applicant. This was totally unfair termination. In such circumstances, this Court which stresses more on equity has readily awarded compensation to the Applicant. I therefore do award such compensation which would amount to three months salary for the unfair termination. The money

to be paid immediately. The Registrar of the Industrial Relations Court to immediately assess the amount of money for the period between 1985-89. He should do this in consultations with the Respondents.

DELIVERED this ----- day of April 2002 at Blantyre/Limbe.

M.C.C. Mkandawire

HON. CHAIRMAN