



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 1003 OF 2015

BETWEEN

MADALITSO SIWAKWE PLAINTIFF

AND

PRIME INSURANCE COMPANY LIMITEDDEFENDANT

CORAM : HER HONOUR MRS. BODOLE, ASSISTANT REGISTRAR

Kaluwa, of Counsel for the Plaintiff

Maliwa, of Counsel for the Defendant

Ms. Kazembe, Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The plaintiff brought proceedings against the defendant claiming damages for pain and suffering, loss of amenities of life, disfigurement, special damages and costs of the action. Judgment by consent was entered by the parties on 11th October, 2017. The Court then proceeded to make an award on special damages as pleaded. The matter has now come for assessment of damages.

The Evidence

On 4th September, 2015 the plaintiff was hit by a motor vehicle registration number KK 3205 Tata bus near Somba Trading Centre along Machinga/Zomba road. The bus was insured by the defendant.

As a result of the accident the plaintiff sustained injuries. According to the medical report the plaintiff sustained dislocation of the left shoulder, multiple cut wounds on the left shoulder, left forearm, left hip, right foot, left leg and bruises on the left shoulder. The wounds were sutured and dressed with iodine. The surgical procedure of reduction of dislocation was performed on him.

The plaintiff has developed scars on the left shoulder, left lower leg running from the knee going down to the middle lower leg, and under the foot in the middle of the foot.

The plaintiff has been going for physiotherapy at Kachere Rehabilitation. He is unable to walk long distances as the leg swells and he feels pain. He is able to do his job as a businessman. The plaintiff's permanent incapacity has been assessed at 22%.

General Law on Damages

A person who suffers bodily injuries due to the negligence of another is entitled to the remedy of damages. Such damages are recoverable for both pecuniary and non-pecuniary losses. The principle underlying the award of the damages is to compensate the injured party as nearly as possible as money can do it – **Elida Bello v Prime Insurance Co. Ltd** Civil Cause No. 177 of 2012 (unreported).

The damages cannot be quantified in monetary terms by use of a mathematical formula but by use of experience and guidance afforded by awards made in decided cases of a broadly similar nature – **Wright v British Railway Board [1983] 2 AC 773**. The court, however, considers the time the awards were made and currency devaluation – **Kuntenga and Another v Attorney General** Civil Cause No. 202 of 2002.

The non-pecuniary head of damages include pain and suffering, loss of amenities of life and loss of expectation of life. These are assessed by the court. Pecuniary loss must be pleaded and proved - Renzo Benetollo v Attorney General and National Insurance Co. Ltd Civil Cause No. 279 of 1993 (HC).

Pain and Suffering

Pain and suffering is attributable to the plaintiff's injury or to any necessary surgical operations and mental anguish such as that suffered by a person who knows that his expectation of life has been reduced or who being severely incapacitated, realizes the condition to which he has been reduced – Sakonda v S.R. Nicholas Civil Appeal Cause No. 67 of 2013.

It is clear from the evidence that the plaintiff suffered great pain and is still suffering. He sustained dislocation of the left shoulder, multiple cut wounds on the left shoulder, left forearm, left hip, right foot, left leg and bruises on the left shoulder. Reduction of dislocation was done and the wounds were sutured and dressed with iodine. He had to undergo physiotherapy at Kachere Rehabilitation. He is unable to walk long distances as he feels pain and the leg swells.

Loss of Amenities of Life

Loss of amenities is attributable to deprivation of the plaintiff's capacity to engage in some sport or past-time which she formerly enjoyed – Kanyoni v Attorney General [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do.

It is clear from the evidence that the plaintiff is unable to enjoy life as he used to. He is unable to walk long distances due to the pain he feels in his leg and his leg swells.

Deformity/Disability

Disability is a limitation either physically or mentally for someone to do what any other person can do without reasonable accommodation. In Ching'amba v Deerless Logistics Ltd Civil Cause No. 2888 of 2007 the court stated that

disfigurement is not a matter to be taken lightly and casually. It is something that one has to live with permanently.

The plaintiff has scars on the left shoulder, left lower leg running from the knee going down to the middle lower leg and a big scar under the foot. He will have to live with these scars which have disfigured his body.

Award of Damages

In **Owen Kayira and 2 Others v Unusu Shaikh** Personal Injury Cause No. 1160 of 2013 the 2nd plaintiff sustained a head injury and multiple soft tissue injuries over the head. The court ward him a sum of K2,500,000.00 on 1st July, 2014. In **Norah Malichi (A Minor by her father and next friend, Henry Malichi v Prime Insurance Company Limited** Civil Cause No. 2613 of 20009 the plaintiff sustained a fracture of the left tibia, cut wound on the scalp, bruises on the face and swollen head. The court awarded him a sum of K4,500,000.00 for pain and suffering and loss of amenities of life on 29th May, 2012.

The injuries suffered by the plaintiff in the present case is in between the injuries suffered by the plaintiffs in cases cited above. He sustained cut wounds on different parts of his body and a dislocation of the left shoulder. He sustained no fracture. I, therefore, award the plaintiff a sum of K1,300,000.00 as damages for pain and suffering, K800,000.00 as damages for loss of amenities of life, and K800,000.00 as damages for disfigurement. I award the plaintiff costs of the assessment proceedings.

Conclusion

In conclusion, the plaintiff is hereby awarded a total sum of K2,900,000.00 and costs of the assessment proceedings.

Pronounced in court this 18th day of February, 2018 at Blantyre.



EDNA BODOLE (MRS)

ASSISTANT REGISTRAR



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NUMBER 283 OF 2013

BETWEEN

MAJOR HARRY SOKO PLAINTIFF

-and-

MOTA ENGIL DEFENDANT

CORAM : Z. J.V. NTABA, J. HONOURABLE
: Dr. M. Nkhata, Counsel for the Plaintiff
: Mr. Mussa, Counsel for the Defendant
: Mr. A. Nkhwazi, Court Clerk and Interpreter
: Mrs. G. Chirombo, Court Reporter

JUDGMENT

1.0 THE PLAINTIFF'S CASE

- 1.1 The Plaintiff, Major Harry Soko, a retired Army officer employed by Mota Engil, a company engaged in the construction business in various projects across Malawi as a Human Resources Manager commenced an action by writ of summons for constructive dismissal. He indicated that he is a holder of a Bachelor of Human Resource Management from Chancellor College.
- 1.2 The Plaintiff did not call any witnesses but testified himself by adopting his witness statement which entered into evidence as **Exhibit PD 1**. He confirmed that he had been engaged as a Human Resources Manager with a military background at Kayelekera Uranium Mine as that was what the Defendant was looking. He stated he was engaged directly by Mr. Gilberto Rodrigues who was then the Director of the Defendant Company. The contract was orally negotiated and he was not given a copy of the contract although he recalled that he had signed. He was employed from 2008 to 2011. He produced payslips to show that he was paid as the Human Resources Manager. He also produced several company business card which bore

Resources Manager. He also produced several company business card which bore his name and designation which were marked **Exhibit PD20**. He stated he did not know which company would give a person such documents if he was not its Human Resources Manager. The payslips were marked **Exhibit PD2 to PD7** and they were from October 2008 to February 2009.

- 1.3 Whilst at Kayelekera, he was annually assessed by the Project Manager (PM) and the document was called a Key Performance Indicator (KPI) Report. Upon completion, his supervisor would print the KPI report and sign it as supervisor as would he with is designation as Human Resources Manager. He tendered it as part of his evidence and it was marked **Exhibit PD8** and the payslips dated 31/07/11 and 31/12/11 were marked **Exhibit PD9-PD10**. He also applied for upgrading from associate member in the Institute of People Management of Malawi (IPMM) of which he was a member. The Institute's forms were signed by him and he indicated that he was the Human Resources Manager and the PM signed as his immediate supervisor and Mr. Blake Mhatiwa as overall supervisor. He tendered the same as **Exhibit PD11**.
- 1.4 He testified that the main event that triggered his move from Kayelekera concerned a quarrel with the PM from Zimbabwe regarding a Malawian Mechanical Engineer (holdind a Bachelor's degree from Chancellor College) but working in the vehicle shop and not allowed to manage the workshop but it was entrusted to an unqualified Zimbabwean. At this point, he also showed the court and identified a document which indicated a restructuring at the Defendant's company which was signed by Mr. Antonio Viera, who was the Project Director based in South Africa and in-charge of all African mines. The document indicated new title to the Human Resources Superintendent and it was marked **Exhibit PD12**. He tendered the 29/02/12 payslip whereby he was paid as the Human Resources Manager which was marked **Exhibit PD13**.
- 1.5 Allegedly during a management meeting whilst at Kayelekera, one of the Defendant's agent indicated that there was no proper person to run the workshop because there was no competent person, which the Plaintiff opposed. He thereafter became sick and was taken to the hospital but on returning to work the next day, the PM shouted at him and said he was absent. The following day he was officially communicated via email by Mr MacDonald Maliro which is **Exhibit PD 14** that he was transferred to Nacala Corridor project as a Human Resources Technician. The Defendant's PM then snatched the keys to his official vehicle, a Toyota D4D Double Cabin. This was done in public and in front of junior employees thereby embarrassing the Plaintiff. He was further informed to travel with a colleague to Lilongwe who would drop him with his luggage in Lilongwe and after which he

would travel to Zalewa. He also showed and identified 31/07/12 and 31/10/12 payslips where he was being paid as Head of Human Resources and tendered and marked **Exhibits PD15 and PD16**. Whilst in Lilongwe he indicated that he was showed and identified a list of positions which existed at Nacala Corridor project but did not include the position of Human Resources Technician, that is it was non-existent and he indicated so to the Human Resources Manager at the headquarters that he was not ready to take up a position that was not in existence unless it was higher. This was marked as **Exhibit PD17**.

- 1.6 Subsequently the Plaintiff moved to the Nacala Corridor Project but was based, firstly in Blantyre then in Mwanza. However, whilst in Blantyre, the position was re-designated to Human Resources Senior Officer. Incidentally in Blantyre he was involved in a disagreement with another senior employee over the latter's treatment of another employee and this disagreement was reported to the Defendant via email as evidence by **Exhibit PD 19**. Immediately he was transferred again to Mwanza on a Friday where he was required to move to immediately. There he found that there was no work for him to be doing. Consequently, from April 2012 to about November 2012, he found himself sitting idle in Mwanza Hotel.
- 1.7 For his time in Mwanza, he was requested to negotiate a dispute at Kanyemba Quarry where employees were protesting against overtime pay and mistreatment by one of their supervisors. He prepared a report of what transpired in the discussions at the quarry and made recommendations on the resolution of the dispute and it was marked **Exhibit PD18**. Incidentally he recommended that the Defendant's employees, Mr Joao Sequiera should get counseling on how to deal with people. Following the report submission he was informed that he had been transferred to Lilongwe. This transfer again happened on a Friday and he was required to report on the following Monday. He was denied transport to travel to Lilongwe as such he took a minibus.
- 1.8 In Lilongwe, he met with Sandra Bento, an employee in the Human Resources Department and she informed him that his transfers around the country were because there were allegations that he had been instigating strikes at the various project sites as reported by Blake Mhathiwa in terms of Kayelekera and by Sorgion Siapon in terms of Mwanza. He responded by asking her as to why he had never been charged with any misconduct if this was indeed the case but he got no satisfactory response. After the conversation with Sandra Bento, he was showed the office space that he was supposed to occupy which turned out to be commonly shared space with junior employees like mail sorters and some of whom were recruited by him. Incidentally, the Defendant did not also provide him with

accommodation nor transportation. He testified that this conduct was different from their conduct on previous occasions when he visited the head office where they would organize accommodation and transport for him. He discussed with Ms Bento that since his accommodation and transportation was not ready, he would take 2 days and travel to Zomba whilst the Defendant sorted the issues out.

- 1.9 In cross examination, he indicated that he became frustrated and gave up his job. He also believed that he was constructively dismissed decided due to the various acts by the Defendant. He conceded that his salary was not reduced during the time he was being moved around but the nomenclature of his position kept changing.
- 1.10 After failing to resolve his issues with the Defendant, he lodged a complaint with the labour office and where both he and the Defendant were summoned to appear. The parties had a discussion the Labour Office but the differences between them were not resolved hence his termination of the contract afterwards. Notably, Ms. Bento stated that he could not be trusted and which she insisted should be included in the report of the Labour Office. Ms Bento appeared at the Labour Office with a lawyer. She also conceded that the vehicle was snatched from the Plaintiff. They also conceded that he bore the Human Resources Manager title at some point. He tendered the evidence indicating the contents of the discussions at Zomba District Labour Office which were marked **PDD1**.

- 1.11 The Plaintiff in arguing the law, firstly cited section 60 Employment Act –

An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship.

- 1.12 In **Banda v Dimon (Malawi) Ltd** (2008) MLLR 92, the court noted that if the employer is guilty of conduct which amounts to significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performances. If he does so then he terminates the contract by reason of the employer's conduct. He is said to be constructively dismissed. The employee is entitled, in those circumstances, to leave at the instant without giving any notice at all. Secondly, there is also an implied term of the contract of employment that employers will not behave in a way which is not in accordance with good industrial practice or create a situation which is intolerable or is such that an employee cannot be expected to put up with any longer. It also noted that a fundamental breach of contract may be made up of

a series of small breaches the last of which provides the straw which finally “breaks the camel’s back”. Then the court must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. The court must examine what that conduct is so as to see whether it amounts to a renunciation or an absolute refusal to perform the contract and whether the other party may accept it as a reason for non-performance on his part. The proof of whether a breach of contract amounts to repudiation is a serious matter not to be lightly found or inferred. Lastly, where the employment of an employee has been unjustifiably brought to an end, the employee has a right of action for wrongful dismissal.

- 1.13 In **Nazombe v Malawi Electoral Commission** (2008) MLLR 46 where the court held that constructive dismissal under section 60 of the Employment Act presupposes that the employee has terminated his/her contract of employment with or without notice. Where an employee is put in a lower office, even if he maintains his salary but is made to give up some benefits this is constructive demotion. As per fair labour practices, charges must be framed against the employee and his/her side heard before disciplinary action is taken.
- 1.14 In **Changa v SS Rent A Car** (2008) MLLR 373 the court observed that termination of a contract is unfair if it amounts to unfair or a constructive dismissal and where an employer breaches a fundamental term of the employment contract, an employee is entitled to repudiate the contract. The burden is on the employee to show that a fundamental term of the contract was breached which made the continuation of the employment contract unreasonable. So where an employee proves on a balance of probabilities that the dismissal was in fact constructive dismissal, the court must find in terms of section 59 of the Employment Act that the dismissal is unfair. Lastly in *The State and another Ex Parte Mpinganjira*, Miscellaneous Civil Cause No. 63 of 2003 (HC) [Unrep] the court held that –

“The employee, aware of the employer’s repudiatory breach must act promptly to accept or confirm the breach. The employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will lose his right to treat himself as discharged. In such cases, what is reasonable depends on the circumstances of the case and the length of employment.”

- 1.15 The Plaintiff’s assessment was that after working at Kayelekera Uranium Mine, he found himself being moved from one project to the other. He testified that in all these transfers, he was of the belief that they were normal movement until the discussion with Sandra Bento. It was realized at this point the Defendant had issues with him in terms of allegations that he was instigating strikes of other employees.

- 1.16 Furthermore, he argued that a demotion which is the basis of a constructive dismissal need not be accompanied by a salary reduction or a withdrawal of any benefits and amenities. Notably, his salary was not altered during the time he was being moved from the one post to the other. However the other circumstances surrounding his movements indicate that demotions were associated with the movements. For example, the email giving him instructions to transfer from Kayelekera clearly states that he was meant to take up the position of Human Resources Technician at the Nacala Corridor Project. Consequently, this position did not exist at the material time and was clearly a lower designation than Human Resources Manager. Furthermore, the Defendant deliberately embarrassed him by snatching the car. Coincidentally, no reasons were given by the Defendant as to why they did not adopt a more courteous approach in retrieving the vehicle keys.
- 1.17 The Plaintiff's further movement from Blantyre to Mwanza was abrupt and followed some disagreements with other members of staff. Furthermore it was not correct to posit that his transfer from Mwanza to Lilongwe was in the ordinary course of events. As noted he found that he had no office space in Lilongwe when he arrived and no efforts were being made to make space for him to utilize as an office. If it had been a planned transfer, his opinion was that he would have arrived to find the office space already organized? He stressed that when he moved to Mwanza he also stayed for a long period of time without being assigned any meaningful work. He was technically made redundant while still in the Defendant's employ.
- 1.18 He pleaded with the court not to conclude that he terminated his contract prematurely without exhausting other possible avenues for resolving the matter. It was his contention that there were no further avenues to resolve the issues that he had with the Defendant. Consequently, evidence in court which was not contradicted, was that he was required to report to his next in charge and in the present case this was Sandra Bento. He had had over time raised several queries with the Defendant's agents but no feedback had been forthcoming. It was the unresponsiveness of the Defendant's system that forced him to approach the Labour Office for assistance. Mediation at the Labour Office was curtailed after it failed to resolve the parties' difference within the prescribed 30 day period. Clearly, the recourse to the labour office and this court was not premature. Besides, the law requires anyone who claims to have been constructively dismissed to act promptly and not to condone the acts the basis of the constructive dismissal.

- 1.19 It was his submission that the law requires the Plaintiff to prove his case on a balance of probabilities. This means that his evidence must make the court think that his version of events is more likely true than not. The constructive dismissal in this case was effected by the occurrence of more than one event. Rather there was a culmination of events over the Plaintiff's engagement with the Defendant that resulted in the latter creating a situation in which it was unreasonable for the former to continue in his position. The final straw that broke the Plaintiff's back was, of course, the treatment he received when he was transferred to Lilongwe from Mwanza and the circumstances surrounding his transfer. He submitted that the court find in his favour on all his claims and that the matter be remitted to the Registrar for assessment of damages.

2.0 THE DEFENDANT'S CASE

- 2.1 The Defendant presented their case through two (2) witnesses. The first witness (DW1) was Olga Pereira. She indicated that she worked at the head office in Lilongwe. She indicated that she started working for the Defendant on 25th June 2013. She testified that she was not present during the time when the issues affecting the Plaintiff happened. She identified her signed witness statement and tendered the same as part of her evidence and it was marked **Exhibit DD1**.
- 2.2 She testified that she knew about the issue of Mr. Soko as she worked in the human resources department and this was one of the cases which was still pending. She indicated that she came across **Exhibits DD1 and 2**, when she was looking at the files. They were letters sent to the Human Resources Manager by Mr. Soko. Whilst **Exhibit DD2** was marked the Termination letter. The response to **Exhibit DD 2** was dated 10th June, 2013 written by Jones Dinis and marked as **Exhibit DD 3**.
- 2.3 She stated that the Defendant had several projects within the country and that staff are often moved between the projects and that as a result of these movements' staff can change the designation of their positions as they move. On cross examination she indicated employees joining the company are not forewarned of such possible changes in designation as they join the company. When asked further whether the Defendant had a circular or directive forewarning employees about the changes in the nomenclature of their positions as they move in between projects she also replied in the negative.
- 2.4 DW 2 was Carol Kanyumba, another employee who was employed in April 2012. She indicated that she knew the Plaintiff and was around on 27th April, 2013 when he came to Lilongwe as she met him. She adopted her witness statement and marked as **Exhibit DD4**. She confirmed that at the time the Head of Human Resources was

Sandra Bento whose office was in Lilongwe. She indicated that Sandra had informed them that the Plaintiff would be coming on Monday to join them. She further stated that the room allocated to him was not ready. She stated that he never came to occupy the office as he left the same day. He only came and discussed with Sandra but she did not know what they discussed. She testified that they had created a big space for him and after which they went for lunch but the Plaintiff left around 12 noon and 1pm and not after 3pm.

- 2.5 The Defendant's submissions in the main consist of their defence in the pleadings. It admitted that it employed the Plaintiff in its Human Resources Department but denied that he was employed as a Human Resources Manager. It further admitted that he was moved from Kayelekera to Nacala Corridor and later to Lilongwe where its Head Office is located. However, denied that the transfers were actuated by malice, ill-will and unfounded allegations. It was their testimony that the said transfers were normal within its organization since the Defendant operates many sites in the country.
- 2.6 It further averred that the termination of the employment contract by the Plaintiff was done by his own volition and it reluctantly accepted the same. It denied that the transfer from Kayelekera to Nacala Corridor to take the position of Human Resources Technician was a demotion as such in contravention of the principles of natural justice and fair labour practices. It was also submitted that the transfer from Nacala to Lilongwe to take the position of Human Resources Technician was not an un-procedural demotion as the Plaintiff claims.
- 2.7 Lastly, it denied that it insisted that the Plaintiff occupy the same office with junior members of staff, and argued that that was done as a temporary measure awaiting to find a suitable office for him and that the Plaintiff was duly aware. Therefore it denied any failure to provide him with accommodation and transport on his arrival in Lilongwe. It also denied that the parties failed to resolve the matter at the District Labour Offices due to lack of their cooperation. Therefore the Defendant denied that it constructively dismissed the Plaintiff. In conclusion it submitted that the Plaintiff commenced the action in the wrong forum as such the court should dismiss it with costs.

3.0 DETERMINATION OF THE CASE

- 3.1 Firstly, I will address the issue of whether this court is the right forum. The Defendant argued that this case was brought in the wrong forum and the court must dismiss it. Malawian laws do provide several fora where people can take their labour disputes. Apart from the courts, a person has the right to take his case to the District Labour Office for the resolution of labour disputes as stipulated under

section 64 of the Employment Act. From the evidence herein, it was clear that the Parties invoked this mechanism with the view of resolving the dispute but however such did not bring resolution.

- 3.2 Incidentally, upon the failure of the matter being resolved by the Labour Office, the Plaintiff was entitled to take his matter to another competent forum such as the courts. Actually it appears to me that even if he had not taken his matter to the District Labour Office and brought the matter straight to the courts, the courts would still have entertained the matter. As per Mzikamanda J's (as he then was) decision in the case of *Mwalwanda v Stanbic Bank*, Civil Cause No. 3256 of 2007 where he stated that the use of the District Labour Offices in employment matters is not mandatory.
- 3.3 Further, it must be made clear that the Plaintiff was not bound to institute his claim in the Industrial Relations Court (IRC) before coming to this court. I am aware that there are decisions of the High Court which suggest that it is the Industrial Relations Court that has original jurisdiction in labour matters and the High Court should dismiss them when they are brought before it at first instance. I do not think that is the correct position of the law. This court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. The High Court and the IRC, therefore, have concurrent original jurisdiction in labour/employment matters. Notably, this was also the observations in the *Mwalwanda* case. However, it is much easier for case management if labour matters are begun in the IRC but since the matter came to this court, I am duty bound to entertain it as per right but as a matter of justice. Therefore I hold that this court is an appropriate forum for this case. I will accordingly proceed to adjudicate the same on the merits.
- 3.4 Turning to the issue at hand, the Plaintiff is claiming damages for constructive dismissal. The law on constructive dismissal is provided for under s.60 of the Employment Act. This provision is clear, in that, it entitles an employee to terminate the contract of employment where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship. The plaintiff in this case claims that the Defendant made it unreasonable to expect him to continue the employment relationship. Therefore, my duty is to determine if indeed the Defendant made it so unreasonable to expect the plaintiff to continue in his employment.
- 3.5 Notably, the Act does not list examples of acts by the employer that would amount to constructive dismissal. Therefore the test in my view is, what must be determined is the effect of the conduct of the employer on the employment relationship. In the case of *Banda v Dimon (Malawi)* [2008] MLLR 92 at p 100, Ndovi J said the following -

"As Lord Denning MR has said in the case of Sharp ante:

"... if the employer is guilty of conduct which is significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled, in those circumstances, to leave at the instant without giving any notice at all."

A substantial change of duties, as already pointed out above, is an example par excellence of a fundamental breach of a contract: Coleman v Baldwin [1977] IRLR 342, as is a reduction of pay or salary: Marriott v Oxford & District Co-operative Society (No.2) [1970] 1 QB 186. There is also an implied term of the contract of employment that the employers will not behave in a way which is not in accordance with good industrial practice to such an extent that the situation is intolerable or is such that an employee cannot be expected to put up with it any longer, that was the formulation by Phillips, J in BAC v Austin [1978] IRLR 332, see also Coultaulds Northern Textiles Limited v Andrew [1979] IRLR 84, a very important authority on that proposition, i.e. constructive unlawful dismissal. The employee will in those circumstances be entitled to compensation: clause 46(3) of the Constitution refers."

- 3.6 Noted from the above quotation, one notes that Lord Denning's statement identified the breach as that going to the root of the contract of employment or which shows that the employer no longer intends to be bound by the essential terms of the contract as amounting to constructive dismissal. Further conduct amounting to constructive dismissal is behaviour of the employer which is not in accordance with good industrial practice to such an extent that the situation is intolerable. In the case of **Changa v SS Rent A Car** [2008] MLLR 373 where the IRC said -

"An employee can claim that his resignation was not of his own volition but was forced due to unreasonable conduct of the employer. Where the employer breaches a fundamental term of the contract, an employee is entitled to repudiate the contract. The burden is on the employee to show that a fundamental term of the contract was breached by the employer, which made the continuation of the employment contract unreasonable, see section 61(3) of the Employment Act and Fernandes v BIC Malawi (Pty) Ltd Matter No. IRC 308/2002 (unreported)."

- 3.7 **Farber v Royal Trust Co** [1997] 1 SCR 846 describes constructive dismissal as where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment- a change that violates the contract's terms-. Thus, the employee is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed.

- 3.8 In terms of the evidence before this court, it was exhibited by payslips, letters, business cards issued to the Plaintiff by the Defendant which confirmed that Plaintiff was employed as the Human Resources Manager. Undeniably that is the

evidence which was not contravened herein that he was employed as such. My perusal of the Plaintiff's payslips for the months of October, November and December 2008, January, February 2009, March, July and December, 2011 and February, 2012 as well as the four business cards that indicated his position. It was also noted that in the Defendant's letter of acceptance of termination of employment, **Exhibit DD 3** did not dispute the allegation that the nomenclature of the Plaintiff's position kept changing. However the letter merely justified the same as being aimed at suiting the Plaintiff to the sites which he was transferred to.

- 3.9 Consequently, it was not disputed by the Defendant that Mr. Rodriguez who was its Director orally employed the Plaintiff as a Human Resource Manager. Notably, they did not provide him with a copy of his signed contract. Incidentally, it is amazing that the Plaintiff did not insist for a copy to be provided especially when all his transfers started. However, it is also clear that the Defendant whether by intent or omission also failed to produce the said contract whether at the Labour Office or here in court despite making assurances of the same at the Labour Office.
- 3.10 Undisputed facts remain that the Plaintiff was from 2008 engaged by the Defendant as a Human Resources Manager and was initially based at Kayelekera Uranium Mine in Karonga. On or about the 25 May 2013, he was compelled to terminate his contract of employment after the Defendant had made it impossible for him to continue in his contract. Therefore I am of the considered opinion that on a balance of probabilities that the Plaintiff was employed as the Human Resources Manager of the Defendant. It was by a series of bad treatment that made him terminate his contract based on the argument of constructive dismissal.
- 3.11 Secondly, I had to determine what was the legal effect of the changes in the nomenclature of the Plaintiff's position at the Defendant's organization? The Plaintiff argued that he was demoted beginning from Kayelekera. The Defendant argued that that was not a demotion since the names were changed to suit the different sites. Further the Plaintiff's salary as conceded had not changed. It therefore could not be considered a demotion. The statement of the Industrial Relations Court in the case of *Nazombe v Malawi Electoral Commission* [2008] MLLR 460 on page 469 is very helpful -

"There has been an argument from the respondent that the applicant's salary and other remuneration remained the same. There is also an argument that her grade remained the same. Whilst I do agree that these did not change, but one has to look at it from an objective point of view. When we talk of demotion, we should look at it from a very wide perspective. The applicant was now re-allocated to an Internal Audit Office. This is an Office, which does not warrant the title holder (head) to have a Personal Secretary. There are only two Personal Secretaries in the whole institution, one for the Chairman and the other for the Chief Elections Officer. The applicant, by virtue of going to that Office will be reduced to performing the work, which is for a Copy Typist. In the eyes of everyone, the

applicant is now put in an Office of lower category. She may have her salary yes, but she is now being told to hand over the cell phone. This is a clear indication that she is now reduced to a different category, which is lower. This, the court finds to be constructive demotion. Having found that this was a demotion, the court will look at the procedure that was followed before she was moved. There is evidence from Mr Chimwaza that the applicant lambasted him in Mangochi. When the court looked at this evidence, it had some hesitation to believe it without a pinch of salt. The witness does not work alone at that office. For example, there were several officers at that workshop. How come that the Chief Elections Officer cannot even bring a single eyewitness to shed more light on this. Calling a boss such names in the presence of other officers, certainly could have attracted a lot of curiosity. The court, therefore, had some food for thought about what the Chief Elections Officer said. It received it with a pinch of salt."

- 3.12 It has become a principle of employment law where there is evidence of maintenance that is no reduction of an applicant's salary throughout the relevant time, courts have held that that this is not conclusive evidence that a demotion occurred. The proper approach to be taken when dealing with claims for demotion is to examine in detail the effect of the employer's action. In the *Nazombe* case the court held that taking the cell phone from the applicant was a reduction to a lower position as it was a deprivation of a benefit which the applicant was previously enjoying and was therefore a construction demotion. The court went further to look into the procedure that was followed by the respondent in demoting the applicant. Applying the principles announced in that case to the facts of the present case, I am of the opinion that the Plaintiff was constructively demoted.
- 3.13 In contextualizing the demotion herein, the Plaintiff was materially placed in a position fundamentally different from that for which he had been initially employed. It is trite law that the reduction of an existent benefit or job position such must be done with the consent of the employee. That was a fundamental breach of the contract of employment on the part of the Defendant.
- 3.14 My considered view is supported by the abundant evidence for instance at Kayelekera as Human Resources Manager, the Plaintiff was a decision maker and advisor to the PM. In terms of Blantyre and Mwanza, he was assigned the post of Human Resources Technician but it was a non-existent position. Furthermore, whilst at this position, he was not assigned any work. Whilst in Lilongwe, he was not provided with accommodation and transport within reasonable time as one would expect to be the case especially with an employee of a high position as he was. Therefore, the Defendant's admission that he was temporary allocated to an office that was used by his juniors so that he should share it with them was not only demeaning and embarrassing. Coincidentally, they could have assigned him to share an office with another senior person, but somehow such degrading treatment was considered by the Defendant as appropriate. Lastly, the evidence that Sandra

Bento's assertion that he was demoted because he had instigated strikes also offers insight on the issue of the Plaintiff's demotion.

- 3.15 The Defendant's conduct on the allegations by the Plaintiff's conduct of instigating strikes was very immature. My opinion and I am sure of other reasonable people, is that if an employer thinks that an employee is guilty of misconduct, the lawful way of addressing is to formally charge the employee of the misconduct and allow the employee to present his or her side of his or her story in full compliance with the principles of natural justice and not to subject the employee to punitive measures without the employee's knowledge. As this would not be in accordance with the interest of administrative justice or procedural fairness and prohibited under s.43 of the Constitution.
- 3.16 Lastly, if this court was to consider the Defendant's argument the Plaintiff was not employed as a Human Resource Manager and the renaming of his position to Human Resources Technician and finally Human Resources Senior Officer was due to title restructuring in the company. However as noted from **Exhibit PD 1**, there was once a change in his position's designation. Notably, this change in designation was preceded by a consultative process which the Plaintiff participated in. Surprisingly, the Defendant would have this court believe that the Plaintiff's other changes in designation were all normal. It is notable that no attempt to involve the Plaintiff in the changes were undertaken. The changes were being unilaterally implemented by the Defendant.
- 3.17 The totality of these factors lead me to the conclusion that the Defendant demoted the Plaintiff and made it unreasonable and unbearable for the Plaintiff to remain in its employment. Clearly, in the absence of express stipulations on the matter it is more probable than not that the Defendant was acting maliciously and not in following with a clear policy in terms of the Plaintiff. It must be plain therefore at this stage is that the Defendant's treatment and conduct amounted to constructive dismissal under the law.
- 3.18 In conclusion, regarding some of the disturbing issues which were indicated by the Plaintiff and not disputed by the Defendant, leave a lot to be desired in terms of how Mota Engil treats its Malawian employees. This court is abhorred that there seems to be a lack of proper policies known to employees of the organizations structures. Further that there are no processes for transfers for staff officers. It was obvious from the evidence that the Defendant has discriminatory practices against Malawians like having an unqualified expatriate run a workshop where there was a qualified Malawian. It is my opinion that the relevant Government Authorities need to seriously investigate these malpractices in the organization. The Republican Constitution guarantees Malawians protection from discrimination under section

20. Further, it also guarantees them under section 19 the right to be treated with dignity.

4.0 CONCLUSION

- 4.1 The Defendant's treatment and conduct of the Plaintiff, entitled him to be deemed to have been constructively dismissed by his employer. It did not matter whether the contract for the employment as a Human Resource Manager was orally reached upon because the evidence before this court proved that he was indeed employed as a Human Resource Manager.
- 4.2 The nature of the conduct resulted in a *de facto* demotion of the Plaintiff from the post of Human Resource Manager as the new positions were lower than what he was recruited for.
- 4.3 Accordingly, this court declares that the Plaintiff was indeed constructively dismissed and the Plaintiff who terminated the contract was right to do and the Defendant if found to be at fault and liable. I grant the reliefs sought by the Plaintiff and award him damages as prayed. The matter is remitted to the Registrar for assessment of damages. Therefore, the writ of summons herein thus succeeds with costs.
- 4.4 The Ministry of Home Affairs are ordered to investigate the allegation of unqualified foreign workers holding positions for which they should not be in accordance with Malawian employment law at the Defendant's Office and report to the court by 31st April, 2017.
- 4.5 The discriminatory practices and human rights violations alleged in terms of the Defendant's Malawian employees, these be investigated by the Ministry of Labour which shall report its findings and recommendations to the court by 31st April, 2017. To offer an independent view, the Malawi Human Rights Commission and the Office of the Ombudsman as per the Constitution are also urged to investigate these allegations as such would be in the best interests of Malawians.

I order accordingly.

Dated this 13th day of February, 2017 at Zomba.



Z.J.V Ntaba
JUDGE