IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 5 OF 2004

BETWEEN

MNELEMBA.…….…… ……..……...APPLICANT

-and-

BARLOWORLD PLASCOM LTD……..……... ……..RESPONDENT

CORAM: R ZIBELU BANDA (MS.); CHAIRPERSON
J E CHILENGA; EMPLOYERS' PANELIST
PADAMBO; EMPLOYEES' PANELIST
Chizuma; Ag. Deputy Chairperson
Ngwira; Of Counsel for the Respondent
Chitsakamire; Of Counsel for the Applicant
Ngalauka; Official Interpreter

JUDGMENT

1. *Dismissal- Reason-Gross Misconduct-releasing goods to customer without vetting creditworthiness-Taking on private work*
2. *Procedure-Right to be heard-Disciplinary hearing- Fair*

Facts

The applicant was employed by the respondent as Senior Sales Representative for the respondent. The respondents trade in paint. The applicant was entitled to give credit limit of up MK150 000-00 to a customer. In the event leading to the dismissal, the applicant gave credit facility of MK600 000-00 to a customer well above the authorized limit without any authority. The applicant was further accused of conducting private business with the respondent's business whereby the applicant received MK20 000-0 from the client and did not remit it to the respondent although at the time the client owed the respondent a lot of money. The applicant was invited to a hearing which took the form of a meeting to be asked about these incidents. The applicant was specifically asked to explain why he offered credit facility to a new customer without vetting his creditworthiness. He was also asked to explain the MK20 000-00 which he received from the respondent's client but did not credit it towards the client's account.

The applicant explained his side. His explanation did not convince the respondent. They decided to dismissed him from employment. The applicant was aggrieved by this

decision hence his claim to this court. The respondent on the other hand averred that the dismissal was fair.

The applicant also claimed 13th cheque for one year and performance incentives. The applicant proved that every year the respondent awarded its employees 13th cheque. At the time of dismissal the applicant had earned the 13th cheque for the year. The court agreed with the applicant. The applicant did not prove his claim for performance incentive. He adduced a document exhibit 'AP2' to show that between January and February the sales overshot the budgeted target. The applicant however claimed incentives for the whole year without any evidence that he had made sales above agreed targets. If anything the applicant is entitled to his individual percentage as incentive for the months of January and February 2003.

The Law

Section 57(1) of the Employment Act provides that before dismissal a person must be provided with a valid reason. While section 57(2) of the act provides that where the reason is connected with a person's conduct, he must be given an opportunity to be heard. It is held that in all cases of dismissal, an employee must be given a valid reason and an opportunity to state his case and defend himself; if one or both of these requirements are not complied with the dismissal is unfair. See; *Beseni v Education Department of Nkhoma Synod* [Matter Number IRC 320 of 2002 (unreported)] IRC.

Reason

Misconduct involving carrying on business in competition with the employer is an unfair labour practice which is condemned in all civilized labour markets. Misconduct involving carrying out functions with negligence is also an act of misconduct. The court found that the applicant was negligent when he offered credit facilities to a new client without verifying his creditworthiness. The court also found that the applicant committed an act of misconduct when he carried on private business with the respondent's client. The reasons for dismissal were therefore valid.

Procedure

The tried to show that he was not given a fair hearing. He stated that he was not aware of the allegations against him until he was asked to explain some anomalies in the course of a meeting. He considered that this was a disciplinary hearing. The court had a contrary view. The standard in labour and administrative matters is that where an employer has cause to discipline an employee and puts forward to that employee an allegation and asks him to respond, that fulfills the right to be heard. It does not have to take judicial or quasi judicial form to be a disciplinary hearing. In *Cornelios & others v Howden Africa Ltd t/a M&B Pumps* [1998] 19 ILJ 921, the Labour Court in South Africa held that:

> It does not matter whether each of the procedural requirements has been meticulously observed. What is required is for al relevant facts to be looked at in the aggregate to determine whether the procedure adopted was fair. One must guard against the rigid imposition of judicial style proceedings in inappropriate situations.

In a local case by this court; *Kumwenda v Paralegal Advisory Service and Youth Watch Society* [Matter Number IRC 447/2003 (unreported)], Mkandawire as he then was held that:

> Section 57(2) demands that the employer should afford an employee the opportunity to defend himself or herself. What this entails therefore is that there should be specific charges or a specific charge against the employee. The employee should then be given adequate time to respond to the charges. The hearing shall depend on the prevailing styles at the workplace. Some institutions have a disciplinary committee at their place of work. Some institutions will appoint specific officers to conduct the hearing. Some institutions have a Board of trustees or Directors. But what is important is that there should be a hearing whereby the employee is leveled with allegations. Some hearings will be orally conducted with the employee having a chance even to cross-examine potential witnesses, whilst some hearings will take the form of the employee responding to written allegations also in writing.

In the instant case the court heard that on 11 November the applicant was informed in writing about the allegations enunciated above, specifically about the account of Mr. Katsanga the client in question. He was provided with documents for reference which alleged that the applicant had received some money from the client. The applicant was further advised to prepare for a meeting on 13 November at 3.00 PM to discuss what he knew about the allegations. He was also informed that the debt Collector assigned on the Katsanga case would be in attendance at the said meeting.

The meeting did indeed take place and the Debt Collector was in attendance. The applicant was asked to explain what he knew about the account and the allegations that he had received some money from the client.

The court failed to appreciate how the applicant could claim that this was not a fair hearing. It was found in fact that the applicant was given a fair hearing.

Finding

The court finds that the reasons for dismissal were valid. The applicant was accorded an opportunity to state his case before dismissal. The respondent complied with the requirements of the law. This action is therefore dismissed.

Order

As indicated earlier the applicant proved that he was entitled to 13th cheque for 2003. the respondent is ordered to pay the applicant what was due to him as 13th cheque before his dismissal.

The applicant also proved that the company made some profits over and above the target in January and February 2003. The respondent is ordered to pay the applicant his percentage for performance incentive for January and February 2003. these orders are effective immediately.

Any party aggrieved by this decision has the right of appeal to the High Court within 30 days of this decision. Appeal lies only on matters of law and jurisdiction and not facts: Section 65 (2) of the Labour Relations Act.

Made this 15th day of November 2007 at **BLANTYRE.**

Rachel Zibelu Banda
CHAIRPERSON

Joel Evalitso Chilenga
EMPLOYERS' PANELIST

Maxwell NR Padambo
EMPLOYEES' PANELIST