

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 569 OF 2000**

**BETWEEN:**

**URBAN MKANDAWIRE .....PLAINTIFF**

**AND**

**UNIVERSITY OF MALAWI .....DEFENDANT**

**CORAM: TEMBO, ASSISTANT REGISTRY**

**Plaintiff present, unrepresented**

Dr Mtambo, Counsel for the defendant

**ORDER ON ASSESSMENT OF DAMAGES**

This is this court's order on the assessment of damages herein pursuant to the order of the High Court directing the Registrar to assess damages herein. The High Court made the said order upon finding after a full trial that the defendant breached the contract of employment of the plaintiff by terminating the said contract without giving the plaintiff an opportunity to be heard.

By its judgment dated 27<sup>th</sup> November, 2003 the High Court awarded the plaintiff two months' pay in lieu of the two months notice of termination of the plaintiff's employment that the plaintiff was entitled to under his contract of employment with the defendant. The High Court then ordered further that the Registrar assess the damages the plaintiff

has suffered herein due to the wrongful termination of his contract apart from the notice pay above. This order relates to those damages. The plaintiff testified at length on the damage he has suffered after the termination of his contract of employment.

Both the plaintiff and the defendant filed their submissions that have greatly assisted this court in arriving at its final decision.

The task of this court is to find out what other items the plaintiff is entitled to apart from the two months notice pay already awarded to him by the High Court.

In his well researched submissions the plaintiff has prayed for damages as follows.

In the first place he seeks damages for breach of contract in the form of 29 years salary, being the difference of his retiring age and his current age at the time of the termination of his employment, as well as his pension and gratuity calculated on the basis of the terminal annual salary at the time of termination of his employment.

And the plaintiff cited the cases of **Dr Chawani v Attorney General** MSCA Civil appeal Number 18 of 2000 and **Chihana v. Council of the University of Malawi** [1992] 15 MLR 58. The defence counsel cited the Employment Act 1999 and submitted that there under the measure of damages for wrongful dismissal depends on the length of service of a former employee prior to such dismissal. And that the plaintiff having worked for less than 5 years herein is only entitled to one week's pay in terms of Section 63 (4) of the Employment Act. And further that such award would suffice to cover the plaintiff's loss of legitimate expectations herein.

The defendant also cited the case of **Phambala v. ADMARC** Civil cause Number 1601 of 1996 in support of his contention that notice pay is the measure of damages for unlawful dismissal.

In taking the stand above the defendant takes the view that the law is settled that under the common law the courts do not award future earnings lost by reason of an unlawful termination of employment. Counsel for the defendant cited the case of **Dr Chawani v. Attorney General** (cited above) in support of the defendant's view. This court has had occasion to consider the cases cited by both parties herein. It has also considered the Employment Act as cited by the defence. This court is of a contrary view to that taken by the defence.

Firstly, contrary to the assertion by the defence, the Employment Act does not apply to an employee of government like the plaintiff see Order 2 (b) Employment Act (Application)

Order made under Section 2 of the Employment Act. This court is of that firm view because the defendants' institution is a governmental institution created by statute and is thereby exempted from the application of the Employment Act. Further, this court has read the case of **Chihana V. Council of the University of Malawi** (cited above) which is on all fours with the instant case. A permanent and pensionable employee having been wrongfully dismissed by the defendant in that case as is the case herein. In that particular case the High Court awarded the plaintiff her monthly salary from the time her employment was terminated up to the time she would have been eligible for early retirement. Further she was awarded a lump sum which she could have received as gratuity on early retirement, as if she had been contributing to the pension fund at the same rate as at the date of the wrongful termination of the contract of employment.

In the face of the authorities referred to above this court finds the defendant's contention that the plaintiff is only entitled to a week's pay unsustainable. And on the contrary, this court finds that the plaintiff herein is entitled to his salary from the time of the wrongful termination of his employment up to the time he would have been eligible for early retirement. And further that the plaintiff is entitled to gratuity pension calculated on the basis of the terminal annual salary at the time of the wrongful termination of his employment. See **Chihana v. Council of the University of Malawi** (cited above). Those two items work out as follows:

#### **Salary for 29 years**

(gross annual salary x 29)

$$=K108,852.00 \times 29 = K3,156,708.00$$

The sum of K3,156,708.00 is therefore awarded to the plaintiff less tax to be calculated. The rate of tax shall be the one applicable at the time of the termination of the plaintiff's employment.

#### **Gratuity and Pension**

The defendant is ordered to within 21 days of the date of this order obtain a quotation of the plaintiff's Pension and Gratuity entitlement from the National Insurance Company who are said to be the administrators of the defendant's employees' pension scheme. The gratuity and pension entitlement ought to be calculated on the basis and at the rate of contributions that the plaintiff and defendant were making at the time the plaintiff's employment was wrongfully terminated. The sum to be quoted by the Pension Scheme Administrators is awarded to the plaintiff. The quotation of the plaintiff's entitlement to

Pension and gratuity certified by the National Insurance Company shall be filed with this court by the defendant within 24 days of the date of this order ie. 3 days after time provided for it to be obtained by the defendant.

This court now moves on to deal with the plaintiff's other heads of claim. He claims reinstatement as damages for his being treated unequally to his then Head of the French Department. This court without belaboring itself to say much wishes to state that the High Court Categorically ruled that reinstatement of the plaintiff to his former employment with the defendant was out of question in the circumstances. That relief is therefore unavailable to the plaintiff.

The plaintiff also claimed damages in the form of rentals that he has incurred since he was told to leave the defendant's house in which he was being housed in the course of his employment. On this item this court agrees with the defence that this claim is unsustainable. The business of the plaintiff's lodging after the termination of his employment being none of the business of the defendant ex-employer. The same conclusion was arrived at on a similar claim in the **Chihana Case** cited above. The claim for rentals therefore fails entirely.

The plaintiff further claimed K8,000.00 being the transport expense for moving his belongings from Zomba to Blantyre. The defendant ought to have provided such transport. The plaintiff could not produce any proof of the fact that he indeed spent K8,000.00 on transporting his belongings from Zomba to Blantyre. Special damages like these ought to be strictly proved as submitted by the defence. That proof is completely lacking and this court declines to award the sum of K8,000.00 transport costs as claimed.

The plaintiff has further claimed damages for conspiracy. With due respect to the plaintiffs' submissions on the same this court finds that these damages are not within the parameters of the judgment of the High nor does the plaintiff's claim herein include damages for conspiracy. At any rate the tort of conspiracy involves at least more than two people. Logically therefore that claim is beyond this matter where there is only one defendant. The claim for damages for conspiracy also fails.

On the question of notice pay the same as admitted by the plaintiff was already paid to him by the defendant on 12<sup>th</sup> January, 2004. That issue is settled. This court can not adjust the same retrospectively to cater for the fall in the value of the Kwacha. This court can also not award the plaintiff the professional allowance as it is based on the contract herein which was itself terminated. So no award for the professional allowance is made. See **Dr Chawani v. Attorney General** (cited above).

The plaintiff also submitted that he be awarded sentimental damages for being

humiliated. This shall be dealt with together with the plaintiff's claim for damages for defamation. This court wishes to agree with the defence that this case does not concern itself with defamation. Humiliation is an aspect which on its own did not come as an issue before the High Court. With the greatest respect to the plaintiff's submissions on damages for defamation and sentimental damages this court declines to award either.

Costs of the instant assessment are for the plaintiff.

Made in Chambers at Blantyre this May, 2004.

**M A Tembo**

**ASSISTANT REGISTRAR**