THE REPUBLIC OF MALAWI

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

CONS. MATTERS NOS IRC 431 OF 2017. 430 OF 2017, 432 OF 2017 AND 561 OF 2017

BETWEEN

MRS BERNADETTE KALUMO……...APLLICANT
MR TREVOR GAMUTI……..APPLICANT
MRS FORTUNE NDOVI……APPLICANT
MRS WEZI CHIBAMBO……APPLICANT

AND

STANDARD BANK PLC……RESPONDENT

CORUM: PETER M.E KANDULU, DEPUTY CHAIRPERSON

K. Kaphale, SC, Counsel for the Applicants

H. Mwangomba, Counsel for the Respondent.

K. Kakhobwe, Court Clerk

JUDGEMENT ON ASSESSMENT OF COMPENSATION

Introduction

The four claims, IRC Matter Numbers 431/2017, 430/2017, 432/2017, and 531/2017 were consolidated under the order of the court dated 23rd day of February 2018.

The Applicant's pleadings sought the following (a) Reinstatement; further or, in the alternative; (b) Salary from the date of dismissal to date of normal retirement, (c) Compensation for unfair dismissal and Severance pay.

After the full trial, the court held the Respondent liable for dismissing the Applicants without any valid reasons, for failure to justify a punishment, which was not proportionate to the alleged misconduct. Because of that finding, the Respondent ordered to compensate the Applicants for unfair dismissal and severance pay. The parties failed to agree to settle the amount due to the applicants as ordered by the court within 14 days hence this Judgement on compensation award. The Court called to assess compensation for unfair dismissal and severance allowance pay due to the applicants. During the assessment trial, all the parties were present and ably represented by their chosen legal law firms.

Burden of proof

The onus is on the applicants to prove their claims as the burden of proof rests upon the party, which substantially asserts the affirmative of the issue ***Joseph Constantine Steamship Line –vs.- Imperial Smelting Corporation Ltd*** (1942) AC 154.

The burden fixed at the beginning of the trial by the state of the pleadings and settled, as a question of law remains unchanged throughout the trial exactly where the pleadings place it. **B. Sacranie v. ESCOM,** HC/PR Civil Cause Number 717 of 1991.

Standard of Proof

The standard required in civil cases is generally expressed as proof on a balance of probabilities ***Miller v. Minister of Pensions*** 1947] All ER 372. It follows in this matter that the applicants have a burden to prove on the balance of probabilities the claims made against the respondent in their pleadings.

1st Applicant Mrs. Bernadette Kalumo

Mrs. Bernadette Kalumo worked for the Respondent from 4th of November, 1976 to the 3rd of July 2017 which is 40 years and 8 months when she was unfairly dismissed. She exhibited a letter of dismissal, was marked. She stated that on termination, her remuneration package was as follows:

a. Basic Salary – MK1, 059,954.42
b. Car Allowance – MK966, 000.00
c. Group Life Assurance Contribution by Employer- MK34, 441.23
d. Medical Aid- MK148, 868.00
e. Cellphone Allowance- MK39,500.00
f. Pension Contribution by Employer- MK384, 931.34
g. Teveta (ER Contribution) - MK20, 259.54

Total MK2, 653, 954.53

She was cross-examined and the record will show her responses mainly focused on salary increments she had lost due to the unfair dismissal.

2nd Applicant Mrs. Wezi Chibambo

Mrs Wezi Chibambo worked for the Respondent from 27th of February 1981 to 5th of September 2017 which is 36 years and 6 months when she was unfairly dismissed. She exhibited a letter of dismissal was marked. She stated that on termination, her remuneration package was as follows:

(a) Basic Salary- MK 1,323,166.50
(b) Car Allowance MK 966,000.00
(c) Group Life Assurance Contribution by Employer – MK 38, 915.83
(d) Medical Aid contribution by employer MK 79,308.00
(e) Cellphone Allowance MK 39,500.00
(f) Pension Contribution by Employer – MK 320, 483. 31
(g) Teveta [ER Contribution] - MK 22,891.67

Total MK2, 790, 265.31

She was cross-examined and the record will show her responses mainly focused on salary increments she had lost due to the unfair dismissal.

3rd Applicant Mrs Fortunate Ndovi

Mrs Fortunate Ndovi worked for the Respondent from 28th of November 1989 to 3rd of July, 2017 which is 27 years and 8 months when she was unfairly dismissed. She exhibited a letter of dismissal was marked. She stated that on termination, her remuneration package was as follows:

(I) Basic Salary – MK1, 273, 245.17

(ii) Car Allowance – MK966,000.00

(iii) Group Life Insurance Contribution by Employer- MK38, 067.17

(iv) Medical Aid- MK110, 151.00

(v) Cellphone Allowance- MK39, 500.00

(vi) Pension Contribution by Employer- MK313, 494. 32

(vii) Teveta CER contribution MK 22, 891.67

Total MK2, 763, 349. 33

She was cross-examined and the record will show her responses focused on salary increments she had lost due to the unfair dismissal, and loan payment affordability.

4th Applicant Trevor Gamuti

Mr Trevor Gamuti worked for the Respondent from 3rd of November 1997 to the 3rd of July 2017 which is 20 years and 9 months when she was unfairly dismissed. He exhibited a letter of dismissal was marked. He stated that on termination, his remuneration package was as follows:

a. Basic Salary – MK1, 016,392.33

b. Car Allowance – MK483, 000.00

c. Group Life Assurance Contribution by Employer- MK30, 491.77

d. Medical Aid- MK66, 090.60

e. Cellphone Allowance- MK39,500.00

f. Pension Contribution by Employer- MK254, 098.08

j Teveta CER Contribution MK 22, 891. 67

Total MK1, 912, 464. 45

He was cross-examined and the record will show his responses focused on salary increments he had lost due to the unfair dismissal and salary differences between Standard Bank and NBS Bank.

Maziko Kumbani the Representative Witness

Maziko Kumbani a representative of the respondent, and a Manager of projects within the People and Culture Department, testified. He stated that mandatory retirement at Standard Bank Plc was at the material time 60 years. He exhibited a copy of the Conditions of Service, which was marked.

Mrs. Bernadette Kalumo the 1st Applicant

As of the date of termination of her employment contract, Mrs. Bernadette Kalumo only had 29 months to go before reaching mandatory retirement. The loss that she probably has suffered is the remaining months for her to work before attaining mandatory retirement age. Therefore, any compensation should take into account the fact that Mrs Kalumo only had a period of 29 months to serve before reaching mandatory retirement age.

Mrs. Wezi Chibambo the 2nd Applicant

He further stated that likewise, at the date of termination of employment, Mrs. Wezi Chibambo had 5 years to go before mandatory retirement. Therefore, any compensation should take into account the fact that Mrs Chibambo had a period of 5 years to work in the Bank before reaching mandatory retirement age.

Mr. Trevor Gamuti the 3rd Applicant

Mr. Trevor Gamuti found employment with NBS Bank Plc as a Branch Operations Manager on May 11, 2018. He exhibited a copy of a letter from NBS Bank Plc seeking employment reference. He stated that he believed that the loss that Mr Gamuti suffered was only for the period he was out of employment.

Mrs. Fortunate Ndovi the 4th Applicant

He stated that Mrs Fortune Ndovi found another job with NBS Bank Plc on 11th May 2018. He exhibited a copy of a letter from NBS Bank Plc seeking employment reference. He stated that the job that Mrs Ndovi secured at NBS Bank Plc is the same as the one she had at Standard Bank Plc. He said that he believed that the loss that she probably could have suffered was only for the period that she was out of employment.

He further stated that Standard Bank Plc duly gave employment references for both Mr Trevor Gamuti and Mrs Fortune Ndovi. He also stated that he knows that repeatedly their Courts have reiterated that employment contract is not for life and could be terminated by either party. Therefore, the applicants should have made efforts to seek alternative employment.

He stated that those seeking alternative employment found other jobs after leaving Standard Bank Plc. In respect of those who found employment, the Court should take into account the fact that they mitigated their losses by finding alternative employment after termination of their employment with Standard Bank Plc. For those who did not make an effort to find another job, the Court should hold that they failed to mitigate their loss.

His prayer to the court was that the Court should make awards that take into account all circumstances of each of the applicants and the award should be just and equitable not only to the part of the applicants but also the respondent.

The court is indebted and thankful to both counsel for the Applicants and the Respondent for their thoughtful insights, exhibited through the final written submission filed with the court. The court shall not reproduce all, which, was submitted for brevity's sake. However, the court is assuring the parties that the court shall consider all that is in the submission to dispose of the matter at hand.

Issue for determination

What is the applicable and appropriate quantum of compensation for unfair dismissal, and the severance pay for the applicants?

The Law

Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.

In determining the sum payable as compensation, the starting point is the sum the Applicant was getting as wages. Section 3 of the Employment Act defines 'wages' to mean all earnings, however, designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law, which is payable by a written or unwritten contract of employment by an employer to an employee for work done or to be done or for service rendered or to be rendered.

An award of compensation for unfair dismissal is made under Section 63(4) of the Employment Act, ("the Act") which states:

"An award of compensation shall be such amount as the court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal."

It follows that in assessing compensation the court has to consider the following:

(I) Award amount that is just and equitable.

(ii) Amount shall be determined by loss sustained by the employee.

(iii) Cause or contribution to the dismissal by the employee.

Section 63 (5) of the Employment Act prescribes minimum awards that the court may award. It must be noted that this provision does not take away prescription in Section 63 (4) of the Act.

Section 63 (5) of the Act provides:

The amount to be awarded under sub-section (4) shall not be less than:

A) One-week's pay for each year of service for an employee who has served for not more than five years.

b) Two weeks' pay for each year of service for an employee who has served for more than five years but not more than ten years.

c) Three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years and.

d) One month's pay for each year of service for an employee who has served for more than Fifteen years.

The Malawi Supreme Court of Appeal and High Court of Malawi have expounded these two provisions:

In ***Willy Kamoto v Limbe Leaf Tobacco Malawi Ltd*** MSCA Civil Appeal Cause no. 24 of 2010 the Supreme Court of Appeal held that:

"*Compensation could never be aimed at completely protecting the employee into the future."*

In ***Terrastone Construction Ltd v Solomon Chatantha*** MSCA Civil Appeal Cause no. 60 of 2011, the court held that:

"Our labour law is concerned with the ***attainment of fairness for both employer and employee****. In weighing up the interest of the respective parties is of paramount importance to ensure that a*

balance is achieved to give credence not only to commercial reality but also to a respect of human dignity". (Emphasis supplied).

Furthermore, in the same case of ***Terrastone Construction Ltd vs Solomon Chathuntha,*** (Supra), the Supreme Court of Appeal determined the question of what amounts to a just and equitable compensation and how the Court would apply its discretion to arrive at a just and equitable compensation concerning Section 63(4) of the Employment Act.

The Court held that a court has to take into account the loss sustained by an employee because of the unfair dismissal but that the assessment does not have to end on the enquiry of loss. The court has to determine the matter on reasonable terms and that reasonableness will be achieved, if the interests of both the employee and the employer are taken into account.

The court in that case (Supra) then guided and advised that Section 63(4) of the Employment Act should be read together with Section 63(5) of the same Act and added that

"It is important that reasons should always be given for coming up with the assessment of damages which are more than what is set down in the law."

In the case of ***Sothern Bottlers (SOBO) vs Graciam Kalengo,*** [2013] MLR 345 the Supreme Court of Appeal also stated the following on Page 348:

"Let us reiterate what was said in ***Standard Bank Vs R. B Mtukula****, Misc Appeal No. 24/2007 (High Court) that where the court wishes to* ***exceed the minimum compensation in Section 63 (5) of the Employment Act, it must give clear reasons*** *so that the employer, employee and also the appeal or review court can appreciate why the award was enhanced."*

Section 63 (4) is not a blank cheque for the court to decide any amount to be paid. It needs to be read with Section 63 (5) whenever compensation is awarded. In our view, it is a guideline on how a court may give an award under subsection (5) and should not be read in isolation". (Emphasis supplied).

"It is important that courts must not be seen to award damages, with elements of punishment to the employer".

In ***Stanbic Bank Ltd v Mtukula*** [2008] MLLR 54 the Malawi Supreme Court of Appeal said on p. 62:

"We, therefore, think that for the 19 years of service, the respondent would receive three months' pay for each year which would translate to 57 months' pay".

In ***First Merchant Bank Ltd v Eisenhower Mkaka and Others*** Civil Appeal no. 1 of 2016 Mkandawire J (as he was then) stated the following:

"In assessing compensation, the Industrial Relations Court had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of compensation that falls due, not the loss of salary increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages compensation." In the same manner, future loss does not matter. Therefore, one cannot talk of loss of earnings up to the time the former employee would have retired, certainly, which is not in the spirit of the Employment Act. (Emphasis supplied).

"There are 17 respondents and each one of them had worked for the appellant for a different number of years. Each one of them gave evidence during the assessment. Each respondent should therefore have been treated separately in assessing compensation.

In all, the above-cited decisions do (inter alia) hold that the period of service by the employee is the most important factor when computing compensation under Section 63 (4) as read with Section 63(5) of the Employment Act. Other factors can be considered when computing compensation above the minimum as prescribed under section 63 (4) and (5).

It follows for example, that someone who has served for 16 years may not get the same compensation as someone who has served say 5 years. This approach had been applied in this court. This point is the order of assessment in ***Eisenhower Mkaka and Others V First Merchant Bank Ltd*** IRC Matter no. 137 of 2012 (LL).

In fact, in the case of ***First Merchant Bank Ltd vs Eisenhower Mkaka and Others*** (supra), which is relatively the recent Supreme Court of Appeal decision, it was well articulated that ***employment is not a lifetime commitment*** and that it would not be in the spirit of Section 63(4) and (5) of the Employment Act to award the ***Applicant up to retirement age.*** The Court stated as follows which we also find quite illuminating, instructive and illustrative:

"In assessing compensation, the IRC had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of the compensation that must fall due, not the loss of salary, increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation. ***In the same manner, future losses do not matter at all.*** *Therefore, one* ***cannot talk of loss of earnings up to the time the former employee should have retired****. Certainly,*

that is not the spirit of the Employment Act. As already observed, Section 63(5) sets down the minimum compensation. The court may go up depending on its evaluation of the matter. ***The court enjoys the wide discretion to settle for either the minimum prescribed or for any higher amounts of compensation as would fit the description of "just and equitable" after weighing the considerations in Section 63(4) of the Act".***

In this case, the respondent substantively breached the contract of employment for the applicants when the respondent dismissed the applicants unfairly without any good cause and without considering the duration, the applicants had served the respondent. The holding by the court found the Respondent wholly to blame for the breach of the contract of employment of the applicants, which resulted in the loss of employment by the applicants. It is a result of this loss that the court was called to assess compensation for the applicants.

It is also trite that in considering what is just and equitable compensation, the court takes into account the age of the applicants, education qualification, marketability and contribution to the dismissal see ***Chiumia vs SS Rent a Car Ltd*** Matter No 149 of 2000.

On the issue of compensation, the case of ***Eisenhower Mkaka and Others V First Merchant Bank Ltd*** (supra) in my view should be the guiding and leading case on how compensation ought to be computed in this case. The reason was that the trial Court did not find that the applicants contributed to their unfair dismissal.

The Amended 35 (2) of the Employment Act, provides the meaning of pay or wages, it is provided under section 35 (2) (a) that 'wages' includes basic salary, housing and accommodation allowance, car allowance, cash payments and payments in kind to an employee, except those excluded from the formula.

Section 35 (2) (c) excludes the following items, among others, from the meaning of the word 'wages': cash payments for equipment to enable the employee to work, employer contributions to medical aid, pension, provident fund or similar schemes, etc.

Counsel for the Respondent has submitted that one of the factors to consider, in determining how much to award as compensation, and it is now trite in all employment cases dealing with issues of compensation for unfair dismissal, is that of mitigation of loss. Under this requirement, the dismissed employee must take the initiative to mitigate the loss. He or she is not supposed to sit idle on the pretext that the court will make good no matter what the time. He must move on and try to fetch for himself another job (See **Archibald Freighting Ltd vs Wilson** [1974] IRLR 10).

Counsel for the Respondent argued that the reason is that it is not "just and equitable" for the Court to assist litigants who sit idle and fail to make an effort to alleviate their loss (See also ***Msiska vs Dairiboard Malawi,*** IRC, Matter No. 6 of 1999). This takes different forms but the obvious ones include trying to look for alternative employment. If this was not shown at trial, it is a ground on which the discretion could be exercised by the court in an unfavourable way to the Applicants.

The court's understanding of the Judgement cited by counsel for the Respondent regarding the mitigation of loss, especially, after the enactment of the Employment Act 2000, which is the main Act parliament had legislated to regulate how compensation ought to be made which is: ***an award amount that is just and equitable: amount shall be determined by loss sustained by the employee: and cause or contribution to the dismissal by the employee***.

As you can see the issue of mitigation of loss is not among the factors that the court is called to consider as a factor when determining compensation if you can read the Employment Act section 63 (4) and (5) with legalistic eyes and understanding of it.

Before the enactment of the Employment Act 2000, the court relied on common law principles to resolve how much a dismissed employee ought to be paid. The principles of mitigation of loss are entrenched in the common law especially when conserving general damages, which are, accruing to the applicants.

The common law is part of the laws in Malawi especially, where there is no law to resolve the issues brought before the court. But where the laws are available and clear, the priority is to look at the laws dealing with the issues at hand, in this case, there are the Employment and Labour Relations Acts which are the principal laws regulating employment disputes in this country. The court is afraid to say that it sees no relevance to resorting to looking at the common law principles when there are clear laws, which could easily guide the court and resolve any matter brought before it regarding how compensation ought to be calculated.

In this regard, the court read the Employment Act and Labour Relations Act to try to understand whether the concept of mitigation of loss is one of the factors the court should consider when calculating how much a dismissed employee should be awarded. The Court is sorry to say that it did not find these principles in the law dealing with labour and employment matters in Malawi. The Precedents of the Superior Courts are very crucial, relevant and binding in the lower courts. However, where the precedents are detrimental to achieving justice for the litigants before the lower court, it is my view, that those precedents must be distinguished and regarded as ***per in***

curium by the sitting court, if, when applied justice shall not be achieved or the intention of parliament shall not be achieved.

This is the reason ***Mkaka's case*** (supra) shall remain the precedent to be followed and in that case, the court held "***In assessing compensation, the IRC had to stick to the spirit of Section 63 of the Employment Act.*** Under this provision***, it is the duration of service before termination that matters a lot in the calculation of the compensation that must fall due***, not ***the loss of salary, increments, and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation.***

In the same manner, **future losses do not matter at all.** Therefore, one cannot talk of loss of earnings up to the time the former employee should have retired. Certainly, that is not the spirit of the Employment Act in sections 63 (4) and (5). As already observed, Section 63 (5) sets down the minimum compensation.

The reading of the Judgement of ***Mkaka's case*** demonstrates to me that the issue of common law principles was abandoned when the court held **that the IRC must stick to the spirit of section 63 of the Employment Act when assessing compensation.** When you read section 63 of the Act, the concept of mitigation of loss is not one of the factors to consider. The question that has always exercised my mind is, how *would then should the IRC stick to the spirit of sections* 63 (4) and (5) *on the one hand and insist on the principles of mitigation of loss on the other hand when the same is not part of the employment Act in Malawi***. (*Emphasis supplied by me).**

It is now trite that one would not be compensated up to the retirement age despite the breach of contract, which was unspecified. The court has always insisted that it cannot award compensation to a dismissed employee during the time he was not an employee of the employer because doing so, would mean the employee was never dismissed at all see ***Kachinjika vs Portland Cement Company [***2008] MLLR 161.

In my understanding of this holding, it meant that the court had refused to accept the concept of common law principles which would have entitled the applicants to receive their compensation up to the retirement age or period because in any contract an innocent party who has not caused any harm to any agreement has the right to be compensated to put that person to the position before the harm.

The court had departed from this concept which is mostly a common law principle embedded in the law of contract. If this was abandoned, in my view, there shall be no need for the same court

to insist that the applicants must mitigate loss when the same is not the spirit in section 63 of the Employment Act.

This, the court shall not take into consideration the concept of mitigation of loss as a factor to consider when assessing and computing compensation for the applicants. The concept of mitigation of loss is not in the Employment Act. The MSCA in Mkaka's case (***supra***) has always guided the IRC to stick to the spirit in sections 63 (4) and (5) when computing compensation. The main and serious factors this court shall consider religiously shall be the ***duration or period before termination of service, contributions to loss of employment if any and whether the awards are just and equitable.***

In the ***National Bank of Malawi, vs Benjamin Khoswe*** (supra), Chipeta J, as he then was stated the following on the award of compensation for unfair dismissal and salary increments on pages 25 and 26 of the judgment:

"In this case, however, instead of the Respondent seeking just and equitable compensation that is under Section 63(5) as might or might not be increased in the court's discretion, he wants full salary and increments for each day he was out of employment to date of assessment of damages. Subject to discretion the law gives me about whether to stick with the minimum or to increase it, my opinion is to follow the guidance offered by Section 63(5) of the Employment Act. At the minimum, therefore, regardless of whether it will come to more than or less than what the Deputy Registrar had awarded him, I hold the view that the Respondent would be entitled to a just and equitable award of a month's pay for each of the 21 years he had served the Bank. Considering, however, that this case is virtually at all fours with the ***Stanbic Bank vs Mtukula*** *case, where the Supreme Court of Appeal upheld an award at the rate of three month's pay for each of the completed years of service, I see no reason why the Respondent should be treated differently in this case. I accordingly set aside the award he got of full salary for the whole period between dismissal and assessment of damages. Instead, I award him three months' salary per year for each of the 21 years he served the Appellant …which is what I would consider granting him as his due compensation under the current* ***legal formula as legislated by the Employment Act."***

In the case of ***Kachinjika vs Portland Cement Company*** [2008] MLLR 161, *the court refused to award loss of salary from the* ***date of termination to the date of judgment on the ground that 'such an award would be flawed as it would proceed on the assumption that the plaintiff was never terminated which was not true****; that he continued being an employee of the defendant*

company which was not true; and that the plaintiff in his pleadings prayed a declaration that he should be regarded as having continued in his position from the date of termination until that of judgement which was also not the case'.

If the applicant or applicants contributed to the termination of employment, they ought to be compensated with the minimum as provided under sections 63 (4) and (5).

If the termination is wholly on the respondent, the court is called to award compensation more than the minimum and when deciding how much more to compensate the victim, ***the issue of just and equitable is crucial.*** This is where the court is invited to invoke its discretion to depart from the minimum prescribed in section 63 (4) and (5) and consider how many months within the period the applicants had worked for the respondent it could award the applicants to arrive at a just and equitable appropriate compensation.

Compensation is not meant to punish the employer or unnecessarily and unjustly enrich the applicants; the compensation must be just and equitable to any reasonable person.

Section 35 (2) (c) of the Employment Act (as amended in 2010) stipulates that in the calculation of severance allowance, such benefits as fuel, airtime, phone allowance and internet allowances which were in the form of cash are excluded by section 35 (2) (c) (I) of the Employment Act. These were cash payments or payments in kind which were provided to enable the applicants to work efficiently. Pension and medical schemes are excluded in Section 35 (2) (c) (vi),

The only applicable benefits that ought to be calculated for the applicant's severance allowance are their basic salary, car allowance and house allowance for each applicant.

In terms of the First Schedule – Part 1 of the Employment Act provides that a person who has worked for a period not less than one year, but not exceeding five years, two weeks' wages for each completed year of service up to and including the fifth year, exceeding five years, but not exceeding ten years two weeks' wages for each completed year of service for the first five years, Plus, three weeks; wages for each completed year of service from the sixth year up to and including the tenth year, plus four weeks' wages for each completed year of service from the eleventh year onwards."

Counsel for the Applicants has implored the court to consider the loss suffered by the Applicants had the respondent not unfairly dismissed the Applicants. Counsel had submitted that the award to be computed should reflect the loss that has been suffered and that the court should consider awarding the applicants more than the minimum prescribed by the law.

The court shall take into consideration this aspect when computing the awards to be paid to the applicants. The court has a legal responsibility to balance the interest of the applicants and the respondent when it is computing compensation to be awarded to the applicants.

The court would like to state that all the benefits the applicants were receiving should form part of wages for them to calculate compensation for unfair dismissal except when calculating severance allowance pay, the court shall consider the aspect of salary, car allowance, housing and accommodation.

There has been an argument in response by counsel for the applicants that there is no need to exclude telephone allowance when calculating severance allowance pay as argued by counsel for the respondent. According to SC counsel, the Applicant's car allowance and phone allowance should be treated the same. The court disagreed with SC and invited him to read or re-read the exclusion clause in section 35 as amended of the Employment Act on how severance allowance pay ought to be calculated. The Applicants were receiving cash payments instead of telephone allowances, these cash payments are excluded from the exclusion clause especially, cash payments for the provision of telephone allowances.

As already discussed in the law's section, the employment contract is not lifetime employment. No law provides that upon termination of employment, an applicant must be compensated up to the retirement age. It is trite, these days that the most important factor the court takes into consideration when calculating the compensation due to the applicants is the duration the applicants had been in employment with the respondent.

In this case, the 1st applicant worked for the respondent for 40 years and 8 months. She did not contribute to her dismissal as per the findings and decision of the court. If she had not been unfairly dismissed, there was a possibility that she could have been still an employee of the Respondent. She could have enjoyed promotions and adjustments of her salary and other benefits if the respondent acted with equity. This is a persuasive factor that the court shall consider awarding the applicant more than a minimum.

The starting point should be how many years the applicants worked for the respondent before their unfair dismissal. With the authority of the ***National Bank of Malawi vs Benjamin Khoswe (Supra) Justice Chipeta*** held that the employee who had worked over 19 years should be paid 3 months' pay for each completed year of service. There are more compelling reasons in this case that the applicant did not contribute to her unfair dismissal according to the holding of the Court. She had

dedicated her time and life to working for the bank for over 40 years. In my view, the effective way to deal with her case, the respondent would have acted with justice, they could have asked her to retire early in recognition of her long service rather than dismiss her the way they did and failed to follow the proper procedure. Mr Khoswe and Mtukula, all worked for the bank for a period not exceeding 19 years, the court compensated them with 3 months' pay.

Mrs. B Kalumo, 1st Applicant

Mrs Kalumo has worked double the period Mr Khoswe and Mtukula had worked for their employers. She had only 29 months before she reached her retirement age. The prospect that she could have been dismissed, if the respondent acted with justice is almost 05%. The reason is that she had worked faithfully with the bank for the entire 40 years. At least there was no evidence presented before the assessing court, which demonstrates that there was a likelihood that she could be dismissed before the retirement age. It is my strong view that 6 months' compensation for each completed year of service would be just and equitable for both her and the respondent.

She was entitled to a monthly wage of MK2,653,954.53 according to evidence tendered in court.

MK2, 653, 954. 53 X 6 months = MK15, 923, 727.18

MK15, 923, 727.18 X 40 years = **MK636, 949, 087. 20**

Mrs. Kalumo Severance Allowance

For severance allowance calculation, the court shall be guided by section 35 as amended Mrs Kalumo's basic salary is MK1, 059,954.42 and her car allowance was MK966,000.00 the two figures shall be used to calculate her severance pay.

Her monthly wage for severance calculation is MK2, 025, 954. 42

1st 5 years 2 week's wages MK2, 025, 954. 42 / 2 = MK1, 012, 977. 21 X 5 = **MK5, 064, 886.05**

2nd 5 years 3 week's wages MK2, 025, 954. 42 / 3 = MK1, 519, 465. 82. X 5= **MK7, 597, 329. 08**

3rd 5 years above 1 month's wages MK2, 025, 954. 42 X 30 years = **MK60, 778, 632. 60**

Total severance allowance pays **MK73, 440, 847. 73.**

i. Compensation for unfair dismissal **MK636, 949, 087. 20**

ii. Severance allowance **MK73, 440, 847, 73.**

iii. Total Compensation Award **MK783, 830, 782. 66**

Mrs. Wezi Chibambo, 2nd Applicant

Mrs Wezi Chibambo worked for the Respondent for 36 years and 6 months. Her remuneration package was Total MK2, 790, 265.31. Unlike the 1st applicant, Mrs Chibambo had worked for the respondent 36 years and 6 months short of 4 years of the 1st applicant. She had 5 years to go to reach her retirement age. As stated earlier, the respondent would have acted with justice and equity to employees who had dedicated their service to them.

Considering her age Mrs. Chibambo could hardly be employed in the modern world. The court recognised her vast experience amassed over the years she had worked. However, she only possesses a Diploma as her higher qualification, which would put her at a disadvantage in the market currently, as most employers apart from experience have enhanced qualifications for senior managers to Masters Degrees. It is my view that 6 months' pay for each completed year of service will fit in the just and equitable definition to both the employer and the employee. The 2nd applicant did not contribute to her unfair dismissal. She had worked for the respondent almost her entire life. This is the reason the court shall enhance her compensation with 6 months' pay for each completed year of service

MK2, 790, 265. 31 X 6 months = 16, 741, 591. 86 X 36 = **MK602, 697, 306. 95**

Mrs Chibambo's Severance allowance

For severance allowance calculation the court shall be guided by section 35 as amended Mrs. Chibambo's basic salary is MK 1,323,166.50 and her car allowance is MK966, 000.00 the two figures shall be used to calculate her severance pay.

Her monthly wage is MK2, 289, 166. 50 for severance calculations

She had worked for 36 years

1st 5 years 2 weeks' wages MK2, 289, 166.50 / 2 = MK1, 144, 583, 25 X 5 = MK5, 722, 916. 25

2nd 5 years 3 weeks' wages MK2, 289, 166. 50 / 3= Mk1, 716, 874. 89 X 5= MK8, 584, 374. 45

3rd 5 years and above 1 month wages MK2, 289, 166. 50 X 26 years = MK59, 518, 329. 00

Total Severance **MK73, 825, 619.70**

i. Compensation for unfair dismissal **MK602, 697, 306. 95**
ii. Compensation for severance pay **MK73, 825, 619.70**
iii. **Total Compensation <u>MK676, 522, 926.65</u>**

Mrs Fortunate Ndovi 3rd Applicant

Mrs Fortunate Ndovi worked for the Respondent for 27 years and 8 months. Her remuneration package was Total MK2, 763, 349. 33. Unlike the 1st and 2nd applicants, Mrs. Fortunate Ndovi secured employment with NBS in a similar position she held before her dismissal. Despite that she secured employment with NBS, the court had received evidence that she holds a position similar but with less salary and loan repayment at a commercial rate. If she was not unfairly dismissed by the respondent she could not have been subjected to the conditions by NBS, which are unconducive. The court recognises that it was not her choice to leave the respondent's position to join NBS with a less attractive condition of service, if the respondent had acted with justice before her unfair dismissal she could not have chosen to leave when there were no valid reasons for her dismissal as per the finding of the trial court.

The securing of another job did not change in any way that she was unfairly treated by the respondent considering the 27 years she had worked for them. I have observed and stated repeatedly that having worked for 27 years could have been a consideration to request the applicant to apply for an early retirement rather than to dismiss her summarily and lose all 27 years of benefits she had worked for the respondent.

Should her securing another job with NBS change the factor to consider when computing compensation? In my view, since the concept of mitigation of loss mainly focuses on the immediate and future loss aspect but the spirit in section 63 (4) and (5) considers the duration the applicant worked for the respondent before her dismissal, this shall not affect the computation.

Did she contribute to her dismissal, if the answer is NO, then the issue regarding immediate and future loss when she secured another job will not affect the compensation due to her for the years she had worked for the Respondent.

The respondent's unfair dismissal had caused her to pay the loan she secured with the respondent and the said loan was transferred to NBS at a commercial rate. This is one of the factors the court shall consider in computing her compensation and one of the factors, which would trigger her compensation to be above the minimum prescribed in the Employment Act. The court awarded the 1st and 2nd applicants 6 months because they had worked for more than 30 years. Mtukula who worked for 19 years was awarded 3 months for each completed year of service. The applicant had worked 8 years more than Mr Mtukula. It would only be fair for the court to award the applicant with 4 months' pay for each completed year of service if the court has to balance the interest of

the applicant as well as the interest of the respondent. This also factors in the issue of age, qualifications and her new employment. The court therefore awards the applicant 4 months' pay for each year of service she had worked for the respondent.

MK2, 763, 349. 33 X 4 years = MK11, 053, 397. 32 X 27 years = **MK298, 441, 727, 64**

Mrs F Ndovi's Severance Allowance

Severance allowance pay for the applicant who had worked 27 years. To calculate severance allowance, the court had already stated when computing the severance pay for the 1st and 2nd applicants. The same principle shall be adopted when computing severance for the 3rd applicant. The basic salary and car allowance for the applicant enabled her to receive MK2, 239, 245. 17 per month. The court shall adopt this figure to calculate the severance allowance for her.

1st 5 years 2 weeks' wages MK2, 239, 245. 17 / 2 = MK1, 119, 622. 59 X 5 years = **MK 5, 598, 1122. 95**

2nd 5 years 3 weeks' wages MK2, 239, 245. 17 / 2 = MK1, 679, 433, 88 X 5 years = **MK8, 397, 169. 39**

3rd 5 years above 1 month wages MK2, 239, 245. 17 X 17 years = MK38, 067, 167. 89 = **MK52, 062, 450. 23**

Total Severance allowance pay is **MK66, 057, 723.57**

i. Compensation for unfair dismissal **MK298, 441, 727. 64**
ii. Compensation for severance allowance **MK66, 057, 723. 57**
iii. **Total Compensation MK364, 499, 451.21**

Mr. **Trevor Gamuti, 4th Applicant**

Mr Trevor Gamuti worked for the Respondent for 20 years and 9 months when he was unfairly dismissed. His remuneration package was MK1, 912, 464. 45. Unlike the 1st and 2nd applicants, Mr. Trevor Gamuti secured employment with NBS in a similar position he held before his dismissal. Despite that he secured employment with NBS, the court had received evidence that he holds a position similar but with a good salary difference that in his new position he holds with NBS he gained an advantage. This in my view points to the fact that the applicant is a performer

and with his experience, he was able to bargain for better benefits. If he had not been unfairly dismissed by the respondent, I believe he could have been receiving a good salary from the respondent, If the respondent had acted with justice before his unfair dismissal he could not have lost another job with NBS on a mistake of his subordinate.

The securing of another job did not change in any way that he was unfairly treated by the respondent considering the 20 years he had worked for them. I have observed and stated repeatedly that having worked for 20 years could have been a consideration to request the applicant to apply for early retirement rather than to dismiss him summarily and lose all 20 years of benefits he had worked for the respondent.

Should his securing of another job with NBS change the factor to consider when computing compensation? In my view, since the concept of mitigation of loss mainly focuses on the immediate and future loss aspect but the spirit in section 63 (4) and (5) considers the duration the applicant worked for the respondent before his dismissal, this shall not affect the computation.

Did he contribute to his dismissal, if the answer is NO, then the issue regarding immediate and future loss when he secured another job will not affect the compensation due to him for the years he had worked for the Respondent. This is one of the factors the court shall consider in computing his compensation and one of the factors, which would trigger his compensation to be above the minimum prescribed in the Employment Act.

The court awarded the 1st and 2nd applicants 6 months because they had worked for more than 30 years. The 3rd applicant had been awarded 4 months' compensation considering that she only worked 27 years and she is relatively younger.

Mtukula worked 19 years and was awarded 3 months for each completed year of service. The applicant had worked for 1 year more to Mr Mtukula. It would only be fair for the court to award the applicant with 3 months' pay for each completed year of service if the court has to balance the interest of the applicant as well as the interest of the respondent and for consistency as 20 years is not very far from 19 years. The court therefore awards the applicant 3 months' pay for each year of service he had worked for the respondent.

1, 912, 464. 45 X 3 months each completed year of service MK5, 737, 393. 35 X 20 years **MK114, 747, 867. 00**

Mr Gamutis' Severance pay

Severance allowance pay for the applicant who had worked for 20 years. To calculate severance allowance, pay, the court had already stated when computing the severance pay for the 1st, 2nd and 3rd applicants. The same principle shall be adopted when computing severance for the 4th applicant. The basic salary and car allowance for the applicant enabled him to receive MK1, 499, 392. 33 per month. The court shall adopt this figure to calculate the severance allowance for him.

1st 5 years 2 weeks' wages MK1, 499, 392. 33 / 2 = MK749, 696. 17 X 5 years = **MK3, 748, 480. 25**

2nd 5 years 3 weeks' wages MK1, 499, 392. 33 / 3 = 1, 124, 544. 25 X 5 years = **MK5, 622, 721.24**

3rd 5 years and above 1 month's wages MK1, 499, 464. 45 X 10 years = **MK14, 994. 644. 50**

Total Severance **MK 24, 365. 769. 25**

i. Compensation for unfair dismissal **MK114, 747, 867. 00**
ii. Compensation severance allowance pays **MK 24, 365. 769. 25**
iii. Total compensation **MK139, 113, 636. 25**

The awarded sum was due to the applicants in July 2017. However, there has been a devaluation of the kwacha over time since 2017. In 2017 the Malawi kwacha was trading at around MK725,000 to USD Cumulatively, the kwacha has been devalued by slightly over 125 % if we have to factor in all the devaluation that the Reserve Bank of Malawi has been effecting over the past years. It is therefore crucial that the awarded figure should be boosted to retain the purchase value or purchasing power of the amount awarded to the applicant if the same had been paid in March 2017 the time the applicant was dismissed.

In the case of ***Museum and Chillida -vs- Reserve Bank of Malawi*** Matter No. 30 of 2014, the court boosted the awards by 50% owing to inflation.

In ***Kandonje v Malawi Housing Corporation*** [2008] MLR 433 in the court said

"The cause of action arose in 2003 but the events cover a period from 1998. The Applicant was lowly paid as noticed from the pay slip. The local currency has since devalued and the court has the discretion to award interest to cater for devaluation and inflation …in this case, court awards 40% of the total awards to cater for devaluation since 1998"

Not every case requires that the award be boosted. Compelling reasons have to be shown to warrant such an award and the percentage thereof. Thus, in ***Frackson Chitheka v Attorney General (Ministry of Finance),*** Civil Appeal No. 67 of 2008 (unreported an award of compensation was boosted by 100%, whilst in ***Mrs Catherine Kamwendo v Portland Cement Company*** (1974) Limited, Civil Appeal No. 25 of 2012, the court deemed it fit to boost the award by 75%.

Recently in ***Malawi Confederation of Chambers of Commerce and Industry v Rehema Mvula and 5 others,*** Civil Appeal No. 13 of 2014, Justice Madise on 21st May 2018 confirmed the 50% uplifting of a compensation award.

Mzikamanda J, as he was then, in confirming the 100% boost of the award ***in Frackson Chitheka Case:-***

"As will be seen the issue of compensation for unfair dismissal is a matter governed by the law with the discretion of the court built in …in assessing compensation for unfair dismissal the court takes into account several factors. These include the applicant's effort to mitigate his loss, the employee's age, physical fitness, qualification, and the prevailing labour market. These factors inform the court in determining the multiplier and the formula for calculating is set by the law. In matters that come to the Industrial Relations Court, the general formula will apply unless some special formula is pleaded and proved… As regards the boost of 100% per cent that was entirely at the discretion of the lower court considering the devaluation and the rate of living at the time. I confirm that 100% boost"

I am of the view that there are more compelling reasons, which entitle the court to boost the money awarded to the applicant by 50 % considering how the kwacha has devalued to the USD in the recent past. I would cite a basic simple example that a 1 kg packet of sugar in 2017 was selling at K550.00 on the market but the same 1 kg packet of sugar price is now selling at MK2, 200, 00. Petrol was selling MK824.70 per litre in 2017 but now the pump price is MK2, 530.00.

The Court would fail its mandate if it fails to consider factors in the devaluation of the kwacha to retain the purchase value of the awards due to the applicants. To align the value of the awards to the period it was due, my court is of the view that a 50 % boost will be justified.

Let me hasten to mention that the issue of boosting the money awarded to the applicants is always the discretion of the taxing or assessing court if justice has to be achieved especially, owing to inflation and devaluation of the kwacha among other factors.

The court that held the respondent liable has no legal responsibility to instruct the taxing or assessing court that the amount (money) to be awarded must be boosted. However, the assessing or taxing court will weigh all the intervening factors from the date the cause of action arose to the date the awards are determined especially to retain the purchase value of the money as awarded would have been paid to the applicant.

The litigants must understand that the purpose of boosting the award is only to retain the value or the purchase value of the amount (money) owed by the respondent and nothing else. There is no need to plead the boosting of awards in the pleadings. However, if the applicant would like to be awarded interest, then interest should be pleaded in the claim against the respondent at the inception of the case.

An interest and boosting of the awards are two different concepts. Boosting of awards is aimed at aligning the amount awarded to the period the cause of action arose or the amount would have been paid, while interest would mean, if the amount awarded to the applicant was not withheld by the respondent, the money could have been used or could have been put to good use by the applicant. An award of interest is statutory while the boosting of the amount awarded is at the discretion of the court computing the awards.

This is the proper case for the awards should be boosted to retain the purchase value of the money, which would have been made or paid out to the applicant in 2017. As stated in the previous paragraphs in this judgement, the kwacha cumulatively had been devalued to date by slightly over 125 % against USD for the last 7 years. Therefore, with the authority of ***Frackson Chitheka v Attorney General (Ministry of Finance***), Civil Appeal No. 67 of 2008 boosted the award by 50 %. I now present the award of compensation due to the applicants.

Summary Compensation for each applicant.

1. B. Kalumo

i. Compensation for unfair dismissal MK636, 949, 087. 20

ii. Severance allowance MK73, 440, 847. 73.

iii. Total MK783, 830, 782. 66 X 50 % = **MK391, 915, 391.33**

iv. **<u>Total compensation awarded MK1, 175, 746, 173. 99</u>**

2. W. Chibambo

i. Compensation for unfair dismissal MK602, 697, 306. 95
ii. Compensation for severance pay MK73, 825, 619.70
iii. Total MK676, 522, 926.65 X 50 % = MK338, 261, 463. 33
iv. Total compensation awarded **MK1, 014, 784, 389. 98**

3. F Ndovi

i. Compensation for unfair dismissal MK298, 441, 727. 64
ii. Compensation for severance allowance MK66, 057, 723. 57
iii. Total MK364, 499, 451.21 X 50% = MK182, 249, 725. 61
iv. Total compensation awarded **MK546, 749, 176. 82**

4. Mr. Gamuti

i. Compensation for unfair dismissal MK114, 747, 867. 00
ii. Compensation severance allowance pays MK 24, 365. 769. 25
iii. Total MK139, 113, 636. 25 X 50 % = MK 69, 556, 818. 13
iv. Total Compensation awarded **MK208, 670, 454. 38**

Any party dissatisfied with the judgement is free to appeal to the High Court within a period stipulated by the IRC Rules.

The court directs that if the Respondent, shall require leave of the court to appeal, 50% of the awarded sum shall be paid to the applicants and the other 50% shall be deposited into the court's account and evidence of the 50% payments to the applicants and 50% deposits slip into the court's account shall be attached in the motion seeking leave to appeal.

Delivered in chambers this 12th day of December 2023 at Blantyre.

HON. PETER M.E KANDULU
DEPUTY CHAIRPERSON