JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 13 OF 2015
(BEING MATTER NOS. IRC MATTER NO. 448 AND 554 OF 2010)

BETWEEN:

CHARLES MWASI AND OTHERS ..... APPELLANT

-AND-

MALAWI REVENUE AUTHORITY ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mumba, of Counsel, for the Appellants
Mr. Nkhono SC, of Counsel, for the Respondent
Mr. Orbet Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

INTRODUCTION

This is an appeal from the Industrial Relations Court (lower court) against an Order of Assessment of Compensation dated 21st October 2014, in which it dismissed the Appellants' prayers for several reliefs [hereinafter referred to as "OAC"]. The appeal is strongly opposed by the Respondent.

A brief background may not be out of order. In Consolidated IRC Matter Number 448 of 2010 (as consolidated with Matter Number 554 of 2010), some 167 former employees of the Respondent sued the Respondent in the Industrial Relations Court sitting at Blantyre (lower court) essentially for unfair dismissal. The overriding reason given by the Appellants was that they had been declared redundant by the

Respondent without being consulted in contravention of s.57 of the Employment Act (Act).

By its judgment dated 24th January, 2014, the lower court found that the Appellants had been unfairly dismissed by the Respondent. Consequently, the lower court ordered compensation to be assessed. Further, by its ruling dated 15th May, 2014, the lower court, in order to inform the assessment of compensation, clarified a number of issues that had been raised by the Respondent in its letter dated 31st January 2014 [Hereinafter referred to as the "Supplementary Ruling"].

The lower delivered the OAC on 21st October, 2014. On 5th November 2014, the Appellants filed a notice of appeal in the lower court expressing their dissatisfaction with the OAC.

The Consolidated Applicants' Statement of Claim (IRC Form 1)

The relevant part of IRC Form 1 reads:

> *"4. **Brief description of alleged trade dispute: (e.g. dismissal, suspension, withholding wages, etc)***
>
> *4.1 Unlawful dismissal*
>
> *4.2 Unfair, wrongful and unlawful termination of employment*
>
> *4.3 Unfair labour practice*
>
> *4.4 Unlawful withholding of severance allowance*
>
> *4.5 Withheld terminal benefits*
>
> *4.6 Non payment of pension benefits, severance pay, repatriation allowance, notice pay, bonuses and house allowance*
>
> *4.7 Non payment of arrears of in annual salary increment*
>
> *4.8 Non-payment of leave days*
>
> *4.9 Wrongful deductions of money from terminal benefits package*
>
> *4.10 Salary increment on promotion*
>
> ***5. Particulars of alleged trade dispute***
>
> *5.1*

5.52 By reason of the above the Applicants have suffered damage and loss on account of their loss of employment and are entitled to compensation

PARTICULARS OF LOSS

5.39.1(sic) Salary and other incidental benefits from the date of termination of employment and:

5.39.2(sic) Pension benefits and:

5.39.3(sic) Wrongful deductions from terminal benefits and:

5.39.4(sic) Arrears in leave days, annual increments and increments on promotion and:

5.39.5(sic) Severance allowance and:

5.39.6(sic) Repatriation allowance and:

5.39.7(sic) Notice pay and:

5.39.8(sic) Leave grant and:

5.39.9(sic) Redundancy pay:

5.39.10(sic) Withheld house allowance and:

5.39.11(sic) Withheld bonuses and:

6. Particulars of relief sought

6.1 Reinstatement and damages for immediate loss of all earnings, benefits and other entitlements

6.2 Alternatively, compensation for unfair dismissal to be computed from the date of dismissal to the date of mandatory retirement age of each of the Applicants and

6.3 Compensation for loss of immediate loss of earnings

6.4 Compensation for future losses taking into account yearly increments and inflation and leave days until the mandatory retirement age of each of the Applicants and;

6.5 Compensation for breach of contract;

6.6 Damages for constitutional breaches;

6.7 Compensation for unfair labour practices

6.8 Payment of pension benefits and compensation for loss of pension earnings and;

6.9 Payment of wrongful deductions from terminal benefits and;

6.10 Payment of all arrears in leave days, annual increments and increments on promotion and;

6.11 Severance allowance based on increased wages and all allowances due to the Applicants which was underpaid;

6.12 and

6.13 Payment of repatriation allowance and;

6.14 Payment of notice pay and;

6.15 Payment of leave grant and payment in lieu of leave

6.16 Payment of withheld house allowance and;

6.17 Payment of withheld bonuses and;

6.18 Reimbursement of money wrongfully and unlawfully deducted from terminal benefits

6.19 Payment of salary arrears

6.20 Payment of disturbance allowance

6.21 Payment of border allowances;

6.22 Compensation for the sum of MK3399,484.10 wrongfully deducted from the 8th Respondent's terminal benefits;

6.23 Payment of the sum of MK14,000.00 wrongly deducted from the 8th Applicant's benefits as rent

6.24 Payment of redundancy payment in terms of Clause 3.3.0 of the Conditions of service

6.25 Aggravated as well as exemplary damages

6.26 Any other reliefs as the court may deem fit in the circumstances.

6.27 Costs of this action"

The Respondent's Statement of Reply (IRC Form 2)

The Respondent filed its response to the Appellant's Statement of Claim in the prescribed IRC Form 2 and the relevant part thereof provides as follows:

> *"3.11 Following the implementation of the organizational restructuring, the respondent has paid or undertaken to pay all affected employees their terminal benefits*
>
> *including repatriation expenses and the cost of training for alternative employment or entrepreneurship.*
>
> *3.12 The Respondent denies that it has withheld payment of the terminal or other dues from the claimants or any of them as alleged in the claim or at all.*
>
> *3.13 The Respondent denies that the claimants or any of them are entitled to make any claims under the Employment (Amendment) Act 2010 on the ground that the said Act was not in force at the times material to these proceedings.*
>
> *3.14 In the premises the Applicants are not entitled to the relief claimed against the Respondent in the Applicant's statement of claim or at all."*

STATEMENT OF ISSUES

Rule 13(1) and (2) of the Industrial Relations Court (Procedure) Rules requires parties to hold a pre-hearing conference with a view of agreeing on a statement of issues. A statement of issues serves a very important purpose. It gives the parties and the court a clear sense of the issues and this in turn helps the parties in structuring their respective submissions, and the court's disposition of the case. Inexplicably, the pre-hearing conference did not take place with disastrous results (see below under **"SUPPLEMENTARY RULING"**).

JUDGMENT OF THE LOWER COURT

The lower court held that the Appellants were unfairly dismissed. The holding is to be found on page 14 of the judgement:

> *"We feel inclined to think, and we agree, that the decision to terminate the applicant's services was unilateral and without due process of consultations. To that extent, we find that the applicants' respective dismissals were unfair. We do not find that there was any attempt to reach a consensus. There was hardly disclosure of information by the employer. But most importantly, the employees were not afforded an opportunity to make representations. Apart from that, we are at a loss as to the selection criteria that the respondent used as regards the applicants in declaring them liable for retrenchment."*

The lower court dealt with the issue of reinstatement in paragraphs 54 and 55 of the judgement. In ruling against ordering reinstatement of the Appellants, the lower court reasoned thus:

> *"54. The applicants suggested that they should be reinstated. As a matter of law, a court may order reinstatement under Section 63(1)(a) of the Employment Act whereby the employee is to be treated in all respects as if he had not been dismissed. It has been said that reinstatement should be automatic where employment is terminated on grounds of discrimination (See Mwaungulu J in*
>
> *Kalinda v Limbe Leaf Tobacco), pregnancy-related dismissals (Section 49 of the Employment Act) and where the dismissal is based on one's trade union activities (Section 8 of the Labour Relations Act). In all other cases, reinstatement should only be ordered where it is practicable*
>
> *to do so and where the employer and employee were willing to continue the employment relationship. In this matter it does not appear that it would be practicable to order that the parties should continue in the relationship.*
>
> *55. The respondent relies much on the fact that their establishment was restructured and therefore that it would be impracticable to order reinstatement. On that score alone, it would be exotic to order reinstatement of the applicants. Therefore, on an appointed date, the court will consider the appropriate compensation to award the applicants."*

SUPPLEMENTARY RULING

As already mentioned, the Supplementary Ruling was issued at the written request of the Respondent. The request is contained in a letter dated 31st January 2014. The rationale for the request is put in the following terms:

> *"We believe that the process of assessment is an exercise at ascertaining compensation on the basis of a prior order for liability. In order for the assessment to proceed orderly, it is important in the order finding liability to give an indication of what the party found liable is to be liable for. By operation of law, we know that the court will proceed by referencing section 63 of the Employment Act regarding compensation for unfair dismissal. However, there are issues which the parties argued that have a bearing on how the assessment will proceed and on which the court has not made a ruling yet. The effect is that there is much uncertainty and it will be difficult even for the parties to attempt an agreement of the compensation payable."*

The following were the ten issues the Respondent sought to be clarified:

(a) whether the employment of the applicants whose employment commenced before the establishment of the Malawi Revenue Authority are entitled to severance pay that take into consideration

(b) their years service in the departments of Income Tax and Customs [Hereinafter referred to as the "Government Departments"], before the where specific very employed by the Malawi Revenue Authority?

(c) whether the applicants are entitled to notice pay and whether or not it was already paid at the termination of employment?

(d) whether the applicants are entitled to redundancy benefits?

(e) whether the applicants are entitled to damages for breach of contract?

(f) whether the applicant Mr. Good Nyirenda is entitled to claim in respect of the alleged mistake in promotion?

(f) whether the applicants are entitled to house allowance allegedly withheld by the Malawi Revenue Authority?

(g) whether the applicants are entitled to payment in respect of group insurance cover?

(h) whether the applicants are entitled salary increment and bonuses allegedly withheld?

(i) whether the applicant Mr. Good Nyirenda, is entitled to payment back of deduction made on his salary in respect of loss of keys?

(j) whether the applicants are entitled to exemplary damages?

The lower court determined the ten issues as follows:

(a) the Appellants' contracts with government were terminated and the contract with the Respondent started as new contracts and, therefore, they cannot claim severance allowance from the time they were working with government to the time of the dismissal;

(b) the Respondent paid the Appellants' notice pay and even if that were not the case, the notice could have been submerged in the award of compensation for unfair dismissal;

(c) redundacy benefits are the very benefits that employees get at the separation with their employer;

(d) the Appellants are not entitled to any separate awards in damages for breach of contract: it would be splitting hairs, as it were, to consider compensation for unfair dismissal on the one hand, and damages for breach of contract, on the other in that the lower court awards compensation in the light of the Act in ss. 63 and 64;

(e) the Appellants are not entitled to compensation with regard to house allowance because there is clear evidence that the Respondent stopped paying house allowance;

(f) the Appellants are not entitled to payments in respect of group insurance cover as the same was cover for death of employees while

in the service of Respondent and, as such, it cannot be proper to order payment of the insurance of cover when all the Appellants were still in the employment of the Respondent when they were dismissed;

(g) the Appellants are not entitled to salary increment and bonuses allegedly withheld because when making an order for compensation the court looks at the salary that an employee was getting at the time he was dismissed; and

(h) the Appellants are not entitled to exemplary damages because the lower court is not in habit of awarding exemplary damages in that the court aims to compensate for the loss suffered due to the termination of the employment in a just and equitable manner having regard to the circumstances of the case.

The determinations of the lower court on issues relating to Mr. Good Nyirenda have not been stated herein because Mr. Nyirenda withdrew his appeal.

Before resting, I am compelled to comment on the Supplementary Ruling in so far as the functus officio rule is concerned. Functus officio is a common law rule that prohibits, in the absence of statutory authority, the re-opening of a matter before the same court, tribunal or other statutory actor which rendered the final decision.

Once a validly-made final determination has been issued, the court is powerless to change it, other than to correct obvious technical or clerical errors, or unless

specifically authorised to do so by statute or regulation. In the Canadian case of **Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848**, Sopinka J. wrote in relation to the principle of functus officio that:

> *"The general rule (is) that a final decision of a court cannot be reopened.... The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: where there had been a slip in drawing it up, and where there was an error in expressing the manifest intention of the court."*

The functus officio rule exists to provide finality to judicial decisions so that people and businesses are afforded the certainty they require to operate effectively. The ability to revisit and change determinations could easily disrupt the lives and businesses of those affected by the determinations, and cause them hardship and loss. The rule is premised on the idea that overall, the advantages of avoiding uncertainty (and its consequences) outweigh the reasons a court might have for wanting to change a determination in a particular case. If a court is permitted to

continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.

In the present case, having delivered its judgment on 24th January, 2014 and having appointed a date for assessment of compensation, the lower court should not have subsequently re-opened the substantive case by entertaining the Respondent's request. In so far as the substantive case is concerned, the lower court became functus officio after it delivered its judgment on 25th January 2014.

ORDER OF ASSESSMENT OF COMPENSATION (OAC)

A brief statement on the OAC will make the appeal intelligible.

The lower court stated that where compensation is awardable, the Act, in s. 63(5), provides the minimum award that a court can make. The making of the actual award is left to the discretion of the court after having recourse to the evidence and all circumstances of the case which might include mitigation of loss, the level of culpability of the parties and so on. The guiding principle is that the compensation must be just and equitable. In determining what is just and equitable, the court

must consider the circumstances surrounding the dismissal and the attendant loss occasioned by the dismissal.

The lower court further stated that in trying to award a just and equitable amount, the court will look at several factors such as the marketability of the applicant on the job market, the job market itself, the qualifications of the applicant, age of the applicant and whether the applicant has mitigated his loss. Most importantly, the court looks at the loss itself and its proximity to the dismissal and the applicant's role in causing the dismissal. One decision that expounds this proposition is **Kachinjika v. Portland Cement Company [2008] MLLR 161 (HC)**.

The lower court dismissed the Appellants' claim that they should be compensated for the salary that they have lost up to the dates they would have retired. The lower court also found that "*most of the applicants have not shown that they mitigated the loss occasioned by the dismissal ... there is no evidence whatsoever that the applicants mitigated the losses that they suffered as a result of the termination of employment*".

The lower court concluded the OAC in the following terms:

> *"As we pointed out before, we are mindful that the respondent made some payments to the applicants. We find that the respondent did an act that was aimed to alleviate the losses the applicants suffered as a result of the retrenchment. The respondent was also ready to*
>
> *provide repatriation to the applicants. This Court was told that the applicants were paid salary, severance pay, and notice pay comprising of three months' salary.*
>
> *In this matter, taking into account the law we have outlined and the facts of the matter, we are of the view that the applicants should be compensated for their lost salary for 30 months. We find that that would the suitable and ample compensation in the circumstances of the matter. Therefore, the respondent is ordered to pay the applicants their respective lost remuneration for 30 months. The respondent should make the payments within 18 days of this order. For the one applicant who has shown that he had made job applications, we order that he should be treated differently and be awarded the lost remuneration for 42 months.*

We have been informed that some of the applicants were engaged by the respondent. To those applicants, we make no order of compensation. We were also informed that some of the applicants died. For those applicants, they should also be compensated in a similar manner as those that are still pursuing this matter. Unless personal representatives of the deceased applicants appoint counsel at for their estates, the respondent should deal with the deceased applicants personal representatives with regard to the release of the compensatory sums.

On repatriation, ...[repatriation is not an issue in this appeal]

Finally, on the issue of leave: The parties have agreed that some applicants had outstanding leave days. It is our direction that the respondent should calculate the outstanding leave pay and pay the applicant's together with the payment of the compensation herein.

In summary, the applicants should be paid for the 30 months salary as compensation as well as leave pay. One applicant should be paid lost remuneration for 42 months. The applicants should also indicate their readiness to be repatriated to their places of choice."

GROUNDS OF APPEAL

According to the Notice of Appeal dated 4th November 2014, the Appellants have advanced the following ten grounds of appeal:

"1. The Industrial Relations Court erred in law in dismissing the Appellants' prayer for payment of severance allowance for the entire period they served before the amalgamation of the Income Tax Department and the Customs & Excise Department to form the Malawi Revenue Authority up to the time they were unfairly dismissed in the year 2010;

2. The Industrial Relations Court erred in law in dismissing the Appellants' prayer for payment of redundancy benefits and notice pay in line with the Respondent's conditions of service;

3. The Industrial Relations Court erred in law in failing to properly interpret the Respondent's conditions of service on the payment of severance pay, notice pay and redundancy benefits.

4. The Industrial Relations Court erred in law in dismissing the Appellants' prayer for the payment of compensation up to the Appellants' respective retirement ages in view of the fact that the Appellants were purpose trained as admitted by the Respondent and in view of the fact that most of the Appellants had few years remaining to their retirement age.

5. *The Industrial Relations Court erred in law on facts found to have been proven in dismissing the Appellants' prayer for the payment of aggravated and exemplary damages.*

6. *The Industrial Relations Court erred in law in making determinations on issues which were not pleaded by the Respondent.*

7. *The Industrial Relations Court erred in law in holding that the Applicants had failed to mitigate their losses.*

8. *The Industrial Relations Court erred in law in failing to properly apply the law to the facts when dismissing the Appellants' various claims.*

9. *The Industrial Relations Court erred in law in failing to make an award of salary increments as pleaded considering that the salary which was used for purpose of computing compensation was one payable in the year 2010 and as such the compensation awarded was not just and equitable.*

10. *The Industrial Relations Court erred in law in failing to award interest on compensation in order to make the award just and equitable."*

The grounds of appeal number 1 to 10 inclusively will be referred to as Ground of Appeal No. 1, Ground of Appeal No. 2, Ground of Appeal No. 3, Ground of Appeal No. 4, Ground of Appeal No. 5, Ground of Appeal No. 6, Ground of Appeal No. 7, Ground of Appeal No. 8, Ground of Appeal No. 9 and Ground of Appeal No. 10 respectively. Subject to the Court's decision on a preliminary issue raised by the Respondent, each ground of appeal will be considered in turn.

PRELIMINARY ISSUES

Before considering (if at all) the grounds of appeal, there is are two preliminary issues raised by the Respondent that have to be examined. The Respondent gave notice in respect of one preliminary issue (Hereinafter referred to as the "first preliminary issue"). The notice was given on 19th December 2016 and it is worded as follows:

> *"**TAKE NOTICE** that at the hearing of the appeal scheduled for 20th December, 2016 the Respondent shall raise as a preliminary issue the question whether the appeal ought not to be dismissed on the ground that it was filed out of time."*

The first preliminary issue has to do with s. 65 of the Labour Relations Act, which is couched in the following terms:

"(1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.

(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered."

Counsel Nkhono SC submitted that the appeal was filed out of time in that for a decision delivered on 21st October, 2014 a notice of appeal ought to have been lodged by the 21st of November, 2014. Counsel Nkhono SC further submitted that as (a) no explanation had been given by the Appellants regarding why the appeal was not lodged within 30 days of the decision and (b) no order of the court had been obtained to extend the time within which the appeal should have been lodged, the appeal should be dismissed on this ground alone.

Counsel Mumba's response on this issue is also very brief and succinct. He invited the Court to note that the Notice of Appeal (a) is dated 4th November 2014, (b) the date (stamp) endorsed thereon by the court is 5th November 2014, and (c) was served on Messrs Mbendera & Nkhono Associates on 5th November 2014 and Messrs Mbendera & Nkhono Associates duly accepted service of the same on the very same day. In this regard, Counsel Mumba submitted that the appeal was brought within the 30 days stipulated by s.65 of the Labour Relations Act.

In his reply, Counsel Nkhono SC conceded that the first preliminary objection had been erroneously raised because it so happened that the documents mentioned by Counsel Mumba were missing on the Respondent's file. Having seen the documents, Counsel Nkhono SC stated that he was in agreement with Counsel Mumba that the appeal against the OAC was lodged within time.

Despite the concession that the appeal against the OAC was made within time, Counsel Nkhono SC sought to change tack by submitting that the Appellants' appeal against the Supplementary Ruling should not be entertained. Clearly, the subplot must fail in that it falls outside the first preliminary issue as set out in the

Notice to raise preliminary issue. Further, it is clear from the Notice of Appeal that the decision being appealed against is the OAC and not any other judgement or ruling. Furthermore, a perusal of the OAC shows that it also dealt with matters that

were the subject of the Supplementary Ruling such as the claim for the salary up to the Appellants' respective dates of retirement and the claim for salary increments.

In short, the subject matters of the Supplementary Ruling and the OAC are very much intertwined that it would be legally and practically very difficult to give them separate treatment.

The second preliminary issue was introduced by way of submissions and it is to the effect that the premise of the appeal is no longer sustainable. It might help to quote in full the Respondent's submissions on the issue:

> *"When the IRC delivered its judgment on 24th January, 2014 against the Respondent the premise of the judgment was that the respondent was liable for unfair dismissal on the basis that the respondent had not consulted the applicants when it declared them redundant. Consequently, the compensation ordered and assessed proceeded on that basis. In the case of* ***First Merchant Bank Limited v Eisenhower Mkaka & Others MSCA Civil Appeal No. 23 of 2013*** *delivered on 10th October, 2014 the Supreme Court held that the requirement that an employer must consult employees prior to declaring them redundant is an incorrect interpretation of s.57 of the Employment Act and is certainly not a part of our law. Further in that case, the Supreme Court held that ILO Convention No, 158 Concerning Termination at the Initiative of the Employer on which such reliance has consistently been placed in the past is not part of the law of Malawi. Consequently to the extent that the appellants now proceed to seek payment of sums of money based on the premise that they were unfairly dismissed, they are not entitled to make these claims.*
>
> *The appeal should be dismissed on that ground. The Respondent did not lodge an appeal against the judgment of the IRC of 24th January, 2014, finding unfair dismissal. The subordinate Court Rules, however, do not provide for the filing of a cross-appeal but we submit that the Respondent can use the appeal by the appellants herein to raise an issue that might otherwise be raised in a cross-appeal."* – Emphasis by underlining supplied

Counsel Mumba submitted that the Respondent's argument is misplaced in that it seeks to attack the Respondent's liability for unfair dismissal as determined by the lower court in its judgement dated 24th January, 2014. As already mentioned

hereinbefore, it is in that judgement that the lower court found that the Appellants had been unfairly dismissed by the Respondent. In the premises, I fully agree with Counsel Mumba that the Respondent is seeking to appeal against the judgement on liability through the back door.

Further, it will be recalled that Respondent sought to have the Appellants' appeal against the OAC (delivered on 24th October 2014) dismissed for being filed out of time. I, therefore, find it very ironical that the Respondent seeks to be allowed to raise issues that would otherwise have been the subject of a cross appeal against

the judgement of the lower court delivered on 24th January 2017 way out of time, more than nine months prior to the OAC. Surely, what's good for the goose is good for the gander. In any case, the appeal herein in not against liability: it is against the OAC. Further, it seems to me that it would be wrong in principle for an appellant court to determine cases otherwise than on the basis of the law obtaining at the time the case was being considered by the lower court. In this regard, I am baffled by the contention by the Respondent. No authority for this novel and somewhat strange proposition has been, or can be, cited.

In the premises, the second preliminary issue also lacks merit.

GROUND OF APPEAL NO. 1

Under this ground, the Appellants espouse the view that the lower court erred in law by wrongfully dismissing the Appellants' prayer for payment of severance allowance for the entire period they served before the amalgamation of the Government Departments to form the Respondent up to the time they were unfairly dismissed in 2010.

Counsel Mumba placed reliance on ss. 32, 41 and 42 of the Act. Section 32 of the Act provides that:

> *"(1) Except as provided in subsection (2), no contract of employment shall be transferred from one employer to another without the consent of the employee.*
>
> *(2) Where an undertaking or a part thereof is sold, transferred or otherwise disposed of, the contract of employment of an employee in employment at the date of the disposition shall automatically be transferred to the transferee and all the rights and obligations between the employee and the transferor at the date of the disposition shall continue to apply as if they had been rights and obligations between the employee and the transferee and anything done before the disposition by or in relation to the transferor in respect of the employee shall be deemed to have been done by or in relation to the transferee."*

The relevant parts of s. 41 of the Act are subsections (1) and (2) and these state as follows:

> *"(1) For the purpose of this Act, "continuous employment" shall begin from and include the first day on which an employee begins to work for an employer and shall continue up to and including the date of termination of employment.*
>
> *(2) It shall be presumed, unless the contrary is shown, that the employment of an employee with an employer is continuous whether or not the employee remains in the same job."*

Section 42 of the Act provides that *"where an undertaking or part of it is sold, leased, transferred or otherwise disposed of, the periods of employment of an employee with the two successive employers shall be deemed to constitute a single period of continuous employment with the successor employer."*

Based on the above-mentioned provisions of the Act, Counsel Mumba advanced the following propositions of law:

(a) the effects of the legal transfer of an enterprise or establishment on its employees' contracts of employment are regulated by s. 42 of the Act;

(b) the transfer of an undertaking does not affect an employee's period of continuous employment (used for calculation of entitlements, for example, redundancy);

(c) the start of the continuous employment period is taken from the date on which the employee commenced work with the old employer (see http://www.redundancyhelp.co.uk/LegTrans.htm, s.32 (2) of the Act, **British Fuels Ltd v. Baxendale and another and Wilson and others v. St Helens Borough Council [1998] 4 All ER 609);**

(d) on a transfer, the employees' rights against his previous employer are enforceable against the transferee and cannot be amended by the transfer itself: see **British Fuels Ltd v. Baxendale and another; Wilson and others v. St Helens Borough Council, supra);** and

(e) s. 42 of the Act institutes the principle that the contract of employment is maintained with the transferee, that is, the transfer does not affect the employee's legal position, since contractual rights and obligations corresponding to an existing employment relationship are automatically transferred to the transferee. In other words, the

transfer results in the automatic replacement of the employer: a subject with a new identity is transplanted into the existing relationship, the content of which remains unchanged.

To buttress his submissions, Counsel Mumba referred the Court to dicta in the judgement of the European Court of Justice in **Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar (in liq) Case 105/84 [1985] ECR 2639** wherein the European Court of Justice commented on a provision which akin to s. 42 of the Act. The first dicta is at 2641:

"The effect of the Directive, in my opinion, is that an employee of the transferor at the time of transfer is entitled to insist, as against the transferee, on all the rights under his existing employment relationship. By virtue of Article 3, he can thus claim to continue to be employed by the transferee on the same terms as he was employed with the transferor, or if the transferee refuses or fails to observe those terms, he can bring a claim for breach of contract or the relationship, against the transferee ... The employer who dismisses an employee for one of the reasons specified in article 4(1) can thus justify the dismissal. Otherwise if the dismissal or purported dismissal is based on the transfer of the undertaking or business, the employee can insist on his rights under Article 3."

The second dicta is to be found at 2650–2651, paras 15 and 16:

"15 Taken together those provisions show that the directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. As the Court stated in its judgment of 7 February 1985 (Wendelboe v LJ Music ApS (in liq) Case 19/83 [1985] ECR 457 at 462), it is intended to ensure, as far as possible, that the employment relationship continues unchanged with the transferee, in particular by obliging the transferee to continue to observe the terms and conditions of any collective agreement (Article 3(2)) and by protecting workers against dismissals motivated solely by the fact of transfer (Article 4(1)).

16 The protection which the directive is intended to guarantee is however redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer. That is the case where the employee in question terminates the employment contract or employment relationship of his own free will with effect from the date of the transfer, or where that contract or relationship is terminated with effect from the date of the transfer by virtue of an agreement voluntarily concluded between the worker and the transferor or the transferee of the undertaking. In that situation Article 3(1) of the directive does not apply."

It is also the view of the Appellants that the lower court misinterpreted s. 27 of the Malawi Revenue Authority Act (MRA Act). Counsel Mumba argued the point thus:

"3.15 ... the section does not state that the Appellant's employment with Government was terminated. A proper reading of section 27 of the Malawi Revenue Authority Act would actually show that the Appellant's employment with Government was transferred to the Respondent.

3.16 More importantly, the Respondent did not dispute that there was a transfer of undertaking from the Malawi Government to itself as the Malawi Revenue Authority took over functions previously performed by Government Departments

> *of Customs and Excise and the Income Tax. However, the Respondent argued before the lower court that the Appellants were merely on secondment to the Respondent in terms of section 27(4) of the MRA Act. According to the Respondent, the Applicant's secondment was a temporary transfer and that the Applicants were subject to recall by their employer. Your Lordship, the case of British* ***Fuels Ltd v Baxendale and another; Wilson and others v St Helens Borough Council [supra]***
>
> *applies exclusively to employee's period of continuous employment (used for calculation of entitlements, for example, redundancy). It applies to the Applicants herein. What is clear here is that the Applicants were on continuous employment. The Respondent promoted them and transferred them to different stations. The Respondent also had powers of firing them or declaring them redundant. Such being the case the Malawi Government could not recall the Applicants. We agree that in terms of section 27(4) of the Malawi Revenue Authority Act and in terms of subsequent conduct of the Respondent, the Respondent employed the Applicants. There was no break at all when the Applicants were employed by the Respondent. The putting of the Applicants on probation would not by any slightest imagination create a break. It would not affect the Applicants continuous service with the Respondent. In terms of inter alia section 32 of the Employment Act and the case* ***British Fuels Ltd v Baxendale and another; Wilson and others v St Helens Borough Council*** *their rights were not affected by the merger."*

In concluding his submissions on this ground (Ground of Appeal No. 1), Counsel Mumba contended that proof of severance of employment should have been done by adducing documentary evidence but the Respondent failed to do so:

> *"Moreover, it is a settled rule of evidence that if a party relies upon a document, or terms in a document, he must produce and prove it otherwise such party will not be allowed to give evidence of the contents of the document* ***(Mikeyasi v Ching'amba and Others*** *(Civil Case No. 2726 of 1999, [2001] MWHC 57)"*

The position of the Respondent is that the Appellants' respective employment contracts with Government were terminated and their respective contracts with the Respondent started as new contracts. It is thus contended that the Appellants cannot claim severance allowance from the time they were working in the Government Departments to the time of their dismissal.

Counsel Nkhono SC placed reliance on s.27 of MRA Act and the evidence of Mr. Good Chakaka Nyirenda. The material part of s. 27 of MRA Act provides as follows:

"2. Except as otherwise provided in subsection(1) in relation to property, all contracts, debts, obligations and liabilities of the Government attributable to the Department of Customs and Excise and the Department of Income Tax before the commencement of this Act shall remain vested in the Government and may be enforced by or against the Government.

4. Unless the Board otherwise determines, all persons who before the commencement of this Act are employed by the Government for the purposes of the written laws specified in the Schedule shall, on commencement of this Act, be deemed to be on secondment to the Authority until they are employed in the service of the Authority in accordance with this Act or their secondment with the Authority otherwise ceases

in accordance with the terms of the secondment." – Emphasis by underlining supplied

Based on s.27(2) of MRA Act, Counsel Nkhono SC submitted that the notion contended for by the Appellants that the creation of the Respondent was by way of a transfer of undertaking or a merger complete with transfer of assets and liabilities into the Respondent is erroneous in that the aspects of the operations and institutions of the Government Departments that were transferred to the Respondent are specifically provided for in MRA Act:

"5.3 Regarding what happened to the employment of those of the appellants who had previously worked for two Government departments aforesaid, one only has to look at s.27(4) of the MRA Act and the evidence of the applicants in the court below; in particular, the evidence of Mr Good Chakaka Nyirenda, who was one of the applicants in the court below whose employment in Government pre-existed the establishment of MRA.

*5.4 Mr Nyirenda's evidence was contained both in a written witness statement complete with exhibits and also viva voce evidence in court at the hearing. The document marked **"GCN2"** exhibited to Mr Nyirenda's witness statement is a letter dated 21st October, 1999 from the office of the Secretary to the Treasury to the Controller of Customs and Excise in the Department of Customs and Excise. The letter addressed various issues but in paragraph 3 (screening and appointment of staff on probation) refers to S.27 (4) of the MRA Act. Evidently, the Board of MRA decided that members of staff from the Government Departments of Income Tax and Customs & Excise would be screened for "appointment on probation" to MRA. The method of screening is explained in that paragraph.*

5.5 The process would work as follows:

1) Members of staff interested in a job in MRA would apply for it on application form IIR12 indicating thereon the post that they then held.

2) *Members of staff of the two Government Departments who did not apply (presumably those not interested to join the employment of MRA) would be handled in accordance with the Malawi Public Service Regulations (MPSR).*

3) *Those members of staff who applied for a job in MRA would either pass the screening test or fail it. If they failed it, they would be dealt with according to the conditions of service applicable to Civil Servants (MPSR). Those who passed the screening test would be offered employment but only on probation for a period of one year.*

4) *At the end of the one-year probation, the probationers would either pass the probation or fail it. For those who failed the probation, they would return to the Civil Service and be handled in accordance with the MPSR. Those who passed the probation would be offered employment either as permanent employee of MRA or as a fixed term contract employee of MRA."*

Counsel Nkhono SC submitted that it was not suggested by either party that the Board of the Respondent determined otherwise than the process set out in s. 27(4) of the MRA Act. It was thus argued that Appellants who pre-existed the creation of the Respondent were, according to s.27 (4) of MRA Act, *"deemed to be on secondment to the Authority until they are employed in the service of the Authority."*. This deemed secondment operated on the commencement of MRA Act and it would continue until the person was either employed in the service of the Respondent or the secondment ceased in accordance with the terms of the secondment. It is not correct then, so the argument goes, that on the commencement of MRA Act, former employees of the Government Departments automatically became employees of the Respondent. In order for any former employee of either of the Government Departments to become an employee of the Respondent, the overt act of employment in the Respondent, according to s.27(4) of MRA Act, had to take place.

Counsel Nkhono SC also submitted that when an employee is seconded from employer A to employer B, the employee's employment is not transferred to employer B but the employee continues as the employee of employer A. He buttressed his submission by citing the Malaysia case of **Simpson National Finance Bhd & Anor v. Omar Hashim [2002] 1 LLR 272 (Award No. 1013 of (2005)** wherein the Industrial Court explained the meaning of secondment at P 277 as follows:

> *"The ordinary meaning of secondment as a temporary transfer, is on the face of it the connotation that the employee is subject to recall by his employer. So he is not a*

permanent employee of the other. In ***Comex Services Asia Pacific Region, Min v Game*** *Ashley Power quoting OP Malhotra at p.246 it reinforced the idea of a temporary transfer:*

> *'Therefore, so long as the contract is not terminated, a new contract is not made, and the employee continues to be in the employment of the original employer'."*

Counsel Nkhono SC also forcefully argued that it would be legally wrong to call in aid the provision of the Act in ss. 41 and 42 that deal with continuation of employment in that:

> *"the appellants whose Government employment pre-existed MRA were employed on 4th February, 2000. Mr Nyirenda certainly was; that was by offer of employment dated 8th February, 2000 (marked* ***"GNC3"*** *in his witness statement). The employment Act 2000 came into force only in September, 2000."*

Counsel Nkhono SC further invited the Court to note that the Respondent, on one hand, and the Government Departments, on the other hand, are separate and distinct entities:

> *"In any event, Departments of Customs & Excise and Income Tax on one hand and MRA on the other hand, are not the same entity; those were departments of Government whose employees were Civil Servants. MRA is a creature of specific statute and its employees are not Civil Servants; the MPSRs do not apply to them. Clearly, even though it was possible*
>
> *for those appellants concerned to have reverted to the Civil Service at the end of their one year probation in MRA once they successfully completed their probation and were employed as permanent staff members in MRA, their employment in MRA started on the date of the employment with MRA. Certainly, the two Government Departments were not (in the style of S.42 of the Employment Act) sold, leased, transferred or otherwise disposed of to MRA"*

I have considered the submissions by both Counsel and I am inclined to agree with Counsel Nkhono SC. Section 27 of MRA Act is clear. The employment of the respective Appellants with the Respondent commenced only on the dates when they were respectively and specifically employed by the Respondent after the formation of the Respondent in 2000. Therefore those of the Appellants who pre-existed the creation of the Respondent only became employees of the Respondent when they were expressly employed by the Respondent at the end of their respective secondment. Their employment with the Respondent started at the point of employment by the Respondent. There was no transfer of undertaking from which to infer transfer of employment contract. That would run counter to the clear provisions of s.27 (4) of MRA Act. Certainly, employment with the Respondent did not relate back to, or continue from, employment in the Government Departments.

Further, and perhaps more importantly, s.27(2) of the MRA Act expressly provides in clear terms that all contracts, debts, obligations and liabilities of the Government attributable to the Government Departments before the commencement of the MRA Act shall remain vested in the Government and may be enforced by or against the Government. To my mind, the scope of s.27(2) of the Act is wide enough to include employment contracts of the Appellants.

On the premises, none of the Appellants is entitled to make any claims against the Respondent in respect of their respective employments in the Government Departments. Accordingly, this ground of appeal has to fall by the wayside

GROUND OF APPEAL NO. 2

Counsel Mumba dealt with this ground of appeal under two sub-issues, namely, whether or not the Appellants were entitled to notice pay, and (b) whether or not the Appellants were entitled to be paid redundancy benefits.

Whether or not the Appellants were entitled to notice pay

On the first sub-issue, Counsel Mumba submitted that the Respondent's Conditions of Service provided for the payment of three months' notice pay. He also called in aid the provisions of s. 30 of the Act:

> *"4.1. Section 30(2) of the Employment Act provides that in lieu of providing notice of termination, the employer shall pay the employee a sum equal to the remuneration that would have been received and confer on the employee all other benefits due to the employee up to the expiration of the required period of notice.*
>
> *The Employment Act, at section 30(3) states:*
>
> > *'Where the employee terminates the contract without notice in circumstance in which notice was required, and the employer has not waived the right to notice, the employee shall be required to pay the employer in lieu of notice a sum equal to the remuneration that would otherwise have been to the employee up to the expiration of the required period of notice.*
>
> *4.2. Here the period of notice is 3 months. The Applicants are therefore entitled to 3 months notice."*

The issue of notice pay is very much interlinked with that of ex gratia payment. The latter issue is mainly dealt with by the Appellants in paragraphs 6.5 to 6.8 of the Appellant's Skeleton Arguments:

> *"6.5 In terms of the case of **Kachinjika v. Portland Cement Company** [2008] MLLR 161, which is binding on this court, once ex gratia payment has been made it cannot be taken back. Payment of ex gratia is usually made when an employee retires or is declared redundant or retrenched and not when he is dismissed. In this case the Applicants were declared redundant. To convert the ex gratia payment which was dully paid to the Applicant to notice pay would be to take back the ex gratia payment which is contrary to the binding case of **Kachinjika v. Portland Cement Company** [supra].*
>
> *6.6 To hold that the ex gratia payment which was made to the Appellants represented three months' notice would be contrary to **Kachinjika v. Portland Cement Company [supra].** In actual fact, all the Appellants received letters which had the word ex gratia payment.*
>
> *6.7 The case of **Kachinjika v. Portland Cement Company** is on four walls with the present case. It cannot be distinguished.*
>
> *6.8 The Respondent did not pay notice pay. It should be ordered to pay the same to the Applicants with interest of course."*

Counsel Mumba trashed the suggestion by the Respondent that the ex gratia payment was actually the notice pay. Counsel Mumba invited the Court to pay attention to wording of the Respondent's communication to the Appellants. It expressly stated that it was *"Ex-gratia (3 months salary)"*. There was no mention of payment of notice pay. Counsel Mumba buttressed his submissions by citing the cases of **Edwards v. Skyways Ltd (1964) WLR** and **Kachinjika v. Portland Cement Company [2008] MLLR 161** [Hereinafter referred to as the "**Kachinjika Case**"].

The **Kachinjika Case** was cited for the following observations by Chikopa, J., as he then was, on the purport and effect of ex gratia payment:

> *"We would also agree with the defendant that an ex gratia payment of the kind made by the defendant herein is entirely in the discretion of the grantor whether or not to grant it. We are however unable to agree with the defendant that once granted it is also in the discretion of the grantor to take it back. As we understand ex gratia payments they are given, unconditionally, as a token of thanks to the grantee for services well rendered. It is*

exactly what happened herein. The payment was made because the defendant thought it befitting to reward the plaintiff for many years of good service. But having so exercised their discretion, for good reasons we are sure, in favour of the plaintiff it is not the case that they can at any time thereafter get it back. The ex gratia payment though thus styled must be taken to be a gift out and out. After all it is not as if the defendant would be in a position to "refund" to the plaintiff the good service that he put into the defendant company. The only way it can be had back is if it were premised on fraud or misrepresentation from the grantee which is not the case herein. The case of Malawi

Railways Ltd v PTK Nyasaulu MSCA Civil Appeal No. 13 of 1992 (decided in November 1998) has a discussion on ex gratia payments that is in tandem with our opinion above".

Counsel Mumba also contended that it would be legally wrong to submerge notice pay in the award of compensation for unfair dismissal as, firstly, the payment of notice pay in this case was contractual and, secondly, it is a statutory requirement that employers should give notice before terminating the services of any employee.

The Respondent concedes that the Appellants were entitled to notice pay but contends that the notice pay was made. This is to be found in paragraph 7.1 of the Respondent's Submission on Appeal:

"7.1 ...We confirm that the appellants were entitled to notice pay under S.29 of the Employment Act 2000 when their employment was terminated in 2010. At the hearing of the appeal we, inadvertently expressed doubt about employee entitlement to notice pay on termination of employment through redundancy. We seek to correct that notion and confirm such entitlement under S.29 of the Employment Act. The Respondent's argument, then and now, is that notice pay was made at termination of the appellants' employment in 2010.

7.2 Clause 3.3.0 of the MRA Conditions of Service deals with "Redundancy." The appellants were declared redundant and were retrenched so this clause applies to them. One of the benefits that an employee who is declared redundant is entitled to under Clause 3.3.0 is "three months' salary in lieu of notice." At the top end, under S.29 of the Employment Act 2000 requires the minimum of one month's notice where the contract is to pay wages at a monthly rate. Clause 3.3.0 of the MRA Conditions of Service therefore fully complies with S.29 and S.30(2) of the Employment Act by providing for employees' notice pay in the event of termination of employment in such circumstances. In fact Clause 3.3.0 of the MRA Conditions of Service more than complied with Sections 29 and 30(2) of the Employment Act

2000 by exceeding the top-end statutory minimum of one month's notice and providing for 3 months' salary to every employee instead."

The Respondent espouses a different view on this sub-issue. Its case is that the three months' salary payment to the Appellants which was referred to in the letter of termination as *"Ex Gratia (three months' salary)"* was actually notice pay and the reference to ex gratia was no more than a mistaken description and that payment was in compliance with Clause 3.3.0 of the MRA Conditions of Service. It may not be out of place to quote in extensio the Respondent's argument on this sub-issue:

> *"7.4 The appellants' claim that despite receiving the three months' salary, they are entitled, to another three months' salary for no other reason than that the first was called "ex gratia." With due respect, this is a very flippant basis on which to base a claim. The respondent could have simply issued a cheque for precisely the same sum as they issued the cheque for and not call it anything. It appears that if the respondent had taken that course of action the appellants would not have claimed notice pay at all because they would have assumed that three months' notice pay was duly made. It is a sad day when decisions of the courts would be based, not on parties' rights but semantics it should be based on rights and obligations in law. There is everything in the circumstances to militate for accepting Mr Hannison Banda's evidence that reference to ex-gratia payment was just a mistake.*
>
> *7.5 Mr Chakaka Nyirenda testifying for the appellants in the court below, conceded in evidence that the obligations of the respondent at the point of termination of employment was to comply with such payments to the appellants as accorded with the applicants' rights and the respondent's obligations. The applicants' rights and the respondent's obligations in the contract of employment between the applicants and the respondent must be found in the Employment Act and the MRA Conditions of Service. Naturally, the content of those rights and obligations will, in appropriate cases, be mediated by the dictates of the Republic of Malawi Constitution and the common law. It would be a sad day in the delivery of justice if courts craft parties' rights and obligations, not on the basis of their legal rights and obligations, but on words they have used after the fact even in light of a party who clearly states and can demonstrate that "ex gratia" was an unfortunate misnomer.*
>
> *7.6 Further, Mr Chakaka Nyirenda correctly accepted that there is no provision in the MRA Conditions of Service that entitles the applicants to an ex gratia payment. Conditions of Service could in fact, provide for an ex gratia payment for an employee. By so providing in the Conditions of Service, the "ex gratia" payment becomes a contractual "favour" that the employer has agreed to provide to the employee. There is no contradiction in terms there. The MRA Conditions of Service do not provide for any ex gratia payment for employees.*

7.7 MRA is a creature of statute with a stratified system within which it must act. It must comply with the MRA Act in its operations; the Board and other organs of MRA have power and functions spelt out in the Act. As we have indicated earlier, the Public Finance Management Act also applies to the operations of MRA. The

resources of MRA must as a matter of law, be used on lawful and authorised purposes. We have already adverted to the restrictions placed on statutory corporations by 76 of the Public Finance Management Act. It would be unusual for the court to be too ready to find that the respondent applied its resources to pay out an ultra vires and extra-legal (therefore unlawful) ex gratia payment to employees in view of clear explanation from the respondent in the court below that reference to ex gratia was a mistake and in view of the absence in the MRA Conditions of Service of provision for ex gratia payment.

Counsel Nkhono SC then turned his attention to the authorities cited by Counsel Mumba and submitted that the same were distinguishable:

"*7.8 The cases of **Edwards v Skyways Ltd (1964) WLR** and **Kachinjika v Portland Cement Company (2008) MLR 161** with regard to ex gratia payment and its legal effect, are clearly distinguishable from circumstances obtaining in the present proceedings. For one thing, in none of the cases cited did the question arise whether a payment which is mistakenly named as ex-gratia in circumstances where the payer thereof is able to explain what it related to still founds an estoppel in favour of the payee restraining the payer from explaining what the payment was really for.*

*7.9 Again, in none of those cases did the court ever have to deal with a payer who is regulated by a law that restricts the purposes to which its resources may be applied as in the present case. Further, in the **Kachinjika v Portland Cement** case the court dealt, in part, with the question whether once an ex gratia payment has been made, it can be taken back. In that case when the payment was made, there was no doubt that it was meant as an ex gratia payment and there was no suggestion that it was meant as a payment for anything else. In the present case, the respondent says that it never meant to make an ex-gratia payment (for which it had no power to do anyway), the description "ex-gratia" was a mistake right from the start. The respondent did not try to take back an "ex-gratia payment" but only sought for sums to be applied to the purpose that they were meant for right from the start. There is no suggestion by the appellants that there was a practice at MRA to make an ex-gratia payment to employees whose employment had been terminated for redundancy. If such practice had been established, the applicants would be able to show that description as ex gratia was not just a misnomer but that receipt of ex gratia pay was a legitimate expectation of employees being declared redundant."*

I have considered the respective submission on this sub-issue. The starting point is that the parties are agreed that the Appellants were entitled, per clause 3.3.0 of the Respondent's Conditions of Service to be paid three months' salary in lieu of notice. The parties are also agreed that the Appellants were paid three months' salary. The dispute is with regard to the nature of the payment. The Appellants contend that as the payment was termed ex gratia rather than notice pay, this was conclusive of the nature of payment. On the other hand, the Respondent argues that the payment was salary in lieu of notice and the reference to ex gratia was no more than a mistaken description.

According to Wikipedia Encyclopedia, ex gratia (sometimes *ex-gratia*) is Latin (lit. "by favour") and is most often used in a legal context. When something has been done ex gratia, it has been done voluntarily, out of kindness or grace. In law, an ex gratia payment is a payment made without the giver recognising any liability or legal obligation.

To my mind, the nature of the payment cannot be determined in abstract. It is necessary that regard be had to the relevant correspondence, that is, the Respondent's letter dated 28th July 2010 and the schedule attached thereto [Hereinafter referred to as the "Termination Letter"]. The body of the Termination Letter reads:

> *"It is with regret that we inform you that following the Organisational review process that commenced in July 2009, your position has been adversely affected. You are therefore declared redundant.*
>
> *You will therefore be paid your terminal benefits in accordance with Employment Laws. Attached hereto is the schedule of the total terminal benefits payable to you.*
>
> *Management wishes to thank you for the contribution you have made towards national development through your job in Malawi Revenue Authority."* – Emphasis by underlining supplied.

The schedule to the Termination Letter is entitled *"Malawi Revenue Authority Terminal Benefits Computation"* and it sets out the *"Name"*, *"Salary"*, *"Years of*

Service", "Severance Pay", "Ex - gratia (3 months salary", "Total", PAYE 30%", "Nett before loans" and *"Total Loans".*

The catchwords in the Termination Letter are *"You will therefore be paid your terminal benefits in accordance with Employment Laws".* This wording is not consistent with payment of terminal benefits been done voluntarily, out of kindness or grace (see the **Wikipedia Encyclopedia** definition of ex-gratia above). In my view, the terminal benefits being referred to have to be those flowing from the Employment Act and/or the Respondent's Conditions of Service. Neither the Employment Act nor the Respondent's Conditions of Service provides for any ex gratia payment for employees.

In the premises, it is my holding that each of the Appellants was paid notice pay, that is, three months' salary in lieu of notice.

Whether or not the Appellants were entitled to be paid redundancy benefits

A central element in the argument of the Appellants under this sub-issue is that the lower court erred in equating severance allowance to redundancy benefits. It may not be out of place to set forth in full their submissions on these points:

> *"4.9. In making its determination on the claim for redundancy benefits, the lower court stated that "looking at the submission by the applicants, the said redundancy benefits would seem to be the very benefits that employees get at separation with their employer". The lower court never made an award of redundancy benefits in terms of Clause 3.3.0 of the Respondent's conditions of service as pleaded by the Appellants.*
>
> *4.10. My lord, the Respondent's conditions of service, Clause 3.3.0, is very clear that the Appellants are entitled to redundancy benefits. Clause 3.3.0. is in the following terms.*
>
> > *"Before any post in the Authority is declared redundant the Authority should discuss proposed redundancy with the Board. In the event of redundancy an employee shall be entitled to:*
> >
> > *(i) Three months' salary in lieu of notice.*
> >
> > *(ii) One month's salary for each completed year of service for either Junior Staff or Senior Staff.*

(iii) Refund of own Pension Contributions plus employer's Contributions in accordance with Pension Fund Rules.

(iv) Payment of outstanding leave days.

(i) Payment of outstanding overtime hours".

4.11. My lord, despite the conditions of service being cited extensively before the lower court, the lower court made no reference to it. My lord, the fact that severance allowance is not the same as redundancy benefits can also be discerned from the Respondent's conditions of service which use severance allowance differently in separate clauses. The Respondent cannot substitute the statutory severance allowance with the contractual redundancy benefits. It is therefore prayed that this Honourable Court should set aside the lower court's ruling and substitute it with the order that the Respondent should pay redundancy benefits to the Appellants as outlined in Clause 3.3.0 of the Conditions of Service."

The position of the Respondent on this sub-issue is that the "Severance pay" referred to in the schedule to the Termination Letter was actually paid in compliance with

Clause 3.3.0 of the Respondent's Conditions of Service which entitles an employee, in the event of redundancy, to *"One month's salary for each completed year of service"*. The submissions on the matter are to be found in paragraph 6 of the Respondent's Submissions on Appeal:

"6.1 Clause 3.3.0 of the MRA Conditions of Service [page 103 Volume A of the Record of Appeal] (that were in force at the date of retrenchments in 2010) is headed "Redundancy" and does not contain expressly the term "redundancy benefits," which the appellants have coined. A section heading is not part of the substance of the text. Very clearly, clause 3.3.0 deals with redundancy. One of the things that clause 3.3.0 deals with is what an employee is entitled to in the event of redundancy. One such entitlement is "one month's salary for each completed year of service for either Junior Staff or Senior Staff."

6.2 In the evidence in the court below, (Mr Hannison Banda) admitted that severance allowance is not the same as "redundancy benefits," but only in responding to a question put to him by the applicants' counsel in cross examination – counsel pressed Mr Banda to accept that clause 3.3.0 of the MRA Conditions of Service makes no mention of severance allowance and asked Mr Banda to confirm that fact. Mr Banda did so. By so doing, however, the applicants' counsel sought to push through the notion that clause 3.3.0 provides, instead, for what the applicants call "redundancy benefits;" which is a phrase that does not exist as such, in clause 3.3.0. Clause 3.3.0 thus deals with benefits that an employee is entitled to in the event of redundancy.

6.3 The contention seems to be that "severance allowance" is not mentioned in clause 3.3.0 of the MRA Conditions of Service and that therefore clause 3.3.0 does not deal with severance allowance. This is incorrect. Consequently, whether the "one month's salary for each completed year of service for either Junior Staff or Senior Staff" in clause 3.3.0 (ii) of the MRA Condition of Service is not the same as severance allowance provided for under S.35 of the Employment Act 2010 is a

question of law or construction to be decided by the court. We submit that in fact that provision in clause 3.3.0 (ii) of the MRA Conditions of Service relates precisely and complies with the requirement to pay severance allowance under S.35 of the Employment Act 2010. It is enough for Conditions of Service to comply with the minimum requirements of the Employment Act 2000 without citing specific provisions of the Act with which the Conditions of Service comply.

6.4 One of the purposes of the Employment Act 2000 was to set minimum employment standards which all employment contracts must comply with. It is "an Act to establish, reinforce and regulate minimum standard of employment." Also see ***DHL International Ltd v Aubrey Nkhata, High Court, Principal Registry, Civil Appeal No. 50 of 2004 (unreported).*** *S.69(2) of the Employment Act required employers to align their employees' contracts of employment and, by extension, their conditions of service with the Employment Act 2000. The MRA Conditions of Service comply with the Employment Act 2000. If an employment contract of an*

employee such as the applicants herein is terminated on redundancy, clearly under S. 35 of the Employment Act, such employee is entitled to severance allowance. The appellants were, at termination of employment in 2010, each paid among other things, one month's salary for each year completed service as

provided for under Clause 3.3.0 of the then applicable MRA Conditions of Service. This more than complied with the minimum requirement under S.35 of the Employment Act to pay such employees depending on length of service, severance allowance of between two to four weeks' wages for each year of completed service.

6.5 Clause 3.3.0 (ii) of the MRA Conditions of Service was clearly intended for compliance and does comply with S.35 and S.69 of the Employment Act in that by way of providing for the minimum severance allowance standard of S.35 of the Act it exceeds the minimum requirement by entitling every employee to a month's wages for each completed year of service regardless of the length of service. Once it is accepted that an employee whose employment has been terminated for redundancy would, under the Act be entitled to the payment set out in clause 3.3.0 of the MRA Conditions of Service it is wrong to suggest that there ought to be a second set of severance allowance payable for a redundant employee under S.35 of the Employment Act on the ground only that the words "severance allowance" are not specifically used in clause 3.3.0. This would create an absurd situation that although pursuant to S.69 of the Employment Act the Conditions of Service

must be crafted to comply with the Employment Act and do provide for not less than the minimum requirements of the Act (in many cases exceeding those), just because the Conditions of Service have not specifically put the label severance allowance on Clause 3.3(ii) as in the Act then the employer must pay the employee that sum twice over.

6.6 *It is therefore not correct that the one months' salary for each completed year of service for either Junior Staff or Senior Staff in clause 3.3.0 (ii) of the Conditions of Service is not the same thing or does not satisfy severance allowance payable under S.35 of the Act. That is the severance allowance referred to in S.35 of the Act; at any rate, payment of it satisfies S.35 of the Employment Act. In fact, as we said earlier, clause 3.3.0 does not anywhere describe these sums as a "redundancy benefit" as coined by the applicants. The contractual is dictated to by the statutory, and the contractual conditions of service (clause 3.3.0) effectuate the statutory requirement (S. 35 of the Act).*

6.7 *The only place in the MRA Conditions of Service where the word "severance" is used is in clause 3.8.0 (Gratuity). According to clause 3.8.1 employees who are not eligible under the pension fund and are not covered by any contract are entitled to "severance pay" when their employment is terminated other than by way of dismissal (presumably for some wrong doing or fault on their part). Although the heading of that paragraph is "Gratuity" the word "gratuity" itself is not used in the body of the paragraph.*

6.8 *Before the Pension Act was passed, employers had considerable latitude in deciding which categories of employees would not be eligible for the pension fund if any was eligible at all. The reference to employees who "are not covered by any*

contract" presumably refers to employees who are either "temporary staff" (as defined in the conditions of service) or others who are, somehow, not covered by

payment provisions. There is severance pay for those employees on termination other than by way of dismissal. Very clearly, this is a very limited number of employees at any given time. It would be absurd to suggest that according to the MRA Conditions of Service this is the only category of employees entitled to "severance pay" (assuming "severance pay" in clause 3.8.1 is the same as "severance allowance" in S.35 of the Employment Act) and all other employees are not entitled.

Very clearly, employees are entitled to severance allowance on the basis of S.35 of the Employment Act; and this is whether or not an employer's Conditions of Service clearly use the words "severance allowance." Consequently, the appellants were already paid their severance allowance required by S.35 of the Employment Act 2010 when MRA terminated their employment in 2010."

I have considered the respective submission on this issue. The Act, in s. 35 makes provision for payment of severance pay. At the time of termination of the Appellants' contracts, the text of s. 35 of the Act read as follows:

> *"(1) On termination of contract, by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule.*
>
> *(2) The Minister may, in consultation with organizations of employers and organizations of employees: by notice published in the Gazette, amend the First Schedule.*
>
> *(3) The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.*
>
> *(4) For the purposes of subsection (1), termination includes termination by reason of the insolvency or death of the employer, but does not include-*
>
> *(a) termination of a contract of employment for a specified period of time where termination occurs at the expiration of the specified period; or*
>
> *(b) a contract of employment for a specified task where the termination occurs at the completion of the task.*
>
> *(5) The payment of a severance allowance under subsection (1) shall not affect the employee's entitlement, if any, to payment in lieu of notice under section 30 or to a compensatory or special award under section 63.*
>
> *(6) Subsection (1) shall not apply where the employee--*
>
> *(a) is serving a probationary period as provided for in section 26;*
>
> *(b) is fairly dismissed for a reason related to his conduct;*
>
> *(c) unreasonably refused to accept an offer of re-employment by the employer at the same place of work under no less favourable terms than he was employed immediately prior to the termination;*
>
> *(d) is employed by a partnership and his employment ceases on the dissolution of the partnership and he enters into employment with one or*

more of the partners immediately after such dissolution or unreasonably refuses to accept an offer of employment by any such partner under no less favourable terms than he was employed immediately prior to the dissolution;

(e) is employed by a personal employer who dies, and the employee enters into the employment of the personal representative, widow, widower or any heir of the deceased employer immediately after such death or he unreasonably refuses to accept an offer of employment by such person on no less favourable terms than he was employed immediately prior to the death.

(7) Where the contract of employment is terminated by reason of the death of the employee, the severance allowance shall be paid to the surviving spouse of the deceased employee or, in the absence of such a spouse, to such other dependent relative as the labour officer may decide.

(8) A complaint that a severance allowance has not been paid may be presented to a District Labour Officer within three months of its being due and if the District Labour Officer fails to settle the matter within one month of its presentation, it may be referred to the Court, in accordance with section 64 (2) or 64 (3), which, if the complaint has been proved, shall order payment of the amount due." – Emphasis by underlining supplied

Section 35(1) of the Act refers to the First Schedule, which was worded as follows at the material time:

"Length of Service	*Severance Allowance Payable*
Not less than one year but not exceeding ten years	two week's wages for each completed year of continuous service
Not less than ten years	four week's wages for each completed year of continuous service"

The starting point in determining this sub-issue is to state what is obvious; which is that severance allowance payable under s. 35 of the Act is separate and distinct

from "redundancy payments" provided in clause 3.3.0 of the Respondents Conditions of

Service. An employee's entitlement to severance allowance under s.35 of the Act is not a contractual matter. Following the enactment of the Act in 2000, virtually all employees are entitled to severance pay. It is not a matter in which employers have a choice. It is imposed on employers by law: see **Japan International Co-operation Agency v. Jere [2008] MLLR 152** at 158.

It is not uninteresting to note that the two terms of "severance allowance" and "redundancy benefits" are respectively used in several clauses of the Respondent's Condition of Service. As an example, there is clause 3.8.0 of the Respondent's Condition of Service. The clause makes provision regarding gratuity and it reads:

> *"3.8.1 Employees who are not eligible for the Pension Fund and are not covered by any contract shall receive a severance pay when they retire or leave the service of the Authority for any reason other than dismissal.*
>
> *3.8.2 That severance pay shall be one months' salary for each completed twelve months of continuous service."*

The use of different terms was meant to denote different meanings. The drafter of the Respondent's Conditions of Service was not simply indulging in elegant variations. There is a long standing presumption in interpretation of legal documents regarding consistency in use of terms. A drafter of a legal instrument is enjoined to use the same term or expression if he or she means the same thing and he or she must use different words or expressions if he or she means a different thing. In the apt observation by Blackburn, J. in **Hadley v. Perks [1866] LR 1 QB 444, 457**:

> *"It has been a general rule for drawing legal documents from the earliest times, one which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words used unless you are going to change the meaning"*

See also the case of **Selemani and another v. Advanx (Blantyre) Ltd [1995] 1 MLR 262 (HC)**, cited by Counsel Mumba, for the proposition that where a clause in a contractual document is ambiguous, the clause must be construed against the maker of the document.

I am also fortified in my view that severance allowance payable under s. 35 of the Act is separate and distinct from *"redundancy payments"* provided in clause 3.3.0 of the Respondents Conditions of Service by the case of the **State and Another, ex parte Khawela and Others [2008] MLLR 283** [Hereinafter referred to as the **"Khawela Case"**].

The facts in **Kwawela Case**, as gleaned from the Editor's Summary thereof, are as follows. On 1st January 2002, the Minister responsible for Labour and Vocational Training, in exercise of powers conferred by s. 35 of the Act, promulgated the

Employment Act (First Schedule) (Amendment) Order 2002. The Order revoked the First Schedule and provided, among other matters, that where an employee is not entitled to pension, gratuity or such other terminal benefits, severance allowance payable to such an employee shall be calculated in a manner set out in the Order and that no severance allowance shall be payable where an employee is entitled to pension, gratuity or other terminal benefits which exceeds severance allowance, calculated as provided for in that order. The following dicta, at page 284c to g, by Potani J. are relevant:

> *"It appears the driving force behind the minister's decision was to avoid a situation in which an employee whose contract has been terminated would get double payment, that is, pension or gratuity or other terminal benefits on the one hand and also severance pay on the other hand.. The problem the minister sought to address mainly comes about because section 35 and indeed the Employment Act in its entirety does not define severance pay. It appears in the minister's view and thinking, payment of pension, gratuity or other terminal benefits is as good as payment of severance pay. That line of thinking in the view of the court is grossly erroneous as the learned Judge in Alufandika v Encor Products Ltd Civil Cause No. 3828 of 2000 (unreported) said that severance allowance is a distinct phenomenon altogether from pension. Indeed it is also different from gratuity. This Court is mindful that the decision in the Alufandika case was made before the amendment to the schedule was made. The position, however, does not change because the power to amend conferred upon the minister is not to amend the meaning of pension, gratuity or severance allowance but simply to amend the mode of calculating severance allowance which cannot be the same thing as pension or gratuity. Thus, much as the minister's intention might perfectly be right on economic and moral considerations, the decision made by the minister exceeded the power the power conferred by the law. To borrow the words of Counsel for the applicants, the minister sought to do something which is morally and economically right through the backdoor. This is a court of law not one of morality."*

I cannot agree more with His Lordship Potani. Just as was the position by the Respondents in the **Khawela Case**, the arguments by Counsel Nkhono SC (with all respect to the product of his research and his persuasive presentation of them) are primarily premised on moral and economic grounds. This Court is enjoined by s. 9 of the Constitution to determine cases with regard only to legally relevant facts and the prescriptions of law.

Turning to the present case, the Appellants were paid severance allowance in terms of s.35 of the Act (the adequacy or otherwise of the paid sum is the subject matter of Ground of Appeal No. 3 discussed below) but they were not paid redundancy

benefits as outlined in Clause 3.3.0 of the Respondent's Conditions of Service save for pension. Pension is to be excluded because the evidence by Mr. Harrison Banda that the Appellants were paid pension sums in accordance with Pension Scheme Rules went unchallenged.

In the premises, it is my holding that each of the Appellants was paid notice pay, that is, three months' salary in lieu of notice and refund of own pension contributions plus employer's contributions in accordance with Pension Fund Rules. I, therefore, enter judgment for each Appellant as follows:

(a) one month's salary for each completed year of service with the Respondent (not service with the Government Departments);

(b) payment of outstanding leave days, if any; and

(c) payment of outstanding overtime hours, if any.

It will be observed that the judgement above does not include the issue of "three months' salary in lieu of notice". This is because the same has already being dealt with under Ground of Appeal No.1.

GROUND OF APPEAL NO. 3

The Appellants assert that the lower court erred in law in failing to properly interpret the Respondent's conditions of service on the payment of severance pay, notice pay and redundancy benefits.

Counsel Mumba prefaced his submissions with the following general statements of law:

(a) when interpreting a contract or a contractual term, the court looks at the plain meaning of the words used: **Sichinga v. National Bank of Malawi [1992] 15 MLR 452 (HC));**

(c) parties to a contract are bound by its terms. Once they sign the contract, they are not allowed to renegade from it: **Nigrisoli and**

(d) **Another v. Illomba Granite Company Limited and Others (Civil Cause Number 1111 of 2005) [2008] MWHC 194 (4 November 2008)** and **MC Cutcheion v. Macbrayne (David) Ltd [1964] 1WLR 125** at 134; and

(c) where a clause in a contractual document is ambiguous, the clause must be construed against the maker of the document: **Selemani and another v. Advanx,** supra.

The preface is followed by a detailed analysis which it is apposite to set out in full:

"6.4. The Conditions of Service were drafted by the Respondent. They formed contract between the Appellants and the Respondent. The Conditions of Service provided for a specific regime of compensation in case of redundancy. This included payment of three months' notice pay and severance allowance calculated at four months' salary for each completed year of service.

6.5. [6.5 to 6.8 relate to the issue of ex gratia payment discussed above under Ground of Appeal No. 2]

6.9 The employee's entitlement to severance and her entitlement to other benefits such as pension and gratuity, long term service benefits. etc provided by an employer on satisfied termination of the contract of employment are recognised as distinct (see the ***State vs Attorney General (Minister of Labour and Vocational Training) ex parte Khawela and Others,*** *Misc Civil Cause No 7 of 2004 (HC)(PR) (unreported).* *In* ***Zamaere v Sucoma Limited*** *(MATTER NO. 157 of 2001) [2002] MWIRC 27 (20 February 2002) the then Chairperson of the Industrial Relations Court made the following observations:*

> *'Parliament, having expressly indicated that payment in lieu of notice, compensatory award and special award are not to be affected by the payment of* ***severance allowance,*** *ought to be understood that it never intended that payment of* ***severance allowance*** *should not affect the employees entitlement to other payments, such as pension, gratuity or other terminal benefits In other words, a contract of employment that provides that payment of severance allowance shall affect the employee's entitlement to terminal benefits does not violate the letter and spirit of the Employment Act. What the Employment Act has put in place is a minimum statutory requirement on* ***severance allowance.*** *It is up to the employer to make sure that their contract of employment documents are harmonized with the requirements of the Employment Act.'*

6.10 Thus an employee's entitlement to gratuity and pension benefits does not affect severance allowance payment. Therefore Appellants are supposed to get the redundancy benefits which they are entitled to receive under the Conditions of Service. An otherwise interpretation would be "illogical" "artificial" anomalous or productive of a disproportionate counter mischief.

*6.11 Further or in the alternative, an ambiguous contract has to be construed against its maker (**White v John Warrick & Co Ltd** [1953] 2 All ER 1021; **Registered Trustees of the Church of Disciples v Produce Export Co Ltd** [1994] MLR 280 (HC), per Mbalame J **Selemani and another v Advanx (Blantyre) Ltd** [1995] 1 MLR 262 (HC) per Nyirenda, J as he then was.*

*6.12 In construing the contract against its maker in **Registered Trustees of the Church of Disciples v Produce Export Co Ltd** [1994] MLR 280 (HC), Mbalame J made the following observations:*

> *"It is understandable that metrication is not a system we have had for a very long time, but in my judgment when one writes "0,55t" even in the absence of the sign "Kwacha" before the zero, it should read to mean 55t and not ½t as the defendants would wish the court to believe. In any event the defendants were the drawers of the contract document and if they made it unclear or ambiguous the document must be construed against them".*

*6.13 If, which is denied, the Conditions of Service are not clear as to whether the Redundancy benefits comprehensively outlined at Clause 3.3.0 means severance pay, then the same should be construed against the Respondent in terms of inter alia **White v John Warrick & Co Ltd** [1953] 2 All ER 1021; **Registered Trustees of the Church of Disciples v Produce Export Co Ltd** [1994] MLR 280 (HC), per Mbalame J **Selemani and another v Advanx (Blantyre) Ltd** [1995] 1 MLR 262 (HC). Clause 3.3.0 does not state that it is supposed to comply with the Employment Act. Clause 3.3.0 of the Conditions of Service did not use the term severance allowance because they were not intended to cater for severance allowance. The payment of the benefits outlined at Clause 3.3.0 is akin to payment of gratuity which is not supposed to be provided for in the Employment Act. It has to be covered by contract. The basis of the Applicants' claim for redundancy benefits is on the Conditions of Service. Actually payment of gratuity is not regulated by the Employment Act yet the case of **Zamaere v Sucoma Limited** recognises such payments. To argue that payment of redundancy benefits would produce an absurd result in the present case is like arguing that cases such as **Zamaere v Sucoma Limited** and that of **State vs Attorney General (Minister of Labour and Vocational Training) ex parte Khawela and Others were wrongly decided**. These cases represent good law. The Respondent would not pay severance allowance twice. The Respondent would pay redundancy pay as provided for in the Conditions of Service.*

*6.14 We submit that had the lower court properly directed itself to the Conditions of Service and case law on interpretation of contracts, it would not have dismissed the appellant's prayer for the payment of redundancy benefits calculated in terms of Clause 3.3.0 of the Respondent's Conditions of Service. It would also have not dismissed the Appellant's prayer for the payment of notice pay. Further, had the lower court properly directed itself to the Conditions of Service, all ambiguities would have been resolved in favour of the Appellants in terms of **Selemani and another v Advanx (Blantyre) Ltd** [supra]."*

Here again, the Respondent did not directly address this ground of appeal. However, as is usually the case in appeals of this nature, some of the issues raised in this ground of appeal were dealt with by the Respondent indirectly in the course of arguing the other grounds of appeal, that is, Grounds of Appeal No.s 1 and 2.

I have considered the respective submissions on this ground of appeal. To my understanding, the case of the Appellants under this ground of appeal is that the Appellants pleaded and in fact submitted that they were underpaid severance allowance, notice pay and redundancy benefits in that the Respondent used the wrong formula for calculating these items. It is thus prayed that this Court should

proceed to order that the Appellants be paid the shortfall with interest at the commercial bank lending rate.

The main thrust of the Respondent's argument is that the Appellants were indeed entitled to be paid these items and they were paid the same at the rate stated in the

schedule to the Termination Letter, that is, *"One month's salary for each completed year of service"* in respect of severance allowance and *"Three months' salary in lieu of notice"* in respect of notice pay.

On the face of it, the payment by the Respondent of *"One month's salary for each completed year of service"* appears to have more than complied with the minimum requirement under s.35 of the Act to pay employees, depending on length of service, severance allowance of between two to four weeks' wages for each year of completed service in that one month is 30 or 31 days whilst four weeks is 28 days.

The vexing question has to do with the meaning of wages as used in s.35 of the Act. The Appellants take the view that wages have to include all allowances due to them such as medical aid, leave grants, house allowances: see paragraph 5.46 of the IRC Form 1.

The Supreme Court of Appeal was confronted with a similar question in **Stanbic Bank Ltd v. Mtukula [2008] MLLR 54.** In this case, the appellant bank appealed against the decision of the High Court which upheld the decision of the Assistant Registrar of the High Court that the terms *"wages"* or *"pay"* which appear in the Act are sufficiently broad to cover allowances and other benefits such as official car allowance, garden allowance, night guard allowance, electricity, water and telephone allowance, night guard allowance and security alarm system. The appellant bank had argued that upon a proper construction, the terms *"wages"* and *"pay"* are restricted to basic salary or basic pay only. The appellant bank asked the Supreme Court of Appeal to reverse the lower court's decision. Having considered

a host of authorities, the Supreme Court of Appeal dismissed the appeal and upheld the lower court decision that the terms *wage"*, *"salary"*, *"pay"*, and *"remuneration"* are used interchangeably and include allowances, benefits and basic salary.

In the present case, the *"wages"* or *"salary"* used by the Respondent in calculating the severance allowance were restricted to the basic pay; they did not include allowances and other benefits such as medical aid and leave grants. In so far as some allowances and other benefits were not included in the basic pay, the "clean wage system" argument does not hold. In the premises, the Appellants are correct in complaining that they were underpaid severance allowance, notice pay and redundancy benefits as the Respondent used the wrong formula for calculating the same. In short, there is merit in this ground of appeal.

Chapter 8 of the Respondent's Conditions of Service deals with allowances and it provides for eight types of allowances, namely, acting allowance, kilometreage allowance, travel allowance, subsistence allowance, disturbance allowance, occasional meal allowance, housing allowance and lecturer allowance. Out of all

these allowances, it is only the housing allowance that is relevant in that it could be paid as part of monthly salary.

Clause 8.7.0 of the Respondent's Conditions of Service deals with housing allowance and it provides as follows:

> *"All employees not housed by the Authority shall receive Housing Allowance at the rate to be determined by management from time to time. An employee occupying an institutional house shall be deducted monthly rentals from the salary equivalent to the value of rent for a particular house to be determined by management from time to time"*

On the basis of clause 8.7.0 of the Respondent's Conditions of Service, it is only those Appellants that were not housed by the Respondent that are entitled to have housing allowance factored into their respective salaries when calculating severance allowance, notice pay and redundancy benefits.

For the record, the Respondent does not deny that housing allowance was payable but avers that the same was being paid to the Appellants as part of their respective monthly salaries. This is to be found in paragraph 12 of the Respondent's Final Submission Appellants in the lower court:

> *"Mr. Nyirenda claimed that the respondent froze the payment of housing allowances. Evidently, all that happened was that the respondent introduced a clean wage system and stopped breaking down, in the payslip, between basic salary and housing allowances. It*

> *appears that because the payslip no longer specifically set out an entry for "housing allowances", Mr. Nyirenda believed housing allowance had been abolished."*

The fact that housing allowance was included in the basic pay used in calculating severance allowance, notice pay and redundancy benefits was not controverted. In the premises, it is only medical aid and leave grants that were not taken into account in calculating severance allowance, notice pay and redundancy benefits payable to the Appellants. In the premises, the underpayment under this ground of appeal was only in respect of these two items, that is, medical aid and leave grants.

GROUND OF APPEAL NO. 4

The Appellants allege failure on the part of the lower court to award to the Appellants compensation up to the Appellants' respective retirement ages in view of the fact that the Appellants were purpose trained as admitted by the Respondent and in view of the fact that most of the Appellants had few years remaining to their respective retirement ages.

Counsel Mumba submitted that the law requires that the compensation that the Court should award must be what the Court considers to be just and equitable and that compensation must be aimed at making good the loss suffered by the employee as a

result of the employer's breach of the contract of employment taking into account all the circumstances of the case. He has buttressed his submissions by citing several authorities including cases by the Supreme Court of Appeal in **Chawani v. The Attorney-General [2000–2001] MLR 77 (SCA)** [Hereinafter referred to as the "**Chawani Case**"] and **General Simwaka v. The Attorney General, MSCA Civil Appeal No. 6 of 2001 ((judgement delivered on 24th November, 2009) (Unreported)** [Hereinafter referred to as the **"General Simwaka Case"**].

The **Chawani Case** was mainly cited for the following observations made by Tambala, JA (rtd) in delivering the unanimous opinion of the Supreme Court of Appeal at page 12 and 13:

> *"The appellant is clearly entitled to salary for seven years, seven months and ten days, that is, from 1 April, 1997 to 10 November, 2004. He is also entitled, in our view, to salary increments from 1 April, 1997 to 10 November, 2004. The appellant claims salary increment at an average rate of 20 percent per annum. Considering the prevailing inflation and the continuous depreciation of the local currency, we take the view that annual increments at 20 percent per annum are reasonable. The appellant is entitled to the increments at that rate. He is further entitled to leave grants covering the same period of seven years, seven months and ten days. The appellant is awarded these damages on*

the ground that, under the contract of employment, the respondents were under a legal obligation to pay the appellant a salary, annual salary increment and leave grants.

...The Registrar is also directed to calculate gratuity and pension based on the salary covering the period from 1 August, 1972 to 10 November, 2004, taking into account annual salary increments at the rate of 20 percent for the salary covering the period from 1 April, 1997 to 10 November, 2004; from the resulting sum must be subtracted what has already

been paid to the appellant as pension and gratuity; he must be paid the balance. The appellant must also be paid leave grants for the period between 1 April, 1997 and 10 November, 2004".

Counsel Mumba submitted that the **General Simwaka Case** held that where a public servant's employment is wrongfully terminated, he or she is entitled to paid compensation as follows:

(a) an amount of salary representing salary he would have earned during the period between the date of termination of employment and the date when he would have attained mandatory retirement;

(b) salary increments covering the period between the date of termination and the date of mandatory employment; and

(c) gratuity and pension based on salary which could be earned from the date of employment to the date of mandatory retirement together with salary increments.

Counsel Mumba contends that there are common features between the **Chawani Case** and the instant case in that (a) the Respondent is a public institution (not a private entity), (b) the Appellants were public officers, (c) there was here a prescribed minimum retirement age of 55 years and (d) some of the Appellants had less than eight years to retirement.

Counsel Mumba also invited the Court to have regard to the fact that the Respondent admitted before the lower court that the Appellants were purpose trained:

> *"As the Appellants were purpose trained and as the Respondent is the only institution that would employ the Appellants coupled with the fact that some of the Appellants had less than eight years to retirement the lower court ought to have awarded compensation and yearly increments up to retirement age in terms of the decision of the Malawi Supreme Court of Appeal in the case of* ***General Simwaka v the Attorney General*** *which followed the case of* ***Chawani v The Attorney General [supra].***"

Counsel Mumba concluded his submissions on this ground by advancing the following alternative view:

> *"Further or in the alternative the salary used in calculating compensation to the Appellants should have been the salary which their colleagues in similar grades were earning at the time of assessment, that is, the year 2014. The salary should not have been one which they were earning at the time of their dismissal in the year 2010 owing to the fact that the currency lost value due to massive devaluation in the year 2012."*

What lies at the heart of the Respondent's submissions is that where compensation is based on a statutory provision, the court should be careful not to step outside such statutory provision. In this regard, Counsel Nkhono SC submitted that compensation payable to an employee who has been unfairly dismissed is specifically provided for under s.63 of the Act which is worded as follows:

> *"(1) If the court finds that an employee's complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies.*
>
> *(a) an order for re-instatement whereby the employee is to be treated in all respects as if he had not been dismissed;*
>
> *(b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties; and*
>
> *(c) an award of compensation as specified in sub-section (4).*
>
> *(2)*
>
> *(3)*
>
> *(4) An award of compensation shall be such an amount as the court consider 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 the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.*
>
> *(5) The amount to be awarded under subsection (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;*
>
> *(d) one months' pay for each year of service for an employee who has served for more than fifteen years,*
>
> *and an additional amount may be awarded where dismissal was based on any of the reasons set out in s.57(3)*
>
> *(6) Where the court has made an award of re-instatement or re-engagement and the award is not complied with by the employer; the employee shall be entitled to a special award of an amount equivalent to twelve weeks' wages, in addition to a compensatory award under subsections (4) and (5).*

Counsel Nkhono SC called upon the Court to be faithful to the text of s.63 of the Act. He submitted that as the lower court did not make any order for the re-instatement or re-engagement of the Appellants, none of them was entitled to a special award under s.63(6) of the Act.

With regard to a compensatory award under s. 63(4) of the Act, Counsel Nkhono SC contended that nothing therein supports payment of compensation calculated by reference to an employee's prescribed minimum retirement age. He placed reliance on two High Court cases, namely, **DHL International Limited v.**

Aubrey Nkhata, HC/PR Civil Appeal No. 50 of 2004 [hereinafter referred to as the **"Aubrey Nkhata Case"**] and **Manica Malawi Ltd v. Morton Mwafulirwa, HC/PR Civil Appeal No. 87 of 2004** [hereinafter referred to as the **"Morton Mwafulirwa Case"].**

The **Aubrey Nkhata Case** is discussed in paragraphs 8.4 to 8.8 of the Respondent's Submission on Appeal as follows:

> *"8.4 With regard to what is just and equitable, the High court of Malawi has said in the case of **DHL International Limited v Aubrey Nkhata Principal Registry Appeal No. 50 of 2004** that the court must look at the circumstances of each case.*
>
> *In that case, the court further recognised that the Employment Act, the Labour Relations Act and the Constitution of the Republic of Malawi have changed the approach to labour relations in Malawi and that the court must therefore have regard to human rights, including freedom of association, workers' participation*

and equity. Central to this constitutional and legislative framework is industrial peace, advancement of social justice and economic development.

8.5 *In that case* ***(of DHL International Limited v Nkhata),*** *the High Court also had occasion to consider the cases of* ***Chawani v The Attorney General MSCA No. 18 of 2000, Council of the University of Malawi v Urban Mkandawire MSCA No. 38 of 2003, Macpherson Nelson Magola v Press Corporation Limited Civil Cause No. 2719 of 1978, MRA v Everton Mpaso Civil Appeal No. 59 of 2004*** *and* ***Ernest Mtingwi v MRA Civil Cause No. 3389 of 2004****. The high Court per Twea J (as he then was), said with regard to these cases that:*

> *"these cases are as illuminating as they are confusing, in my assessment of the cases, I find that they can all be distinguished. The case of* ***Chawani*** *and those that have followed it are based on the common law approach to employment and contractual obligations. The case of* ***Magola & Others*** *were also based on the common law but the High Court had attempted to fuse the current Employment Act 2000 in interpreting the rights. The court based its view on an English Act that has since been repealed.*
>
> *It is pertinent to note that in these cases, the courts have not come up clearly on how or why they ignore the current Employment Act when computing awards. Lastly, in the case of* ***Mtingwi****, the court relied heavily on the interpretation of the constitution in trying to interpret the Employment Act. The problems raised by these various cases are well articulated in the case of* ***Mpaso.***
>
> *It is clear from the judgment of Chipeta J that the approach of the lower court leaves much to be desired, but he stopped short of interpreting or proffering the proper approach in deciding what would be just and equitable in the circumstances. The case of* ***Mpaso*** *however, leaves no doubt that the applicable law as far as contracts and contracts of employment are concerned is as interpreted by the Malawi Supreme Court of Appeal in the* ***Chawani*** *case. This, however, is as far as case authorities go. As I said earlier, I find that these cases can be distinguished. I will now attempt to shed some light on the proper approach."*

8.6 *In the same case, Twea J (as he then was), then cited with approval a statement made by the Industrial Relations Court that:*

> *"of course the objective of such compensation is not to make the employee richer overnight or leave him or her poorer. At the same time, the court should not aim at punishing the employer. What the court will strive to aim at is to strike a balance which should leave both parties happy and feel that justice has been done".*

8.7 *Further, Twea J (as he then was), in that case said that*

> *"Further, the lower court found that the appellant was liable for unfair dismissal. The Employment Act in s.63 provides for specific remedies for unfair dismissal. The same remedies may stand alone or together. These are reinstatement, re-integration or an award of compensation. Subsection (2) enjoins the court to first consider the award of reinstatement or re-integration subject to some stated conditions before considering award of compensation. In the present case, the court did not make any specific finding as to why the remedies were not appropriate. It should have done so. I have considered the approach of the lower court to the award of compensation*
>
> *I noted that the approach was not properly articulated. The proper approach is as espoused by this court in* ***Mpaso's*** *case. S.65(4) requires the court to make an award of*

compensation that is "just and equitable in the circumstances". When making such a decision, it must take into account three factors:

Loss sustained by the employee consequent upon dismissal;

Whether the loss can be attributed to the action of the employer; and

The extent of the employee's contribution to the dismissal.

Subsection (5) therefore gives the mandatory minimum that the court may award." Depending on the finding of the court in respect of the three above factors, it may adjust the scale upwards in respect of subsection (5). I bear in mind the findings of my brother judge in ***Mpaso's*** *case where the interpretation of s.63(5) was raised. While I agree with the judge's view that as long as the court does not make an order below what is stipulated in the said subsection, then the order is not necessarily wrong I hasten to say, however, that whenever the court is exercising its discretion to move away from the minimum threshold, it must give reasons.*

The decision of the court should not be arbitrary. It is not open to the court to award any sum as it wants. The court must award such sums as would by law, be allowed. It should be clear, on the record, to the employee, employer and all why the court decided to enhance the award from the minimum stipulated in s.65 (5). In the present case, the lower court followed the ***Magola*** *case and some English case authorities. The listed several heads under these include immediate loss of salary, loss of fringe benefits, house allowance, utilities, mobile phones, guard allowances, pension contributions and future earnings. From a glance, these heads reveal that the court misled itself on this issue.*

8.8 The court in ***(DHL International Limited v Nkhata)*** *went on to state that the court should not split heads of compensation and that to do so ignores the basic tenets of the definition of "remuneration" and "wages". The court should therefore look at all earnings together and not split them.*

In that case, the court took particular notice of the very high handed manner in which the employer treated the employee; humiliating the employee and even stopping the employee in engaging in similar employment for twelve months. The

court also commented on the award by the Industrial Relations Court of "immediate loss".

With regard to the head of compensation called "immediate loss" Twea J (as he was then), said:

"in my view, this is not allowed under the law as it stands An employee is entitled on termination to notice pay and severance allowance which payments are statutory and not discretionary. Such payments must be effected within seven days in accordance with s.53(1). It is clear that the law did not intend the employee should suffer unnecessary financial hardship. An award of "immediate loss" therefore is not part of our law. Further, this court criticised award of "future earnings" in the case of ***Mpaso.*** *Clearly, this is not part of our law as it stands"*

The discussion by Counsel Nkhono SC of the **Morton Mwafulirwa Case** is as follows:

"8.11 Further, the court should obtain useful guidance from the case of ***Manica Malawi Ltd v Morton Mwafulirwa High Court Principal Registry Civil Appeal No. 87 of 2004*** *where, among other things, the court says that the future loss claim relates to the notice period in so far as specific sums are concerned and that any other type of future loss is reflected by a general award if there is evidence of the reality of such future loss. In that case the High Court, per Kamwambe J, said at pages 2 and 3 thereof that:*

> *"I am called upon to adjudicate on the nature and extent of compensation payable under section 63 of the Employment Act which provides that if a court finds that an employee's complaint of unfair dismissal is well founded, it shall award one of the following remedies:-*
>
> *(C) an award of compensation as specified in subsection 4..."*

Further, at page 8 of the transcript of the judgment, Kamwambe J, said:

> *"When we are applying the just and equitable principle in relation to section 63 (5) of the Act which provides the minimum that the court may award where an employee has sustained loss, you are considering general damages or unquantifiable losses which may include future financial loss and loss of security, consequent upon redundancy or unfair dismissal. If you marry subsections (4) and (5) thereof, you find that such things as salary, pension, car or fuel allowance, house allowance, medical aid etc which are contractual in nature are not envisaged therein, after all they are specific compensatory items capable of quantification and would be restricted to notice period and would be paid as a matter of "of course". What is awardable under subsection (5) is compensation for general loss only in the event that dismissal is unfair.*

As suggested in ***Norton Tool Ltd Co. v Tewson [1973] 1 All ER 183*** *The president suggests the possible four heads of compensation where an employee has been unfairly dismissed; thus, (a) immediate loss of wages (b) future loss of wages; (c) the manner of dismissal and (d) loss of protection in respect of unfair dismissal or dismissal by reason of redundancy. The first hereby is what I have already said will tally with notice period. On the other hand, the other two heads will squarely come under subsection 5. Under future loss head, it seems the employee was considered by following the* ***Kalinda v Limbe Leaf Tobacco Limited, Civil Cause No. 542/1995.*** *Where we are dealing with compensation under the Employment Act, I feel we would be safer to restrict our consideration under the Act only and not on cases that occurred before the Act. In my view any future loss must be considered under subsection 5. In the same breath I should say the respondent need not have been awarded compensation for loss of salary and other benefits beyond 21st April, 2004 until when he found alternative employment, so that he is paid salary for an extra three months up to 21st July, 2004. Subsection 5 of the Act would not permit this since it requires the minimum under the subsection to be considered when computing compensation".*

Counsel Nkhono SC submitted that on the authority of the two cases of **Aubrey Nkhata Case** and **Morton Mwafulirwa Case**, the court below rightly refused to order payment of compensation calculated up to retirement age. It was also argued

that the compensatory award to the Appellants of the equivalent of 30 months' salary is more than just and equitable in the circumstances:

> *"8.10 From the periods of service set out in the document jointly provided by the parties to the court below, none of the applicants served for a period of more than ten years. Consequently, under section 63(5) (b) the compensation calculable was two weeks' pay for each year of service.*
>
> *Some of the applicants fell under s.63 (5) (a) and were entitled to compensation of one week's pay for each year of service, for having served for not more than five years. In the circumstances the court below went beyond what was fair compensation to the appellants."*

Having carefully considered the respective submissions by both Counsel, I fully agree with Counsel Nkhono SC that most if not all cases relied on by the Appellants on this ground, including the **Chawani Case** and the **General Simwaka Case**, are not directly relevant to principle of "*just and equitable compensation*" under s. 63 of the Act.

It will be recalled that the **Chawani Case** was decided prior to the Act coming into force on 1st September 2000: see Government Notice No. 47 of 2000. There is no doubt in my mind that had the **Chawani Case** arisen after the commencement date of the Act the compensation would have been based on the *"just and equitable compensation"* principle as stated in s. 63 of the Act. I am not persuaded that under that principle, an unfairly dismissed employee can claim, as a matter of unqualified entitlement, to be paid retirement benefits up to the time of retirement. The Court must take care not to regard a contract of employment as a contract for life or one cast in iron until retirement. As was aptly observed by Chikopa J., as he then was, in the **Kachinjika Case** page 178:

> *"Any way you look at that argument is untenable. The truth of the matter is that not only has the plaintiff not worked up to such age, but there is also no bankable guarantee that he would have worked up to such age. He would have died, could have resigned, and could have been properly terminated. It is also possible that the Plaintiff will find other employment gainful work which will extend the same terminal benefits as if he retired at the normal age."*

n the circumstances, the lower court did not err in law in refusing to pay the Appellants future wages for the rest of their respective lives or until their respective retirement. Accordingly, I decline to order that the Appellants be paid compensation up to their respective retirement ages.

GROUND OF APPEAL NO. 5

It was the case of the Appellant under this ground of Appeal that the lower court wrongly dismissed the Appellants' prayer for the payment of aggravated and exemplary damages.

Counsel Mumba prefaced his submissions by drawing the Court's attention to page 3 of OAC where the lower court stated thus:

> *"This court is not in the habit of awarding exemplary damages. The aim of compensation in this court is to compensate for the loss suffered due to the termination of the employment."*

Counsel Mumba submitted that the reason given by the lower court for declining to award aggravated and exemplary damages does not find support in law. He cited the case of **Banda v. Dimon (Mw) Ltd 2008 MLLR 92** as an example of aggravated and exemplary damages being awarded in employment matters.

In **Banda v. Dimon (Malawi) Ltd**, supra, the plaintiff had worked for the defendant's company for a period of nine months as a computer programmer or systems analyst. The defendant was run by white South African managers who obstructed the plaintiff's work. They took away the plaintiff's computer and files and moved him from one office to another office until he was forced to work from home where he had no printer. He was prevented from submitting his reports to the United States of America (his former managers). The plaintiff was forced to account for travel allowances when nobody else in the company was required to do so. The plaintiff sued the company claiming that he had been constructively dismissed from employment through the defendant's unreasonable conduct and that due to the dismissal the plaintiff had been deprived of a salary, allowances and other benefits. The court found in favour of the plaintiff.

Counsel Mumba placed emphasis on the following observations that were made by Ndovi, J. in awarding exemplary damages:

> *"In a no fault situation like in this pathetic case where greed and racism were clearly at work, the plaintiff is entitled to exemplary damages to the tune of 3 years' salary. He should have worked up to pensionable age if it were not for deliberate racial practices and fear of Africanisation by misguided individuals".*

Counsel Mumba contends that, on the facts proven before the lower court, this is a proper case in which exemplary damages should have been awarded. The contention was framed as follows:

> *"The lower court found that the termination of the Appellants' employment was both procedurally and substantively unfair. Following the termination of the Appellants' employment, the Respondent went on a recruitment spree replacing the Appellants with new employees. The Respondent is a public institution. The redundancies which the Respondent carried out are the worst of all. A clear message should be sent to public institutions not to declare employees redundant just for the sake of it. We thus submit that aggravated and exemplary damages would be appropriate in the circumstances of this case."*

The Respondent took a two-pronged attack against this ground of appeal. Counsel Nkhono SC submitted that where a court finds that an employee has proved unfair

dismissal, s. 63 of the Act sufficiently provides for remedies. As such, he argued that:

> *"It is not necessary therefore for the court to take an over zealous approach to the question of remedies for unfair dismissal. In particular, the court is given power to award such compensation as it considers just and equitable in the circumstances. This is what the court below, more than did. Besides, it is clear that whatever view one takes of the respondent's terminations of the employment of the appellants on 28th July, 2010, there was no unlawfulness or arbitrariness or high-handedness.*
>
> *Further, all was lawful on the basis of* ***First Merchant Bank v Eisenhower Mkaka & Others*** *above cited."*

The second prong is that the concept of exemplary damages is one that a court should not too readily seek to use. Counsel Nkhono SC referred the Court to the case of **Rookes v. Barnard [1964] 1 All ER 367** wherein Lord Devlin sets out categories of action that might attract an order for exemplary damages as follows:

> *"the first category is oppressive, arbitrary or unconstitutional action by the servants of government. I should not extend this category, - I say this with particular reference to the facts of this case;- to an oppressive action by corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's; he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of government it is different, for the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation*

that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ..... Where a defendant with cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity ..... Exemplary damages can properly be awarded when it is necessary to teach a wrong doer that tort does not pay.

To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute .....

Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified. But the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved

to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum."

On the basis of the above-mentioned dicta, Counsel Nkhono SC submitted that exemplary damages (a) constitute a province a court should be very slow to enter upon, (b) is a device generally available to the courts at common law, (c) is a device that the lower court did not find much jurisdiction or use for it being a court whose remit is strictly circumscribed within s. 110 (2) of the Constitution and as fleshed out in Labour Relations Act, and (d) should be confined to egregious cases such as for facts obtaining in **Munthali v. Attorney General [1993] 16 (2) MLR 646.**

Counsel Nkhono SC concluded by submitting that the circumstances of the present case are wholly inappropriate as a case attracting an order for exemplary damages:

"The appellants seek to suggest that the manner in which the appellants' employment was terminated rises to that level. We disagree. There is nothing extraordinary in the manner of termination of the applicants' employment. The fact that the respondent is an agency of Government should not cloud reasoning."

I have considered the respective submissions and I am inclined to agree with Counsel Nkhono SC that the case of **Banda v. Dimon (Malawi) Ltd** is

distinguishable. The circumstances in that case quite correctly deserved a different consideration as the Court did in that case. A breach of contract of employment

motivated by malice or ill will or such other malevolence, be it on account of racism discrimination or such other practices, ought to be addressed differently because of the desire or calculation to inflict suffering: see **Dama v. Eastern Produce (RBDA) [2002-2003] MLR 50** and **Lero Munthali v. The Malawi ODA Ciat, HC/Lilongwe District Registry Civil Cause No. 602 of 1996 (unreported)**.

Further, as was rightly observed by Mwaungulu J, as he then was, in **Munthali v. Attorney General**, supra:

> *"Exemplary damages, however, are not necessarily a compensation to the plaintiff for the damage he has suffered; they are more a punishment on the defendant for waywardness."*

I have painstakingly gone through the facts of this case and I have found no evidence of malice, ill-will, oppressive or high-handedness action on the part of Respondent. As such, I am not convinced that the present matter calls for the award of exemplary damages: this was simply a case of unfair termination of employment per se. It is not as though the lower court found that the situation did not call for redundancy: it is just that the Appellants' services were terminated *"unilaterally and without due process of consultations"*. In the premises, this ground of appeal has to fail.

GROUND OF APPEAL NO. 6

On this ground of appeal, the Appellant contend that the lower court erred in law in making determinations on issues which were not pleaded by the Respondent.

The position of the Respondent is that it is the Appellants themselves who raised all the issues that the lower court pronounced judgment upon. I cannot agree more with the Respondent. Every single issue that the lower court determined was placed before it by the Appellants themselves. It, therefore, did not come as a surprise that
this ground of appeal was not pursued by the Appellants at the hearing of the appeal. As a matter of fact, even the Appellants' Skeleton Arguments did not cover this ground of appeal.

GROUND OF APPEAL NO. 7

The issue of mitigation of losses lies at the heart of this ground of appeal. It is submitted by Appellants that the lower court erred in law in holding that the Appellants had failed to mitigate their losses:

> *"9.1. The lower court in awarding the Appellants 30 months' salary stated that the Appellants had failed to mitigate their losses by only submitting application for re-engagement with the Respondents when the Respondent called for the Appellants to apply for re-engagement. We submit that this was a misdirection in law. Further, the lower court misapplied/ignored important facts presented before it that the Appellants were purpose trained according to the Respondent's witness. It would have been difficult for the Appellants to find alternative employment when the only institution that would have employed the Appellants was the Respondent."*

It is commonplace that the burden of proof of non-mitigation is on the employer: see **Blantyre Newspapers Limited v. Charles Simango, HC/PR Civil Appeal Case No. 6 of 200 (unrepresented)** and the Canadian cases of **Bird v. Warnok Hersy Professional Service Limited [198] BC No. 2057(SC), Michaels v. Red Deer College [1976] 2 SC R 324, Fast v. Western Rail Products Limited [2000] BC No. (SC)** and **Edge v. Kilborn Engineering (BC) Limited [1987] BC No. 992 (SC)**.

In **Blantyre Newspapers Limited v. Charles Simango**, supra, Mwaungulu J, as he then was, said:

> *"I was not much impressed, however with the effort – I should say lack of effort – by the plaintiff to obtain other reasonably comparable employment. But the onus is on the Defendant to prove not only failure in fact, but that had the plaintiff taken reasonable steps to mitigate, he would have been likely to obtain comparable alternative employment: see*
>
> *Munana –vs- MacMillan Bloedel Limited [1997] 2AC WS 304 (BCSC)."* – Emphasis by underlining supplied

It is also the law that the defendant must prove that alternative job opportunities were available. This point was put in **Edge v. Kilborn Engineering (BC) Limited**, supra, as follows:

> *"Turning now to the question of other potential job opportunities. Copies of ads from various newspapers were put into evidence for purpose of indicating jobs that could have been obtained by the plaintiff had he only tried. By way of reply the plaintiff said many of these were outside his field of expertise or were at a lower level of employment, were outside of British Columbia or were unsuitable for various reasons. Again, it seems to me that rather than just produce newspaper ads, if it relies on these ads, it should produce the employer who placed them so he can be cross-examined. A newspaper cannot be*
>
> *cross-examined. The defendant must prove that the job was available, the length of its term its nature and the rate of pay. Only then can a Judge decide whether or not it was unreasonable for the plaintiff to turn the offer down."* – Emphasis by underlining supplied

It is plainly clear from the foregoing authorities that the onus on an employer to prove non-mitigation is by no means a small one: see **Michaels v. Red Deer College**, supra, where Laskin CJ said:

> *"But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigating is by no means a light one for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."*

I momentarily pause to observe that the case of **Malawi Environmental Endowment Trust v. Kalowekamo [2008] MLLR 237 (HC)** is often cited as authority for the proposition that an employee should demonstrate through production of employment application letters and negative responses. The Court discussed the issue in three sentences as follows at page 242:

> *"This leads to ground 2 of the appeal which is that the court erred in ruling that the respondent had successfully mitigated his loss. On this aspect there was no evidence on the basis of which the court could have found that the respondent had through employment application letters and negative responses thereto tried in vain to seek alternative employment in order to mitigate the loss from the non-renewal of his contract. The court would therefore agree with the appellant that the respondent did not mitigate his loss and therefore ground 2 of the appeal succeeds."*

We due respect, the decision on mitigation of losses in **Malawi Environmental Endowment Trust v. Kalowekamo** was reached per incuriam: there was no consideration of relevant authorities.

In the present case, it seems both the lower court and the Respondent proceeded on the erroneous assumption that the Appellants bore the onus of proving mitigation. For the lower court, it will be recalled that it found that *"most of the applicants have not shown that they mitigated the loss occasioned by the dismissal ... there is*

no evidence whatsoever that the applicants mitigated the losses that they suffered as a result of the termination of employment". This was very much in line with the submissions by the Respondent:

> *"9.1 The appellant's failure to mitigate loss is clearly to be seen from the witness statements filed with the court in relation to the assessment of compensation. The IRC was therefore correct in holding that the appellants had failed to mitigate their loss. In none of the witness statements did any of the appellants proffer any evidence of attempt to mitigate their loss."*

It seems to me that both the lower court and the Respondent approached the issue of mitigation of loss in a very simplistic way. The Respondent did not call any evidence to prove that alternative jobs were available let alone the nature, duration and the rate of pay of these alternative jobs. In the absence of such evidence, the Court would not be in a position to decide whether or not it was unreasonable for the Appellants not to apply for such jobs.

In the premises, the Court would agree with the Appellants that the lower court erred in law in holding that the Appellants had failed to mitigate their respective losses. Actually, it is the Respondent that failed to satisfy the burden of proving non-mitigation of losses on the part of the Appellants. This ground of appeal, therefore, succeeds.

It will be recalled that in arriving at the award of 30 months' salary, the lower court took into account, among other matters, failure by Appellants to mitigate their losses. The lower court did not state a specific percentage by which the award had been reduced on account of lack of mitigation but it seems it was reduced by 12 months' salary in that "*For the one applicant who has shown that he had made job applications, we order that he should be treated differently and be awarded the lost remuneration for 42 months*".

In the circumstances, a beefing up of the award by the lower court of 30 months' salary by an additional 12 months' salary would be just and equitable. It is so ordered.

GROUND OF APPEAL NO. 8

It is the case of the Appellants under this ground of appeal that the lower court erred in law in failing to properly apply the law to the facts when dismissing the

Appellants' various claims. The arguments by the Appellant were put in the following terms:

> *"10.2. The Appellants pleaded for compensation for various claims before the lower court. This included immediate loss of earnings, lost pension, future earnings, notice pay, redundancy benefits, payment of the underpaid severance benefits and interest. All these were dismissed by the lower court without applying the conditions of service and the binding High Court and Supreme Court of Appeal decisions. For example, as a result of the termination of employment, the Appellants lost pension. Furthermore, it had taken more than three and a half years from the date of termination of employment to the date of the ruling on assessment. The period from the date of termination of employment to the date of the ruling on assessment constituted immediate loss of earnings. The date after*
>
> *the ruling on assessment represented future loss of earnings. This should have been properly applied to the law by the lower court in coming up with its decision. Furthermore, the lower court made no determination on the claim for loss of pension benefits. Had the lower court properly applied the law to the facts before it, it would not have dismissed the Appellant's various claims.*
>
> *10.3. The lower court should have just as in the* ***Chawani case*** *, awarded the Appellants pension and gratuity from the 4th day of August 2010 when they received their letters terminating their employment up to the period they would have been lawfully retired. The calculations should take into account annual salary increments at the rate of 20 percent for the salary covering the period 28th day of July, 2010 to the period of the Appellant's respective retirement dates.*
>
> *10.3. The lower court should also have considered that fact that the Appellants had invested all their energy and time in MRA. They specialized in collecting tax. The Respondent is the only institution that collects tax in Malawi. It is next to*
>
> *impossibility that the Appellants would have ever get employed.* ***To quote, DW1 during trial, the Applicants were purpose trained.*** *There is no any other institution which collects taxes in Malawi. It would be very difficult for them to secure employment. It is however clear that the Appellants were very qualified and experienced in the field of revenue collection. Above all their right to fair labour practices has been gravely curtailed. As it were, in trying to award a just and equitable amount, the Court will look at several factors such as the marketability of the applicant on the job market, the job market itself, the qualifications of the applicant, age of the applicant and whether the applicant has mitigated his loss. More importantly, the court looks at the loss itself and its proximity to the dismissal and the applicant's role in causing the dismissal* ***(Ruth Mbewe v Reserve Bank of Malawi*** *Matter Number IRC' PR381 of 2012).* ***Applying Ruth Mbewe v Reserve Bank of Malawi Matter Number IRC PR381 of 2012,*** *the Applicants should be awarded lost salary from the date of the claimed dismissal, that is from 28th July, 2014 to the date of judgement, that is, January 2014."*

The Respondent took the view that this ground of appeal is dependent on the Court's determination of the issues raised in the other grounds of appeal.

Having considered this ground of appeal and the submissions by both Counsel thereon, it is clear that matters canvassed in arguing this ground of appeal merely repeat or supplement submissions made in respect of the other grounds of appeal. In view of the conclusion that I have reached on those grounds, I do not see the consideration of arguments by Counsel on this ground of appeal as being in anyway necessary.

GROUND OF APPEAL NO. 9

The Appellants contend that the lower court erred in law in failing to make an award of salary increments as pleaded considering that the salary which was used for purpose of computing compensation was one payable in 2010 and as such the compensation awarded was not just and equitable.

Counsel Mumba began his arguments on this ground by drawing the Court's attention to the reasons given by the lower court for refusing to award increments on compensation. The lower court stated that:

> *"If it is the case that the applicants and [sic] making a claim based on this promise, that claim cannot stand because when making an order for compensation the court looks at the salary that an employee was getting at the time he was dismissed".*

Counsel Mumba submitted that the fair and equitable way of compensating the Appellants for loss of immediate earnings and future losses as pleaded in paragraph 6.4 of IRC Form 1 (from the time of the dismissal to the time of mandatory retirement age) is by adopting what prevailed in the **General Simwaka Case** in which the Supreme Court of Appeal awarded salary increments of 20% per annum.

Counsel Mumba further contended that in view of the fact that more than three and a half years had passed from the date of termination of employment to the date of the OAC, payment of compensation using only the salary at the time of termination of employment would render the just and equitable principle illusory. He, accordingly, prayed that the compensation payable to the Appellant should factor in increments of 20% per annum as was held in **General Simwaka Case** and **Chawani Case**

Here again, the position of the Respondent is that this ground of appeal is dependent on the Court's determination of the issues raised in the other grounds of appeal.

This ground of appeal must fail. Firstly, it is clear from the language of s. 63(5) of the Act that the measure of a week's or month's pay has to be with reference to the

employee's remuneration at the termination of the employment: see **Leyland DAF (Malawi) Ltd v. Ndema [2008] MLLR 14** where the Supreme Court of Appeal made the following instructive dicta at pages 20 and 21:

> *"It is also observed, and there is no dispute on this point, that the calculation of severance pay under the subsidiary legislation we have referred to above, namely, the Wages (Hotel and Catering Industry) Order and the Wages and Conditions of Employment (Severance Pay) Order was based on the employee's wages at the time of termination of his services...*
>
> *.... Calculation of severance pay on the basis of wages or salary at the time of termination of services makes a lot of sense and is realistic."*

Secondly, in arriving at what is just and equitable compensation, the courts have moved away from the concept of immediate loss (that is, loss of salary and other benefits from termination to date of judgment) and future loss (that is, loss of salary and other benefits from date of judgment to retirement or such other date as determined by the court) as propounded in English and earlier Malawian cases such as **Norton Tool Co Ltd v. Tewson [1973] 1 All ER 183, F.N. Kalinda v. Limbe Leaf Tobacco Ltd Civil Cause No. 1542 of 1995** and the **Kachinjika Case.**

For the foregoing reasons, I uphold the decision of the lower court that "*when making an order for compensation the court looks at the salary that an employee was getting at the time he was dismissed*".

GROUND OF APPEAL NO. 10

The Appellants fault the lower court for failing to award interest on compensation in order to make the award just and equitable.

> *"We also pray that based on the case of **Jane Matanga Vs Old Mutual Malawi Limited** Appeal Case No. 04 of 2012, per Mwaungulu, J, interest should be awarded on all the money payable to the Applicants including severance allowance, notice pay and compensation for immediate loss of earnings and future loss of earnings."*

Based on the above-mentioned statement, Counsel Mumba contended that it is clear that the lower court never considered the issue of loss of value of the salary thereby making the award not just and equitable. Counsel Mumba expressed surprise as to why the lower court failed to consider the issue when the same was raised in the Appellants' submissions on assessment of compensation at page 13:

> *"Your Honour and members panelists, it should be observed that the value of the salary which the Applicants were earning when they were unfairly dismissed was affected by the ravages of inflation and devaluation of the Malawi currency. No doubt, the value cannot be said to be the same. There were a number of increments effected at the Respondent institution. Employees who were earning MK150, 000.00 at the time the Applicants were unfairly dismissed are now earning of MK600, 000.00. The fair and equitable way of*
>
> *compensating the Applicants for loss of immediate earnings as pleaded (from the time of the dismissal to the time of judgment) is by adopting what prevailed in* ***General Simwaka v The Attorney General MSCA Civil Appeal Number 6 of 2001 (Unreported)*** *in which the Malawi Supreme Court of Appeal awarded salary increments of 20% per annum."* – Emphasis by underlining supplied

Counsel Mumba ended with a prayer that interest on all withheld benefits at the commercial bank lending rate should be ordered against the Respondent in terms of
inter alia **Rick Chindole Malamulo v. Reserve Bank of Malawi, HC/ Lilongwe District Registry Civil Appeal No. 17 of 2012 (unreported), Philip Madinga v. Nedbank, MSCA Civil Appeal No. 15 of 2009 (Unreported), Total Malawi Limited v. Nyson Jeremiah Namwili, HC/PR Civil Appeal No. 203 of 2011 (Unreported)** and **Jane Matanga v. Old Mutual Malawi Limited, HC/PR Appeal Case No. 04 of 2012 (unreported)**.

In **Rick Chindole Malamulo v. Reserve Bank of Malawi**, supra, the High Court granted an order to the appellant correcting the judgment to include the payment of interest at the prevailing bank lending rate. In **Philip Madinga v. Nedbank**, supra, an award of interest was made on the terminal benefits even though such interest had not been specifically pleaded. Interest in labour matters was awarded in **Total Malawi Limited v. Nyson Jeremiah Namwili**, supra. In **Jane Matanga v. Old Mutual Malawi Limited**, supra, Mwaungulu, J, awarded interest on severance allowance which was paid late.

The case of **Kankhwangwa and Other v. Liquidator, Import and Export**

[2008] MLLR 26 (SCA) [Hereinafter referred to as the "**Kankhwangwa Case**"] is for the proposition that the strict rules of pleadings do not apply in the Industrial Relations Court . It is enough if the defendant appreciates what the plaintiff seeks from the Industrial Relations Court.

In the present case, a perusal of IRC Form 1 reveals that the Appellants particularized in detail their respective prayers for reliefs into 27 items. Unlike in **Kankhwangwa Case,** where the claim at least made a mention of interest in the column for particulars of relief sought (Claim for (a) severance allowance (b) interest on the said severance allowances), none of the 27 items in the IRC Form 1 herein mention or relate to interest. As such, I fail to understand how the Appellants expected the Respondent to appreciate that they were seeking the lower court to award them interest on the compensation.

In any case, it is trite that interest on compensation is not awardable anyhow. The **Kankhwangwa Case** appears to be the leading authority on the subject matter and

I make no apology for quoting at lengthy a relevant passage therefrom (from page 32C to page 33F):

> *"Interest is awardable as a matter of law when it is pursuant to an express or implied term of a contract. It is also payable as a matter of law where there is a statutory*
>
> *requirement for the payment of interest. Interest is also awardable in the exercise of the court's equitable jurisdiction. See Gwembere v Malawi Railways Limited 9 MLR 369. The situations in which a court in equity may order the payment of interest are lucidly described by Lord Denning MR, as he then was, in the case of Wallersteiner v Moir [1975] 1 All ER 855 in which his Lordship stated:*
>
> > *"Those judgments show that, in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position – who has misapplied the money and made use of it himself for his own benefit. The Court presumes:*
> >
> > > *'That the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made [i.e. compound interest] ...*
> >
> > *The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust; and, if he does, he is liable to account for that profit or interest in lieu thereof.*

In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs to use in its business. It is plain that the Company should be compensated for the loss thereby occasioned to it."

In the case of Zgambo v Kasungu Flue-Cured Tobacco Authority 12 MLR 311 Mwaungulu, Registrar, as he then was, added agents and Company Directors to the list of persons in fiduciary positions against whom awards of interest may be made. Again the respondent still falls outside such list. We would observe that the list of situations stated in the Wallersteiner and Zgambo cases, in which it would be proper to award interest, is not closed. Where, for instance, the relationship between the parties is essentially commercial or the transaction between the parties involves some trading, a court may have jurisdiction to award interest against a party who wrongfully withholds money, which is lawfully due and payable to the other. If it can be properly presumed that the person withholding the money has profited from using it or has prevented the other person from earning a return on such money, then the need to award interest may become necessary. We do not think that that situation exists in the present case."

It is plain to see that the situations mentioned by Supreme Court of Appeal in **Kankhwangwa Case**, which would attract an award of interest in equity do not obtain in the present case. The Respondent did not stand in a fiduciary position in relation to the Appellants. The Respondent was not a trustee or executor of the

Appellants. Again there is no issue of misuse or misapplication of funds by the Respondent.

Further, the settled proposition of law is that unless a claimant is seeking no more than simple interest at a normal rate, he should also put before the court evidence on which the court can decide what amount (if any) to allow: See **Liquidator, Import & Export Malawi Ltd v. Kankhwanga & Others (2008) MLLR, 219.** In the present case, no such evidence has been offered by the Appellants to justify the award of interest on all withheld benefits at the commercial bank lending rate. Counsel Mumba simply cited cases in which interest at the claimed rate had been awarded. Such cases do not constitute evidence.

The long and short of it is that the lower court did not err in not awarding interest on compensation. There is no basis for awarding interest.

This, however, is not the end of the matter. It will be observed that the Appellants also complain, that in determining the extent of the compensatory award payable to the Appellants, the lower court erred in law by not factoring in the effects of devaluation and inflation. The issue of cost of money cannot be ignored: See **Kachinjika Case** and **Kandoje v. Malawi Housing Corporation (2008) MLLR 433** [Hereinafter referred to as the "**Kandoje Case**"]. In these cases, the Courts noted that inflation and devaluation since the termination of employment are critical factors for the Court to bear in mind.

In the premises, the lower court should have boosted the award as was the case in **Kandoje Case**:

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

It is agreed that 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, whilst 40% was deemed appropriate in **Kandoje Case**, an award of compensation was boosted by 100% in **Frackson Chitheka v. The Attorney General (Ministry of Finance), Civil Appeal No. 67 of 2008 (unreported)**. In

\the latter case, the appellant challenged an award of compensation on seven grounds, all of which

related to erring by the court in its calculation of compensation and in boosting it by 100%. Mzikamanda J, as he then was, reasoned as follows:

> *"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 a number of factors. These include the applicant's effort to mitigate his loss, 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 it is the general formula that will apply unless some special formula is pleaded and proved...As regards the boost by 100% pension that was entirely in the discretion of the lower court considering the devaluation and the rate of living at the time. I confirm that 100% boost."* – Emphasis by underlining supplied

In the present case, it took more than three and a half years from the date of termination of employment to the date of the ruling on assessment. The Court is also aware that there has been a slide in the national economy over the years especially since 2012 and, as a result, there has been (a) a major shift in exchange rate regime with devaluation at a very high percentage and (b) a rise in cost of living/inflation. In the premises and in the exercise of the Court's discretion, I would boost the compensatory award under s. 63 of the Act by 25% to reflect the devaluation of the Malawi currency and the rate of living/inflation since the termination of employment in 2010. I so order.

Conclusion and Disposition

To sum up, the result of my judgment is that:

(a) Grounds of Appeal No.s 1, 4, 5, and 9 are dismissed;

(b) with the exception of the claim for notice pay, Ground of Appeal No. 2 succeeds;

(c) Ground of Appeal No. 3 succeeds in that the Respondent used the wrong formula for calculating severance allowance, notice pay and redundancy benefits and as a result the Appellants were underpaid:

"wages" or *"salary"* used by the Respondent in calculating the severance allowance, notice pay and redundancy benefits were

restricted to the basic pay; they did not include two items, namely, medical aid and leave grants;

(d) Ground of Appeal No. 6 was not pursued; and

(e) as the Respondent had failed to prove that there was non-mitigation of losses on the part of the Appellants, the award by the lower court of 30 months' salary would be beefed up by an additional 12 months' salary; and

(f) on Ground of Appeal No. 10, there is no basis for awarding interest but the compensatory award is to be boosted by 25% to take into account ravages of inflation and devaluation of the currency.

For the sake of clarity, it should be stated that matters under Ground of Appeal No. 8 were dealt with under the other grounds of appeal.

As I do not have sufficient details to determine the amount that is due to the Appellants under paragraphs (b), (c), (e) and (f) above, I order that the Appellants and the Respondent should calculate and agree on the sums due under the said paragraphs within 14 days of this order. Should they fail, the Registrar of the High Court has to appoint a date within 28 days hereof for purposes of assessing the amount of money payable to the Appellants.

Section 30 of the Courts Act, as read with O.62, r.3 of the Rules of Supreme Court, requires costs to follow the event, except when it appears to the Court that some other order should be made as to the whole or any part of the costs. In the present case, the Appellants have substantially succeeded in the appeal. I, therefore, consider it just that they be awarded costs herein: the same to be agreed or taxed. I so order.

Pronounced in Court this 18th day of May 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE