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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 14 OF 2016

BETWEEN

BANNET NANSONGOLE.....CLAIMANT

AND

NATIONAL BANK OF MALAWI.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

- Chayekha- of Counsel for the claimant
- Mwangomba-of Counsel for the defendant
- Chitsulo- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The claimant in this matter sued the defendant for unlawful dismissal. In his pleadings, he claimed reinstatement, damages for unfair dismissal, withheld terminal annual bonus, damages for discrimination, damages for defamation and costs of this action. The matter was heard and decided in favour of the claimant. In his conclusion and disposition of the matter, Justice Kenyatta Nyirenda states:

I have said enough. I think, to show that the Defendant acted unreasonably in concluding that the claimant was guilty of misconduct and in deciding to impose on him the penalty of dismissal. All in all, it is my holding that the claimant's complaint of unfair dismissal is well founded. I, accordingly, grant the claimant (a) an order for re-instatement under

section 63(1)(a) of the Act, whereby he is to be treated in all respects as if he had not been dismissed and (b) an award of compensation under section 63 (1)(c) of the Act.

It is on these terms that this court has been called upon to assess the compensation in this matter. The claimant was paraded as the sole witness for his case. He adopted his witness statement in which he avers that he was employed by the defendant on the 1st of July 2009 as a clerk at Grade H and got promoted to Grade G on the 1st of January 2014. On the 13th of July 2015, the defendant summarily dismissed him for various allegations but the court found that the said dismissal was unlawful and ordered the defendant to re-instate him. However, through a telephone communication between his Counsel and the defendant's Counsel on 19th June 2018, the defendant refused to reinstate him to his position. He exhibits a letter of dismissal and a letter from his Counsel marked "BN1" and "BN2". He further avers that according to the court's judgment on page 84, he was awarded reinstatement whereby he was to be treated in all respects as if he had not been dismissed and an award of compensation.

It is his testimony that since he was not awarded reinstatement he is therefore supposed to be paid all his salaries inclusive of increments for the period he has been out of employment up to the date of refusal to reinstate him (i.e from July 2015 to June 2018). He avers that the defendant pays performance related annual bonus every year to its employees and during the period he worked for the defendant he always received bonus as he was always rated as commendable. He therefore would surely be eligible for bonus for the period he has been out of employment. He further avers that the defendant pays an annual salary increase which again was based on performance and cost of living. As earlier stated, he was always rated recommendable and he always received annual salary increase. He exhibits pages 14-17 of the conditions of service marked "BN3a" – "BN3d" on salary and bonus policy.

He further avers that according to conditions of service the defendant's employees were entitled to various loans during employment and other allowances including leave allowance. He exhibits pages 24 to 30 of the Conditions of Service marked "BN4a" – "BN4f" on loan entitlements and allowance. He also avers that the retirement ages for employees is 50 years old for early retirement and 60 years old for normal retirement. He was 32 years old at the time of unfair dismissal and he did not have any warning meaning he had high chances of working all the way to retirement but the dismissal deprived him of the opportunity to work up to retirement.

He also states that the defendant was also making a 10% contribution towards the employees' pension contribution. He contends that the unfair dismissal deprived him of the company's pension contribution from

2015 up to the retirement age of 60 or at least the early retirement age of 50 years old. During the period of his dismissal he did try to get another job but was unsuccessful. He has been relying on his wife to make ends meet. He applied for jobs at FDH bank, First Merchant Bank, Easy Loans Limited and Nedbank Bank Malawi Limited. He has made these applications even when there were no vacancy advertisements just to try his luck without any success. He exhibits copies of application letters marked n”BN5a” – “BN5d”.

He further points out that at the time of his dismissal his salary was K166,348.78 and this was bound to rise and he is aware that his colleague Tabitha Chisi with whom he was at the same grade having joined around the same period and mostly being graded the same way currently receives in the region of K400,000.00 and he was further aware that the lowest paid Grade G gets a salary of K327,000.00 per month.

He avers that since he was awarded reinstatement and compensation, the date of refusal to reinstate him is the effective date for termination of his employment hence apart from the statutory provision the defendant must pay him the compensation from the effective date of termination to either early retirement or normal retirement as he has suffered such loss owing to the refusal to reinstate me. Further, he avers that he is informed that the defendant projects salary increments from 2015 to 2018 at 24%, 19% and 12% respectively. He exhibits the defendant’s projection marked “BN6”.

Based on the foregoing, he therefore computes his loss as follows:

1. Lost Salaries

	Salary	Amount
2015 July to December	166,348.78	998,092.38
2016 January to December	206,272.43	2,475,269.16
2017 January to December	255,777.81	3,069,333.72
	TOTAL	K10,195,202.02

ii. Notice Pay

One month K340,900.66

iii. **12 weeks wages** at 340, 900.66 per month K1,022,700.00

iv. Bonus

YEAR	ANNUAL SALARY	BONUS PAYABLE
2014		K1,400,000.00
2015	K1,996,185.36	K1,000,000.00
2016	K2,475,269.16	K1,100,000.00
2017	K3,069,333.72	K1,100,000.00
	TOTAL	K4,300,000.00

He avers that this information is based on his enquiries from his colleagues he was on the same grade with but the defendant is better placed to give the exact figures as it is aware of how bonus is computed. He further avers that the bonus was usually close to half the annual salary but he is not sure of the formula used in computing the bonuses. He also states that these sums of money were supposed to be paid to him from 2015 as such the value is not the same therefore the defendant must also be made to pay interest on these sums of money preferably at the bank lending rate compounded for all the years.

He further states that according to the judgment, in addition to reinstatement, he is supposed to be paid compensation. During the period of his dismissal he suffered a lot. He suffered mental torture and lost such opportunities to acquire loans and allowances. He therefore asks court to give him equitable compensation.

Further, he avers that since he was not reinstated he had an opportunity to work for the defendant up to retirement. For this reason, he asks the court that he be awarded compensation up to retirement or such reasonable period the court will find equitable but not less than 10 years after refusal to reinstate him. He avers that he had 28 years to go but being realistic he presents a computation for loss of benefits for 11 years as follows:

(a) Salary

YEAR	SALARY	AMOUNT
2019	K340,900.00	K4,090,800.00
2020	K381,808.00	K4,581,696.00
2021	K427,624.00	K5,131,488.00
2022	K478,938.00	K5,747,256.00
2023	K536,410.00	K6,436,920.00
2024	K600,779.00	K7,209,348.00
2025	K672,872.00	K8,074,464.00
2026	K753,616.00	K9,043,392.00
2027	K945,334.00	K10,128,588.00
2028	K945,334.00	K11,344,008.00
2029	K1,058,774.00	K12,705,288.00
	Total	K84,493,248.00

(b) Bonus

YEAR	ANNUAL SALARY	BONUS (AVERAGE OF 35% OF ANNUAL SALARY)
2018	K3,652,507.06	K1,278,377.45
2019	K4,090,800.00	K1,431,780.00
2020	K4,581,696.00	K1,603,593.60
2021	K5,131,488.00	K1,796,020.80
2022	K5,747,256.00	K2,011,593.60
2023	K6,436,920.00	K2,252,922.00
2024	K7,209,348.00	K2,523,271.80
2025	K8,074,464.00	K2,826,062.40
2026	K9,043,392.00	K3,165,187.20
2027	K10,128,588.00	K3,545,005.80
2028	K11,344,008.00	K3,970,402.80
2019	K12,705,288.00	K4,446,880.80

	TOTAL	K30,851,013.45
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(c) Company's pension contribution (10%)

YEAR	ANNUAL SALARY	PENSION CONTRIBUTION
2015	K998,092.38	K99,810.00
2016	K2,475,269.16	K247,527.00
2017	K3,069,333.72	K306,934.00
2018	K3,652,507.06	K365,250.70
2019	K4,090,800.00	K409,080.00
2020	K4,581,696.00	K458,169.60
2021	K5,131,488.00	K513,148.80
2022	K5,747,256.00	K574,725.60
2023	K6,436,920.00	K643,692.00
2024	K7,209,348.00	K720,934.80
2025	K8,074,464.00	K807,446.40
2026	K9,043,392.00	K904,339.20
2027	K10,128,588.00	K1,012,858.80
2028	K11,344,008.00	K1,134,400.80
	TOTAL	K8,455,988.00

He therefore asks the court to award him compensation as follows:

Lost salaries from dismissal to reinstatement (July 2015 to December 2018)	K10,195,202.02
Notice pay for dismissal after reinstatement (one month)	K340,900.66
12 weeks wages pursuant to Section 63(6) of Employment Act	K1,022,700.00
Bonus (2014 to 2017)	K4,300,000.00
Future Loss pursuant to refusal to re-instate	

Lost salaries for 11 years (2019 to 2029)	K84,493,248.00
Lost bonuses (2019 to 2029)	K30,851,013.45
Company's pension contribution (10% annual salary 2015 to 2019)	K8,455,988.00
TOTAL	K139,659052.00

In cross-examination he stated that the court did not order payment of items listed under 6.9 to 6.13 of the defendant's witness statement. He stated that he is not aware that the court is supposed to assess only those items ordered by the Judge. He stated that the Judge ordered compensation for unfair dismissal. He conceded that paragraph 9.13.15 of the Judgment by the Judge indicated that calculation for unfair dismissal be based on 2 weeks. He stated that he was speculating on figures and had asked his colleagues still working for the defendant. He stated that the figures may not be exact. He stated that he still stood by the assertion he made in his witness statement under paragraph 3.14 that the defendant is better placed to give exact figures. He stated that he agreed that the Judge did not make an order for equitable compensation in relation to what he stated under paragraph 3.17 of his witness statement. He stated that paragraph 3.10 of his witness statement was true in that he still relied upon his wife to make ends meet. He stated that he did not have means of income.

The defendant also paraded one witness, Mr. Charles Dulira. He adopted his witness statement in which he indicated that he is the Head of Human Resources Management for the defendant. He averred that he had been advised by Counsel that by judgment dated the 15th of May 2018 Honourable Justice Kenyatta Nyirenda ordered that the claimant be paid the following:

- (i) Compensation for unfair dismissal under section 63(5)(b) of the Employment Act (see paragraph 9.3.5 of judgment).
- (ii) Payment of any remuneration that the claimant should have earned from date of dismissal to date of judgment. (see paragraph 9.2.15 of judgment).
- (iii) All bonuses he should have earned between the date of dismissal to date of judgment.

He further avers that he has also been advised by Counsel that since the Bank has failed to reinstate the claimant then the Bank should pay a special award under section 63(6) of the Employment Act. This will be paid on without prejudice basis. He further stated that there have been several salary adjustments since the claimant was dismissed. He exhibits a copy of what could have been his salary over a period of between dismissal and judgment of the court marked CD.

He also submits that he computed the sums due under each head and the sums payable as follows:

Salary over the period from the date of dismissal to date of judgment	K7,833,442.93
Bonus	K2,775,265.19
Pension contribution	K861,678.72
Quantum for unfair dismissal as ordered by Judge-being 2 weeks wages for each year for 6 years	K842,886.25
Special award for failure to reinstate under section 63(6) of Employment Act	K842,886.25
Leave pay for 79 leave days	K784,327.59
Leave grant	K110,725.00
TOTAL	K14,047,221.94

It is his testimony that the computation done by the claimant is wrong because it is based on speculative salary and bonus and also includes things that the Judge did not order in his judgment. He contends that there is nowhere in the judgment that the Judge ordered that;

- the claimant be paid additional remuneration for 11 years,
- the claimant be paid salary beyond the of judgment,
- the claimant be paid notice pay.

In his supplementary witness statement, he avers that the earlier calculation omitted bonus for 2014 and also indicated leave days for 2015 as 14 days. He states that the Bank has reworked the figure and has included bonus for 2014 which is K818,748.52. He points out that the leave days for 2014 should have been 27 days and the pay for that is K214,729.04. It is his testimony that the total amount payable should be K14,969,348.51. He exhibits a copy of the calculation sheet that includes these two figures marked CD2a.

In cross-examination, he confirms that the Judge ordered that the claimant be reinstated. He stated that reinstatement meant that the claimant should go back to his employment. He stated that the claimant was supposed to be paid everything that he lost during the period he was not working. He stated that the claimant

was to be reinstated from the date of judgment. He stated that he could not speculate whether the claimant could have reached the age of retirement in his employment with the defendant. He stated that he could not recall the date they communicated their unwillingness to reinstate the claimant. He further stated that the communication was made through their lawyer. He stated that they are complying with the court to pay until the date of judgment. He stated that he read the judgment and that the claimant was supposed to enjoy the rights and privileges as an employee of the defendant. He stated that failure to reinstate the claimant did not mean terminating his contract. He stated that it is not entirely true that bonus is performance related. He explained that certain factors must be met before paying the same. He confirmed that item number 4 on the Conditions of Service for the defendant indicated performance related bonus. He added that the performance of the company must be considered as well. He stated that employees are rated and that he rated the claimant as of good standard and he was average performer. He disputed that the claimant was rated commendable. He stated that he did not bring the records to court as they were not requested.

Such was the totality of the evidence as adduced in this matter. Both parties also filed written submissions. I am grateful to both Counsel for the same for they went a long way in informing the court in coming up with its decision. Suffice to say for now that this court has been called upon to assess compensation in this matter.

I must remind myself that this is a civil matter and the burden of proof in civil matters rests upon the party who asserts the affirmative. This is based on the maxim that he who asserts must prove which is coined in the Latin phrase: “ei incumbit probation qui dicit non qui negat.” On the other hand the standard of proof is that on a balance of probabilities. In **Miller v. Minister of Pensions** [1947] 2 All ER 372 Denning J said “That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not,’ the burden is discharged, but, if the probabilities are equal, it is not.” See **Catherine James Kachale v. Alisa Ashani & Annie Ashani** Civil Cause No. 2306 of 2004.

Having gone through the submissions, I take note that there are several issues that need to be considered. The decision by the Judge presents a scope within which the assessment of damages herein must be made. However, it would appear that the decision of the Judge anticipated a reinstatement of the claimant at his job and to be treated in all respects as if he had not been dismissed. It is not in dispute that the claimant was not reinstated. The claimant now claims for compensation for what he stood to benefit had he been reinstated. The claimant has submitted a computation of benefits for a period of 11 years being a period that he could have worked for

the defendant. The defendant is aghast with the same. They are of the opinion that this is blatant unjustified self-enrichment.

I thought this should be my starting point. It is clear that the refusal to comply with the reinstatement order by the Judge has led to considerable differences in approach to the assessment of the damages herein. The claimant thinks omitting to award the heads of compensation claimed essentially obliterates the finding of unfair dismissal by the Judge. They are of the opinion that the same runs counter the principle of just and equitable compensation as promulgated by the Employment Act. On the other hand, the defendant motivates the court to stay within the dictates of the Judge's order. They drew the court's attention to the case of **Steven Mahomwa v National Bank of Malawi Civil Cause No. 461 of 2012** in which the defendant having refused to reinstate the claimant as ordered by the court the Registrar in her order on assessment of damages stated as follows:

There is some indication from both the plaintiff's and defendant's statements that there was non-compliance to the court's order for reinstatement. However, there is nothing on the court record that shows that such noncompliance was brought to the attention of the court that made the order and neither is there any indication that the court made an order alternative to the order of reinstatement. There is no further order of the court stating what ought to happen in the event the defendant chooses not to comply with the order of the court, as such the present assessment only takes into account the rights and privileges as earlier. I will therefore take it upon myself to consider matters not considered by the court that necessitated this assessment for to do so in effect mean altering the order of the judge, which I do not have the jurisdiction to do so.

This court may not be bound by the same but I daresay I found it to be very persuasive. In addition to that, I see no point in grappling with the issue of the scope of assessment of damages upon failure to reinstate an employee considering that the same is provided for under the law. Section 63(6) of the Employment Act Where the Court has made an award of reinstatement 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). In this case, the evidence indicates that the claimant was informed of the defendant's decision not to reinstate him through a communication that was sent to his lawyer. Surprisingly, the claimant chose not to pursue this with the court that had made the order for an alternative order. It is my considered opinion that it is only proper therefore that this court follows the dictates of the law on this regard. The issue of the anticipated 11 years working for the defendant after failure to be reinstated is clearly not called for. This court is compelled to disregard the same in all heads under which it

was factored in. That settled, I now come to what I believe the claimant is entitled to in accordance with the dictates of the Judge's order.

SALARY

On the issue of salary, it is contended on behalf of the claimant that he has to be paid all his salaries and benefits from the date of dismissal to the date of reinstatement or refusal thereof. The claimant was dismissed on the 13th of July 2015 and the defendant refused to reinstate him on 19th June 2018. They further claim that the claimant must be paid all his increments. The claimant has through his evidence presented the computation for the same to the sum of K10,195,202.02.

On the other hand, the Defendant argues that the claimant's figures under this head and others such as bonus are speculative. It is contended that the claimant was making assumptions that are not correct. He submits that the employer is better placed to calculate accurate figures as they have all information in their system and that the claimant should have asked the bank to him the information as they have all the information. Observably the defendant submits that the correct amount is K7,833,442.93. It is stated that the figure was arrived at upon progressively adjusting the claimant's salary over the period in line with his performance and salary increments over the period. The defendant did not however present to the court how they arrived at the figure.

The situation presents a dilemma of some kind. On one hand, the claimant's figures are largely speculative and on the other the defendant's figure is not substantiated. This court is aware that this being a civil matters the burden to prove lies with the one asserting. However, I believe it is not a leeway for the other party as well to present unsubstantiated evidence. The defendant was in custody of the necessary information but they did not furnish the court with it. In my view, they are caught up in the presumption that a party that does not bring material evidence or call a material witness is hiding something which would be used against him. Somehow, I would say the claimant found himself at a disadvantaged position in that he had not been re-instated and could not have found it easy to approach his former employer to provide the figures that he needed for his computation. I am fortified in this position because reading the judgment especially on paragraph 9.3.4 it reads that the defendant went out of its way to feign ignorance of any document which was detrimental to its case. It is clear that they could not have cooperated. On a balance of probabilities, I exercise this doubt in favour of the claimant. Much as the defendant is of the view that his figures are plucked from the air, I think without shifting the burden of proof to the defendant they have not managed to disprove or offer a substantiated alternative.

BONUS

On the issue of bonus, the Judgment on paragraph 9.4 reads that the claimant has to be paid any annual bonus that was withheld by the defendant on account of the claimant's dismissal. The claimant submits that according to Chapter 5(4) of the Conditions of Service, the claimant was entitled to performance related bonus. He contends that he had always been rated "recommendable" and was not given a bonus from 2014 to 2017. The claimant's computation of the bonus is to the tune of K4,300,000.00. The defendant also calculated bonus over this period and came up with K3,590,013.71. The bone of contention is whether the claimant's performance was rated by the Bank as good standard or commendable. The claimant asserts that he was rated commendable while the defendant through their witness claim that the claimant was rated good standard. Again, the assertion were not substantiated. The court was called upon to consider that the cardinal principle of law is that he who asserts must prove. I believe this court has already dealt with this situation above. I reiterate that without in any way shifting the burden of proof to the defendants they stood a better chance to present much better evidence to the court other than the claimant.

SPECIAL AWARD FOR REFUSAL TO REINSTATE

Further to this, the claimant ought to be paid for the defendant's refusal to reinstate him as provided under section 63(6) of the Employment Act. As earlier stated, the law demands that an employee who has not been reinstated after a court order to that effect would be entitled to an additional 12 weeks wages over and above the award of compensation made. It is submitted on behalf of the claimant that the claimant's salary at June 2018 should have been K340,900.66 hence twelve week's salary should be K1,022,700.00. The defendant indicates that the claimant ought to be paid K842,886.25. Observably, there is no indication how they arrived at the figure. For reasons advanced above, I am inclined to exercise the doubt in favour of the claimant.

PENSION

On the issue of pension, it is submitted on behalf of the claimant that upon the claimant's dismissal, the company paid him his own pension contribution. Counsel opines that since the court found the dismissal to have been unfair, the claimant unfairly lost the company's pension contribution from time he joined the company to such a time as the court would determine to be reasonable period for the compensatory award. He submits that a period of 11 years after the date of refusal to reinstate the claimant would be reasonable. As earlier stated, the issue of the 11 years does not arise. The claimant can proceed the employers's pension contribution up to the date of the judgment in a manner prescribed under sections 64, 65, 67 and 68 of the Pensions Act.

SUMMARY

All in all, what this court finds to be due to the claimant per the order of Justice Kenyatta Nyirenda as dictated by section 63 (1)(c) of the Employment Act can be summed as follows:

a.	Salary	K10,195,202.02
b.	Bonus	K4,300,000.00
c.	Employee Pension Contribution	K861,678.72
d.	Special award for failure to reinstate	K1,022,700.00
d.	Leave Pay	K887,714.65
e.	Leave Grant	K110,725.00
	TOTAL	K17, 378, 020. 39

Lastly, the issue of costs was already settled by the Honourable Judge in his judgment at paragraph 9.5.2 where he states:

Costs in the Industrial Relations Court are by law not recoverable. In the premises, I am satisfied that this is an appropriate case in which each party must pay its own costs. It is so ordered.

In that respect, I make an order that each party has to bear its own costs.

MADE IN CHAMBERS ON THE 24th OF JUNE 2019


WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR