



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 318 OF 2015**

**BETWEEN**

**JACOB SIMFUKWE**

**PLAINTIFF**

**AND**

**RESERVE BANK OF MALAWI**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Mumba, Counsel for the Plaintiff

Ngwata, Counsel for the Defendant

Mankhambera, Official Court Clerk

**ORDER**

This is the order of this Court on the defendant's inter partes application to stay assessment of compensation and to suspend execution of the decision of this Court that was made after a full trial on the plaintiff's action against the defendant, his former employer.

The plaintiff alleged that he was unfairly dismissed from his employment in that the reasons for the termination of employment were not valid and that the procedure on termination was flawed. Accordingly, he claimed compensation for unfair dismissal, severance pay and a number of other reliefs as particularized in the statement of claim.

The plaintiff's action was contested by the defendant who alleged that there were valid reasons for the termination of the plaintiff's employment. The defendant

also asserted that the procedure was lawful and not flawed. The defendant denied liability.

Additionally, the defendant made a counter-claim. It counter-claimed that the plaintiff is indebted to it in view of some outstanding loans that were advanced by the defendant to the plaintiff during the subsistence of the employment relationship herein.

The defendant also counter claimed for sums of money that the plaintiff allegedly misappropriated from the defendant.

The plaintiff filed a reply to the counter-claim where he raised the defence of set-off from the compensation that may be awarded to him after the determination of this action.

After a full trial this Court on the plaintiff's claim that there were valid reasons for dismissal but that the plaintiff was unfairly dismissed on account of the flawed procedure that was followed by the defendant. This Court awarded the plaintiff K150 000 as compensation in that regard.

This Court further found that the plaintiff was entitled to severance allowance following the unfair dismissal. This is to be assessed by the Registrar.

This Court also found that the plaintiff was entitled to some leave days. This Court ordered that the value of the leave days to be paid by the defendant shall also be assessed by the Registrar.

This Court also ordered the defendant to pay back pension benefits that it had applied to offset the plaintiff's loans.

On the other hand this Court found in favour of the defendant in that the plaintiff was indebted to the defendant for certain sums advanced to him as loans during the subsistence of the employment relationship herein.

This Court also found that the plaintiff had misappropriated K300 000 from the defendant's Pension Fund.

The total indebtedness of the plaintiff to the defendant was found to be K3 381 056.83 plus the K300 000 for the defendant's Pension Fund. Interest was held to be payable by the plaintiff at the concessionary rate of five per cent per annum

and at one per cent above base lending rate respectively up to the date of judgment. The interest was to be assessed by the Registrar.

This Court held that the award of compensation to the plaintiff and severance allowance and leave pay, upon assessment by the Registrar, shall accordingly be set-off from the plaintiff's indebtedness to the defendant.

This Court held further that, if any sum remains unpaid after the setoff then it shall be paid by the plaintiff within three months of the assessment by the Registrar, failing which the defendant shall exercise its power of sale over a house the plaintiff had bought using a staff loan from the defendant.

This Court also held that the plaintiff was at liberty to decide to pay his pension benefits against his indebtedness towards the defendant.

Subsequent to the decision of this Court, the defendant applied ex parte and was granted an order staying the assessment of severance allowance and leave days. It also was granted an order suspending enforcement of the decision of this Court herein.

Both the stay and suspension order was made pending an appeal by the defendant against the decision of this Court to the Supreme Court of Appeal. This Court, as is usual in such circumstances, ordered that there be an inter partes hearing on the matter.

At the inter partes hearing both parties filed arguments on the usual principles that govern applications for suspension of execution of decisions of trial courts pending appeal.

At the initial date for the inter partes hearing this Court directed the parties to address this Court on a specific question, namely, whether in view of the decision of the decision of the Supreme Court of Appeal made by Justice Kamanga SC JA in *Escom Limited v Kondowe t/a Saveman Investments* MSCA civil appeal number 67 of 2017 it would be appropriate for this Court to suspend enforcement of its own decision and the assessment of severance allowance and leave pay pending appeal.



In *Escom Limited v Kondowe t/a Saveman Investments* the Supreme Court of Appeal held that an appeal to that Court is premature if the decision appealed against is not a final decision, for instance, where an assessment of damages or compensation is yet to be done pursuant to this court's decision. And further that there cannot be a suspension of execution of the lower court decision pending an appeal in such circumstances.

The defendant pointed out that in the present matter there are aspects of this Court's decision that are final, such as the aspect on compensation for unfair dismissal. And that there are certain aspects that are yet to be assessed, namely, severance allowance and leave pay.

The defendant then asked this Court to suspend enforcement of the decision of this Court only with regard to those aspects that are final and not those that are yet to be assessed.

The plaintiff however indicated that he has no intention of enforcing the aspects of this Court's decision that are final because he is looking to have the set off effected as ordered by this Court.

This Court observes that it is clear that the plaintiff is not intent on enforcing the final aspects of this Court's decision at any point until all the sums due to him are assessed by the Registrar of this Court at which point a setoff will be effected against the plaintiff's indebtedness to the defendant.

In the circumstances, it is not necessary to suspend the enforcement of the decision of this Court on the final awards made in favour of the plaintiff.

At the same time, with regard to the sums yet to be assessed, it would be premature for the defendant to appeal to the Supreme Court of Appeal on those aspects in view of the Supreme Court's decision in *Escom Limited v Kondowe t/a Saveman Investments*.

The defendant cannot be allowed to suspend assessment proceedings pending appeal at this stage because any such appeal would be premature.

The point being that there is no final decision of this Court on severance allowance and leave pay that the defendant can appeal against until the sums involved are certain. Those are yet to be assessed and yet to be certain.

If the appeal were to go ahead, with unassessed severance allowance and leave pay, then what it would entail is that in the event of the appeal failing the parties would come back to this Court for an assessment and if the defendant is dissatisfied with the assessed sums it may appeal again and there would in effect be two appeals in one matter which is highly undesirable.

In the circumstances, the order staying assessment of severance allowance and leave pay as well as suspending enforcement of the decision of this Court granted ex parte herein is vacated. The defendant's inter partes application fails.

In the course of argument, the plaintiff prayed that in the unlikely event the defendant's application was granted then interest on the plaintiff's indebtedness should be ordered to run only up to a certain period.

This Court observes that such a course of action is not necessary in view of this Court's decision in the judgment herein that interest on the sums due from the plaintiff to the defendant should be assessed only up to the date of judgment.

The plaintiff also asked for costs of this application. He contended that the defendant should have just gone ahead with the assessment proceedings without unnecessarily protracting this matter with applications like the instant one.

In view of the Supreme Court decision in *First Merchant Bank Limited v Mkaka and 13 Others* MSCA Civil Appeal No. 53 of 2013 (Unreported) which held that according to section 72 of the Labour Relations Act for matters taken before the Industrial Relations Court no costs orders shall be made in favour of either party, this Court is unable to make an award of costs for the plaintiff since this is a matter that ought to have been taken before the Industrial Relations Court.

So either party shall bear its own costs on this application.

Made in chambers at Blantyre this 18<sup>th</sup> February 2019.



M.A. Tembo  
**JUDGE**