IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

APPEAL MATTER NO. 20 OF 2020

(Being Matter No. IRC PR 684 of 2011)

BETWEEN

GIOVANNI MASINGA — APPELLANT

-AND-

OPPORTUNITY INTERNATIONAL BANK OF MALAWI LIMITED — RESPONDENT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR. ISAAC KAMUNGA, OF COUNSEL FOR THE APPELLANT

MR. PATRICK MPAKA, OF COUNSEL FOR THE RESPONDENT

MR. FELIX KAMCHIPUTU, COURT CLERK

JUDGMENT

INTRODUCTION

[1] This is an appeal by Mr. Giovani Masinga hereinafter referred to as 'the Appellant' following decision of review ruling made on 5th November, 2019 by the Chairperson Her Honour Kamowa, as she then was, sitting at Industrial Relations Court, Blantyre. The Appellant commenced this action in the Industrial Relations Court at Lilongwe, against Opportunity International Bank of Malawi Limited, hereinafter referred to as 'the Respondent', claiming compensation for unlawful

suspension, constructive dismissal, false imprisonment and defamation. The lower court rightly advised the Appellant that it had no jurisdiction on the claims of false imprisonment and defamation as the court only deals with purely employment related issues.

[2] The Appellant therefore, took out a separate case in the High Court on the tortious claims. The High Court found as a fact and the later the Supreme Court of Appeal upheld the same that the Appellant was guilty of suspicious conduct in the course of employment justifying on the employers to report to the Police.

[3] The Industrial Relations Court ruled in his favour and by the judgment made on 11th November, 2016, the lower court found that the Appellant was unlawfully suspended and subsequently unfairly dismissed. Thus, the lower court ordered that the Appellant be paid damages for unfair dismissal, severance allowance and notice pay. The matter proceeded for an assessment of damages before an Assistant Registrar. In the order of assessment dated 25th January, 2019, the Honourable Assistant Registrar awarded the Appellant a sum of MK17,871,897.00 as a compensation for unfair dismissal, a sum of MK25,000,000.00 as compensation for future loss, MK2,000, 000.00 as damages for unfair labour practices, MK413,083.00 as notice pay, MK1,445,790.00 as severance allowance and MK349,500.00 as repatriation costs. In total the Appellant was thus awarded a sum MK47,080,270.00.

[4] Aggrieved with the order of assessment by the Assistant Registrar, the Respondent made an application for review before the Chairperson of the Industrial Relations Court. In her ruling, the Chairperson reversed the finding of the Assistant Registrar on award of compensation for future loss from MK25,000,000 to MK14,870,988.00. She further overturned the order of MK2,000,000.00 awarded for unfair labour practice because the full panel of the IRC had not awarded the same. The Chairperson reduced the total sum awarded to the Appellant from MK47,080,270.00 to MK34,951,258.00. Dissatisfied with the review ruling of the Chairperson of the Industrial Relations Court, the Appellant now appeals before this Court on the following three grounds:

1. "Her Honour the Chairperson of the court below erred in law and fact in reviewing the award of immediate loss to the sum of K17,871,897.00 in that the court did not address its mind to the fact that the amount of K6.5M was erroneously deducted from the head of the immediate loss by the Hon. Assistant Registrar in the Order of Assessment dated 25th January 2019 wherefore the review court below ought to have corrected the error by adding back MK6.5M figure to the immediate loss head of damages;

2. Her Honour the Chairperson of the court below erred in law and fact in holding that the Appellant had not mitigated his loss in that the same was against the weight of voluminous evidence that clearly showed that the Appellant had been making numerous job applications for a long period of time but would nevertheless not secure

alternative employment wherefore the damages award review court ought to have increased or at the very least maintained the future loss of award; and

3. Her Honour the Chairperson of the court below erred on a point of law in failing to award interest on severance allowance in that the actual severance allowance ought to have been paid at the time of the termination of the employment of the Appellant in December, 2011 wherefore the Respondent was required to pay the interest that had accrued effective December 2011 to the date of payment."

STATEMENT OF FACTS

[5] The Appellant was employed by Opportunity International Bank of Malawi Limited, in 2005 and was holding the position of Consumer Credit Payroll Loans Officer. The Appellant told the lower court that he started working with the Respondent at Lilongwe branch in 2005 then he was moved to Kasungu Branch in 2006. Later he was transferred to Mzuzu Branch in 2008 as Consumer Credit Officer North. He then got transferred again to Limbe Branch in March 2009, where he was working as Consumer Credit Officer South responsible for all the regions administration of payroll loan products of the Respondent. The Appellant told the lower court that he stopped working in 2010 after he was suspended on allegation of forgery, uttering false documents and obtaining money by false pretence. He told the lower court that he was called to go Lilongwe where he was in a meeting in presence of six senior members. The Appellant told the lower court that he was not told the reason for going to Lilongwe nor the purpose of the meeting. At the meeting he was informed that the meeting was about two loan applications that the bank suspected of obtaining loans fraudulently.

[6] It was the Appellant's contention in the lower court that the officers involved were duly authorized by the bank and Malawi Revenue Authority and him as Consumer Credit Payroll Loans Officer processed the loans. The loans could not be deemed fraudulent as there was no investigation to prove that the loans were fraudulent. The Appellant was then informed that the internal investigations at the bank and Malawi Electoral Commission were ongoing and once they were concluded he would be taken to Police. The Appellant was later arrested, charged, prosecuted and acquitted on 29th August, 2011. After the acquittal he took a letter to his office in Limbe where he was told that he was still on suspension but the Regional Manager was going to follow up. Neither the Appellant nor his lawyers got a response from the Respondent.

[7] The Appellant then claimed in the lower court that the Respondent produced a letter of summary dismissal which was addressed to Lilongwe Branch and which did not have a clear date of termination. The letter was not signed, nor was it with any attachments as stated. The Appellant claimed in the lower court that he was not heard either before suspension or summary dismissal. And that the summary dismissal was a second punishment. After the hearing of the matter the lower court found in his favour. The lower court found that the Appellant was unlawfully

suspended and subsequently unfairly dismissed. Thus, the lower ordered that the Appellant be paid damages for unfair dismissal, severance allowance and notice pay

PRELIMINARY ISSUE(S)

THE PURPORTED CROSS-APPEAL

[8] The Respondent on 24th November, 2020 filed an application for what it called a '*notice of intention to contend that that award be reversed on some other ground other than those set out in the notice of appeal'* purportedly brought under Section 22 of the Courts Act. The grounds of the said notice of motion are:

1. "The Court below erred in law to have used the sum K413,083.80 as the Applicant's salary when the Applicant's salary was on the basis that his salary would be K300,000.00;

2. The Court below erred in law in failing to take into account the fact that on the facts, the only loss attributable to the action taken by the employer was only K1,239,249.99 at the rate accepted by the Court below;

3. The Court below erred in law in failing to take into account or provide any comment on the extent to which the Applicant caused or contributed to his dismissal and how it affected the relief due under the just and equitable statutory formula;

4. The Court below erred in law and in fact in failing to provide any comment on the Applicant's legal duty to mitigate loss and how that duty affected the sum total due to the Applicant under the just and equitable statutory formula;

5. The Court below erred in law in failing to take judicial notice of binding judicial pronouncements in related matters between the same parties concerning the Appellant's conduct in the course of employment; and

6. The Court below erred in law in adopting the immediate loss – future loss formula as the basis for determining compensation due for unfair dismissal contrary to just and equitable basis prescribed by statute."

[9] It is only in the skeleton arguments in opposition to the appeal and supporting reversal of award on other grounds counsel for the Respondent comes out clearly that he was in a way advancing a cross appeal, he says:

4. "The question now before Court is to determine what sum represents the appropriate compensatory award to the Appellant following that finding of unfair dismissal.

5. These are the Respondent's submissions answering the question and disposing off the appeal while advancing the cross-appeal."

[10] Counsel for the Respondent during the hearing of the appeal told the Court that the Appellant should thank him for the diligence he undertook. There is no cross-appeal in the Labour Relations Act and the Courts Act. There is no cross-appeal in the matter he just wanted the Court to be just and fair. He, therefore, admitted this was not a cross-appeal even though in the written submission he advances it as such.

[11] Whilst I agree with the Respondent that indeed Section 22 of the Courts Act[1] grants this Court wide powers in civil appeals, in my considered view, that power is only confined to how this Court can dispose of the matter where there is an appeal or the same has been heard. A party cannot use that Section in order to bring a cross-appeal before this Court. At this juncture, let me reproduce what Section 22 of the Courts Act provides for:

> "In a civil appeal the High Court shall have power—
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> (a) to dismiss the appeal;
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> (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;
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> (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;
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> (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;
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> (e) to make any amendment or any consequential or incidental order that may be just and proper;

[1] Cap. 3:02 of the Laws of Malawi

(f) to confirm, reverse or vary the judgment against which the appeal is made;

(g) to order that a judgment shall be set aside and a new trial be had;

(h) to make such order as to costs in the High Court and in the subordinate court as may be just."

[12] Clearly, Section 22 as cited above, deals with powers of the Court after an appeal has been heard, nothing of the powers is about how an aggrieved party should bring an appeal to this Court or about powers of the Court to entertain an application purportedly brought because the Respondent could not bring its own appeal or be it a cross-appeal in time. Despite the fact that the Labour Relations Act and Courts Act do not provide for cross-appeal, Counsel would still have brought the same using the same procedure for appeals. The law on cross-appeal applies similarly as the law on appeals. The main difference is that a cross appeal is a cross-appeal because there is already an appeal before the Court which has been filed by the Appellant. Thus, only because the Respondent was the latter to file his appeal, it is called a cross-appeal. Wherefore, when the Court is hearing the cross-appeal the Appellant responds to the grounds of appeal as advanced by the Respondent. The case of **Rolf Patel and others v Press Corporation Limited and another**[2] is instructive:

> "At the point the Notice of Appeal is filed, and entry is made in the register to indicate the existence of the appeal. To my mind it is such an entry that signifies that an appeal has been entered and various processes must be gone through, leading to the disposal of the appeal. The person who initiates an appeal is the one who brings or lodges an appeal and is referred to as an appellant. The person against whom the appeal is brought is called the respondent, as he is expected to file a brief in response to the appellant's allegations. The respondent is also entitled to file a cross appeal if he is minded of appealing against certain parts of the judgment." (Emphasis supplied)

[13] Having seen that the law on cross-appeal similarly applies like the main appeal, it follows that after the Respondent was aggrieved with the decision on review by the Chairperson of the lower court, he had the opportunity to appropriately file a cross-appeal before this Court in terms of Section 65 (2) of the Labour Relations Act[3]. A cross-appeal cannot be brought before this Court as notice of motion brought under Section 22 of the Courts Act. In terms of an appeal from the

[2] [2014] MLR 293 (SCA)

[3] Cap. 54:01 of the Laws of Malawi

lower courts to this Court as provided under Order 21 of the Courts (High Court) (Civil Procedure) Rules as read with rule 27 of the Industrial Relations Court (Procedure) Rules, 1999 is governed by Order XXXIII of the Subordinate Court Rules. In the case at hand, first Section 65 (2) of the Labour Relations Act guides an aggrieved party what form of a decision he may appeal to this Court and when such an appeal ought to be made as we shall outline below.

[14] In terms of Order XXXIII of the Subordinate Court Rules, the rules of the Court are very clear. Counsel has failed to comply with all the laid procedure in bringing the purported cross-appeal before this Court. The application is misconceived, and irregular, therefore must be dismissed.

[15] Further, in the grounds of the purported cross-appeal, Counsel for the Respondent is advancing grounds that fault the findings of the full panel of the lower court. Again, Section 65 is clear if the Respondent intended to appeal against the decision of the full panel of the lower court, he ought to have done so within 30 days from the date the ruling was made. Thus, even if the cross-appeal was brought under the appropriate law, it would still have failed on the basis of Section 65 (2) of the Labour Relations Act.

[16] Further, as seen from the factual background above, this matter moved from the judgment of the full panel to the hearing of and delivering of the assessment order and followed by the ruling of the review of the chairperson. With the cross-appeal, the Respondent is cross-appealing against all the orders of the lower court beginning from the judgment of the panel to the assessment order then to the review order. Perhaps, what makes his case even more difficult to follow is that Counsel has combined the brief response to the appeal and the so-called *'notice of intention to contend that that award be reversed on some other ground other than those set out in the notice of appeal'*. Be that as it may, as found above, the purported cross-appeal is dismissed. Therefore, any ground or argument arising therefrom is misconstrued and will not be considered by this Court. The only exception is where there is coincidence of what the notice of motion is raising and the law. I am of the considered view that as an appellate court, I am under a legal obligation to make sure that the law is complied with. I do not think that as an appellate court, I should shy away from commenting or dealing with the issues, even though not raised in a cross-appeal, where I am of the considered view that the law was not complied with.

THE APPEAL

THE APPELLANT

[17] This Court will now proceed with the appeal as brought by the Appellant. First ground of appeal Appellant submits that the Chairperson of the lower court erred in law and fact in reviewing the award of immediate loss to the sum of K17,871,897.00 in that the court did not address its

mind to the fact that the amount of K6.5M was erroneously deducted from the head of the immediate loss by the Hon. Assistant Registrar in the Order of Assessment dated 25th January 2019 wherefore the review court below ought to have corrected the error by adding back MK6.5M figure to the immediate loss head of damages. Counsel for the Appellant argues that the Assistant Registrar upon being called to determine what represents the compensatory award of the Appellant following the finding of the unfair dismissal, wrongfully deducted the sum of MK6.5 million from the immediate loss award notwithstanding the fact that the same was duly paid as relief entitled to the Appellant following a finding of unlawful suspension by the full panel court judgment covering the period of 06th January, 2010 to date of dismissal, 14th December, 2011.

[18] Counsel for the Appellant further argues and submits that the Chairperson of the Court below in the review order of the assessment failed to notice and analyze the fact that the issue of payment of MK6.5 million was made following the order of the full panel court judgment in respect of the salaries and benefits entitled to the Appellant, from 06th January, 2010 to 14th December, 2011, which is a period before the date of dismissal and as such it was not part of the assessment proceedings that were before the Hon. Assistant Registrar in that the assessment proceedings covered a period immediately after the date of dismissal, which is 14th December, 2011. The Appellant prays that this Court reverses the MK6.5 million deduction and order the Respondent to pay it back to the Appellant with interest at the bank rate.

[19] The second ground of appeal the Appellant submits that the Chairperson of the court below erred in law and fact in holding that the Appellant had not mitigated his loss in that the same was against the weight of voluminous evidence that clearly showed that the Appellant had been making numerous job applications for a long period of time but would nevertheless not secure alternative employment wherefore the damages award review court ought to have increased or at the very least maintained the future loss of award. The Appellant argues further that taking into account the monthly salary of the Appellant which is on the record of this Court, MK413,000.00, the MK25,000,000 that was awarded by the Assistant Registrar, translated to 60 months. The Chairperson of the lower court, reduced the amount to MK14,870,988.00, representing 36 months future loss compensation award because she felt the Assistant Registrar awarded was on the higher side despite evidence on the record and the fact and acknowledgment of the Assistant Registrar in in the order of assessment that the Appellant made efforts to mitigate his loss. Appellant's Counsel cited the case of **Musuma and Chilinda v Reserve Bank of Malawi**[4] the court awarded 54 months' salary and benefits to Mr. Musuma who had 17 years of retirement and 80 months' salary and benefits as compensation Mrs. Chilinda who had 22 years to retirement. This was in addition to compensation for immediate loss earnings.

[20] Appellant's Counsel further contends that the lower court did not apply principles of law to the crucial facts that are in the evidence of this Court. Both the Assistant Registrar and the Chairperson made an error of law. The lower court was supposed to be guided in its decision by

[4] Hc, PR, Matter No. 30 of 2014

factors such as the marketability of the Appellant on the job market, the job market itself, the qualifications and the age of the Appellant and whether the Appellant made efforts to mitigate his loss. More importantly, the court looks at whether there was a finding on contribution of the Appellant to his dismissal. See section 63(4) of the Employment Act. Counsel further argues that the lower court should have considered the actions of the Respondent that deprive the Appellant chances to economic stability through salary and benefits, promotion opportunities, education advancement and other future legitimate expectations and protection in terms of retirement/pension loss and life insurance policies. It is therefore the prayer of the Appellant that the Court will make an order increasing the future loss compensation award to the Appellant commensurate with the award ordered by the Assistant Registrar or more as the Court may deem fit.

[21] The third and last ground the Appellant submits that the Chairperson of the court below erred on a point of law in failing to award interest on severance allowance in that the actual severance allowance ought to have been paid at the time of the termination of the employment of the Appellant in December, 2011 wherefore the Respondent was required to pay the interest that had accrued effective December 2011 to the date of payment. Counsel argues the Respondent was bound to pay the severance allowance at the time of the termination of the employment of the Appellant in December, 2011, therefore the Respondent was required to pay interest having paid the severance allowance after the court order on assessment on 25th January, 2019. Whilst the Appellant admits he did not claim for interest, he at the same time argues that the lower court could have decided and ordered an award of interest on the severance allowance without him claiming for it. The Appellant's Counsel submits that there are several cases where the Court granted interest on severance allowance without a claim from the claimant. Counsel cited among others the cases of **Madinga v Nedbank Malawi Ltd**[5], **Malamulo v Reserve Bank of Malawi**[6], and **Matanga v Old Mutual Malawi Limited**[7].

[22] Finally, the Appellant's Counsel relying on the case of **Kamwaza and Kasote t/a Kamwaza Design and Partners v Eco Bank**[8] argues and submits that the reality of today is that the loss suffered by the Appellant can only be properly compensated by compound interest. He therefore prays for the same.

THE RESPONDENT

[23] As earlier indicated the Respondent choice of responding to this appeal was somehow convoluted with a purported cross-appeal which this Court has accordingly dismissed. As such, I will be selective in the arguments as advanced by the Respondent's Counsel because in his skeleton arguments in opposition to the appeal he has not clearly argued against the grounds of appeal as

[5] MSCA Civil Appeal No. 15 of 2005 (unreported)
[6] Civil Appeal No. 17 of 2012
[7] Civil Appeal No. 04 of 2012 (HC) (Unreported)
[8] MSCA Civil Appeal 45 of 2014 (unreported)

itemized in the notice of appeal. Be that as it may, in response to the first ground of appeal, Counsel for the Respondent argues and submits that the trial court did not give and could not, under statute in Section 63 of the Employment Act[9], have given any other relief apart from compensation or re-instatement or re-engagement. The trial court preferred and gave monetary compensation. The MK6.5 million already paid under the consent order and must be seen as part of that compensation. It was rightly taken out and deducted after the assessment exercise.

[24] I further notice that Counsel has endeavored to argue more against the second ground of appeal on how he opines an assessment court should determine the value of compensation which ideally supported his grounds for cross-appeal. Nevertheless, Counsel argues that the formula for determining the compensation is set out in Section 63(4) and (5) of the Employment Act. The award must be just and equitable sum in the circumstances of each case having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal. In aid of this Section 63(5) gives the minimum guidelines from which a court must develop the just and equitable sum in the circumstances of each given case.

[25] It is the contention of the Respondent's Counsel that it is a fact of undoubted provenance in this case that the Appellant left employment after the service of less than 6 years in the circumstances which a court of law at the level of the High Court, after full trial and in a judgment upheld by the Supreme Court of Appeal found that the Appellant's conduct in the course of his employment was so suspicious that it was reasonable to report him to Police of loss of MK6,000,000.00. The only legal challenge that the employer faced here was procedural non-compliance. On the statutory law and comparable case law from the IRC itself and the High Court the Appellant was entitled only to the minimum statutory award. Counsel among others cited the case of **Misheck Nyirenda v Monsanto[10], Felix Samu v Illovo Sugar Limited[11]**, IRC Matter (Chikwawa) No. 04 of 2016.

[26] Counsel for the Respondent further argues that there is not a single letter applying for employment nor piece of evidence suggesting that the Appellant had taken steps to mitigate the loss or that he was rejected because he lost a job at the Respondent's Bank. And on the principle in the case of **Malawi Environment Endowment Trust v Kalowekamo[12]** and **DHL International v Nkhata[13]** cases, the Appellant cannot go beyond the statutory minimum because the lower court had nothing before it to demonstrate mitigation. For these reasons the appeal ought

[9] Cap. 55:01 of the Laws of Malawi
[10] IRC Matter NO. 04 of 2014
[11] IRC Matter No. 04 of 2016
[12] [2008] MLR 237
[13] Civil Appeal No. 50 of 2004

to fail and the award made before the lower court revised downwards to reflect a correct application of the principles of law.

[27] Finally, Counsel then brought a new whole issue all together that the Appellant has been carefully mean with the whole truth in the appeal record. Section 20 (3) of the Courts Act[14], prescribes that "subject to subsection (4) the High Court shall not entertain any appeal unless the Appellant has fulfilled all the conditions of appeal...prescribed by any rules of Court made for that purpose". Order XXXIII rule 2(1) of the Subordinate Court Rules prescribes that the record of appeal shall contain "the pleadings, the notes of the evidence, the judgment appealed from, the documentary exhibits and any other relevant documents. The record of appeal before the Court does not contain the notes of evidence or the documentary exhibits to the evidence nor the witness statement or notes to examination and cross-examination of the sole witness thereon. Yet these are the basis upon which a Court of Appeal would asses a decision of the lower court. In the premises, there is no appeal entertainable under Section 20(3) of the Courts Act[15]. The Appeal must be struck out. At the outset I must say the appeal has already been properly heard without any limitations in as far as the record of appeal is concerned. This argument therefore does not stand, this Court already proceeded to hear the appeal.

ANALYSIS AND DETERMINATION

[28] First, I must remind myself on the law governing appeals from the Industrial Relations Court to the High Court. Section 65 of the Labour Relations Act[16] provides:

> "Appeals
>
> (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. (My emphasis supplied)
>
> (3) The lodging of an appeal under subsection (2), shall not stay the execution of an order or award of the Industrial Relations Court, unless the Industrial Relations Court or the High Court directs otherwise."

[29] As I deal with the first ground of appeal, I have noted that in the present matter, a serious error occurred to the Appellant. As a court, I am of the considered view that this serious error needs to be rectified. The review by the Chairperson emanated from the assessment by the Assistant Registrar following the judgment of the lower court. Through the judgment dated 11th November 2016, the lower court ordered payment of full salary and benefits from 6th January 2010 to 14th

[14] supra
[15] supra
[16] Cap. 54:01 of the Laws of Malawi

December 2011, a period when the Appellant was unfairly suspended. The lower court ordered that the effective date of dismissal was 14th December 2011.

[30] During the assessment by the Assistant Registrar, he correctly guided himself as to what the court ordered him to do. He correctly noted that the compensatory award for unfair dismissal was to take effect from 14th December 2011. However, there was a serious error that was made by the learned Assistant Registrar. After, he calculated immediate loss award of K24, 371, 897. 00, he ordered that the MK6.5 million representing benefits of the Appellant during suspension period be deducted from the immediate loss award. I find this approach by the Assistant Registrar wrong and against the judgment of the lower court. The amount of MK6.5 million was not part of the compensatory award. This amount as already explained, covers the period when the Appellant was on suspension. Instead of subtracting the same from the immediate loss award of MK24, 371, 897. 00 as the Assistant Registrar did, the amount was to be treated as benefits of the Appellant during his suspension. That amount of MK6.5 million was not part of the compensatory award. The lower court is so clear on this point in its judgment. This was, in my considered view a serious error by the learned Assistant Registrar.

[31] Now, before the Chairperson on review of the assessment by the Assistant Registrar, the Chairperson did not correct this serious error. She did not tamper with the award for immediate loss. The award remained at MK17, 871, 897. 00 after deduction of MK6.5 million. I am of the considered view that had the Chairperson exercised her mind on this point, she could have revised the immediate loss award to MK24, 371, 897. 00 as initially ordered by the Assistant Registrar in his Order of Assessment.

[32] Based on the foregoing, I am of the considered view that I cannot close my eyes and perpetuate this serious error. Doing so, in my considered view, is tantamount to disregarding the lower court which legally guided the Assistant Registrar on what was supposed to happen. The Assistant Registrar was to be guided by the judgment of the court during assessment of the award. I am of the considered view that an award for immediate loss could have been MK24, 371, 897. 00.

[33] However, let me mention that it seems to me that the award by the Assistant Registrar which was not tampered of course by the Chairperson on review does not comply with section 63 (4) as read with section 63(5) of the Employment Act. As already mentioned above, section 63(5) of the Employment Act provides for the minimum threshold to be considered by the court during assessment of compensation for unfair dismissal. The court is at liberty to exceed the minimum amount provided in section 63(5) of the Employment Act. However, the court is mandated to give reasons for such a decision. In **Southern Bottlers (SOBO) V Gracian Kalengo**[17], the court had this to say:

> "Let us reiterate what was said in **Standard Bank V Mtukula,** Misc Appeal No. 24/2007 (High Court) that where

[17] [2013] MLR 345 at 348

> the court wishes to exceed the minimum compensation in section 63(4) of the Employment Act, it must give clear reasons so that the employer, employee and also the appeal or review court are able to appreciate why the award was enhanced."

[34] In the case of **Kachinjika V Portland Cement Company**[18], the court refused to award loss of salary from the date of termination to the date of judgment on the ground that such an award would be flawed as it would proceed on the assumption that the plaintiff was never terminated which was not true; that he continued being an employee of the defendant company which was not true; and that the plaintiff in his pleadings prayed a declaration that he should be regarded as having continued in his position from the date of termination until that of judgment which was also not the case.

[35] Reverting to the present case, the Assistant Registrar calculated the period from date of termination to date of judgment to represent the *just* and *equitable* compensation. I do not think this was a correct approach as stated in **KACHINJIKA CASE**[19]**.** Unfortunately, the Chairperson on review did not question this approach by the Assistant Registrar. I am of the considered view that a court on review or appellate court is legally entitled to revisit the lower court's judgment where legal principles were not complied with. To me, this was a suitable case where the Chairperson was supposed to do that.

[36] Even bearing in mind the reasons advanced by the Assistant Registrar for such an award though not clear, I am of the considered view that an award of K24, 371, 897.00 is excessive thereby defeating the principle of *just* and *equitable* in section 63 (4) of the Employment Act, especially for someone who has just worked for 6 years. This amount represents salary for 59 months for someone who has worked for 72 months (6 years). I do not think that such an award is supported by the law. I therefore set it aside.

[37] I am of the considered view that based on the reasons given by the Assistant Registrar, the appropriate award be less than 59 months. I therefore order that the Appellant be compensated with 20 months' salary. This translates to K8, 261, 660. 00 (K20 Months x K413, 083).

[38] Now, let me deal with the award for future loss. Section 63 (4) of the Employment Act provides guidance as to the award of compensation for unfair dismissal. It provides as follows:

> "An award of compensation shall be such amount as the court considers just and equitable in circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and

[18] [2008] MLR 161
[19] Supra

> the extent if any, to which the employee caused or contributed to the dismissal."

[39] My understanding of this section is that the award ought to be *just* and *equitable* to both the employee and the employer. As already mentioned above, section 63(5) of the Employment Act provides some guidance as to amount of compensation the court may award. I am of the considered view that section 63 (4) as read with section 63 (5) of the Employment Act provides adequate guidance in assessing a compensatory award for unfair dismissal as already outlined above.

[40] In **First Merchant Bank V Eisenhower Mkaka and Others**[20], (being IRC matter number 137 of 2012), the Court stated the following with respect to assessment for unfair dismissal:

> "In assessing compensation, the IRC had to stick to the spirit of section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of the compensation that must fall due, not the loss of salary, increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation. In the same manner, future losses do not matter at all. Therefore, one cannot talk of loss of earnings up to the time the former employee should have retired. Certainly, that is not the spirit of the Employment Act. As already observed, Section 63(5) sets down the minimum compensation. The court may go up depending on its evaluation of the matter. The court enjoys the wide discretion to settle for either the minimum prescribed or for any higher amounts of compensation as would fit the description of "just and equitable" after weighing the considerations in Section 63 (4) of the Act." (My emphasis supplied)

[41] I am persuaded by the reasoning of the Court in the above cited case that an award of future loss goes against the spirit of section 63 of the Employment Act. What matters most is the duration of the employment. Awarding compensation for future loss is tantamount to imputing something into section 63 of the Employment Act which the framers did not consider appropriate. I am of the considered view that in assessing compensation for unfair dismissal, the court must always comply with the dictates of section 63(4) as read with section 63(5) of the Employment Act. See also **Charles Msaliwa V Malawi Communications Regulatory Authority**[21]. The approach of assessing compensation for unfair dismissal under heads of immediate loss and future loss is not supported by section 63 of the Employment Act.

[42] Reverting to the present case, I have noted that the learned Assistant Registrar awarded the Appellant the sum of K25, 000, 000 for future loss. This award by the Assistant Registrar was arrived at after taking into consideration several factors including time before retirement (12 years)

[20] Civil Appeal No. 1 of 2016
[21] Matter No. IRC PR 24 of 2015

and failure to secure alternative employment. During the review by the Chairperson, this award for future loss was reduced to K14, 870, 988. 00 by the Chairperson.

[43] Let me reiterate what I have said above that future loss awards are against the spirit of section 63 of the Employment Act. I am of the considered view that the Chairperson was to stick to what section 63 of the Employment Act provides. The Chairperson (and the Assistant Registrar), in my considered view, was not supposed to make future loss award to the Appellant. I totally agree with what the Court pronounced in **First Merchant Bank V Eisenhower Mkaka and Others**[22] that future losses do not matter at all in assessment of compensatory awards under section 63 of the Employment Act. I am therefore of the view that the future loss award of K14, 870, 988 cannot stand as it is not supported by section 63 of the Employment Act. This is what the law provides. I therefore set it aside.

[44] Turning to the second ground of appeal whether the Chairperson of the court below erred in law and fact in holding that the Appellant had not mitigated his loss. The argument of the Appellant in that the same was against the weight of voluminous evidence that clearly showed that the Appellant had been making numerous job applications for a long period of time but would nevertheless not secure alternative employment. It is the Appellant's argument therefore that the Chairperson ought to have increased or at the very least maintained the future loss award. I am of the considered view that this ground appeal has been dealt with in ground one above.

[45] Be that as it may, the question is whether the lower court could have legally made the factual findings that it did. To buttress this point is yet another legal development that as a Court of Appeal we should be slow to overturn findings of fact by a trial court. Findings of fact by a trial court should be allowed to stand unless they lead to absurdity or are obviously perverse or cannot be supported on the evidence[23]. In **Cughlan v Norman**[24] wherein Lindley MR said:

> "Even where the appeal turns on the question of fact, the court has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge, with other materials it might decide to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong."

[46] Let me mention that if I was the one sitting as a review court, I do not think I could have come up with a different conclusion than that of the Chairperson of the lower court. In any event this ground only raises questions of fact, which is contrary to Section 65(2) of the Labour Relations Act. Therefore, this ground of appeal must fail.

[47] Lastly, on the 3rd and final ground of appeal whether the Chairperson of the court below erred on a point of law in failing to award interest on severance allowance in that the actual severance

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[22] supra

[23] National Bank of Malawi v Right Price Wholesalers Ltd [2013] MLR 276 (SCA).

[24] [1898] 1 Ch 704

allowance ought to have been paid at the time of the termination of the employment of the Appellant in December, 2011 wherefore the Respondent was required to pay the interest that had accrued effective December 2011 to the date of payment. The review before the Chairperson was raised by the Respondent. There was no issue before the Chairperson on review of the Appellant being paid the severance allowance without interest. It is difficult for me to make such an award at this point, when the Appellant has the opportunity to raise it before the Chairperson on review. In the case of **National Bank of Malawi v Cane Products**[25] , the Supreme Court of Appeal stated the following:

> "The difficulty, as we see it, is when the new matters sought to be introduced on appeal tend to affect the subject matter or the pleadings from that which was before the Court below. It is for that reason that the Court in the *SEDOM* case would have declined the introduction of a matter that virtually shifted the case for the appellant if it were not for the respondent not raising objection and arguing the matter."

[48] Bearing in mind Section 65(2) only allows appeals to this Court on questions of law or jurisdiction only, the question of awarding interest affected the pleadings from that which was before the lower court. I find no question of law which this Court should delve into. In any event, awarding interest on severance allowance as pointed out by Appellant's Counsel is a matter of discretion. Some courts have granted while others have refused to grant the same. If I was put in the same position as the assessment court as well as the review court, I would or would not have awarded the interest on severance allowance where it was not prayed for.

[49] Further, as alluded to above, the question of awarding interest as the case law would suggest, is a matter of court's discretion. Certainly, appellate courts are highly reluctant to interfere with the exercise of a trial judge's discretion. Generally, appellate courts will only interfere with a trial court's decision where the trial judge has incorrectly applied a legal principle or the decision is clearly wrong that it amounts to an injustice[26]. As a result, this ground is also dismissed.

[50] This means that the total award to the Appellant is K10, 470, 033.

[51] Each party shall bear its own costs.

MADE IN OPEN COURT THIS 24TH DAY OF NOVEMBER 2021 AT PRINCIPAL REGISTRY, BLANTYRE.

JOSEPH CHIGONA

JUDGE

[25] [2012] MLR 301

[26] Witkamp V Sittig (1971-72) ALR MAL 246