

THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

IN THE MATTER OF ARBITRATION

(BEFORE HONOURABLE JUSTICE ELTON SINGINI, SC. JA (RETIRED) (ARBITRATOR)

BETWEEN

MR DUDDLEY CHIDZUNGU & 14 OTHERS.....CLAIMANTS

AND

THE ATTORNEY GENERAL (MINISTRY OF FINANCE, ECONOMIC PLANNING &
DEVELOPMENT- MALAWI FLOOD EMERGENCY RECOVERY PROJECT DEFENDANT

CORAM:	<i>Madalitso Khoswe Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>B Semphani</i>	<i>Counsel for the Claimant</i>
	<i>Matola</i>	<i>SSA Counsel for the Defendant (AG)</i>
	<i>Mc Jesse</i>	<i>Counsel for AG</i>
	<i>V. Chitawo</i>	<i>Court Clerk</i>

ASSESSMENT OF DAMAGES

Introduction

1. This matter was set down for assessment of damages following an arbitral award made by the arbitrator appointed by Court on 3rd September, 2020. The award was made following the defendants admission to liability for unlawful termination of contract, unpaid extra work and underpayment of one claimant. The parties were given a chance to discuss the quantum of damages within 30 days which they failed to reach a consensus. Therefore the arbitrator referred the matter to the Assistant Registrar for assessment of compensation hence the assessment proceedings.

Facts:

2. The applicants were employed by the defendant on a one year renewable contract in various positions to work under a project known as the Malawi Flood Emergency

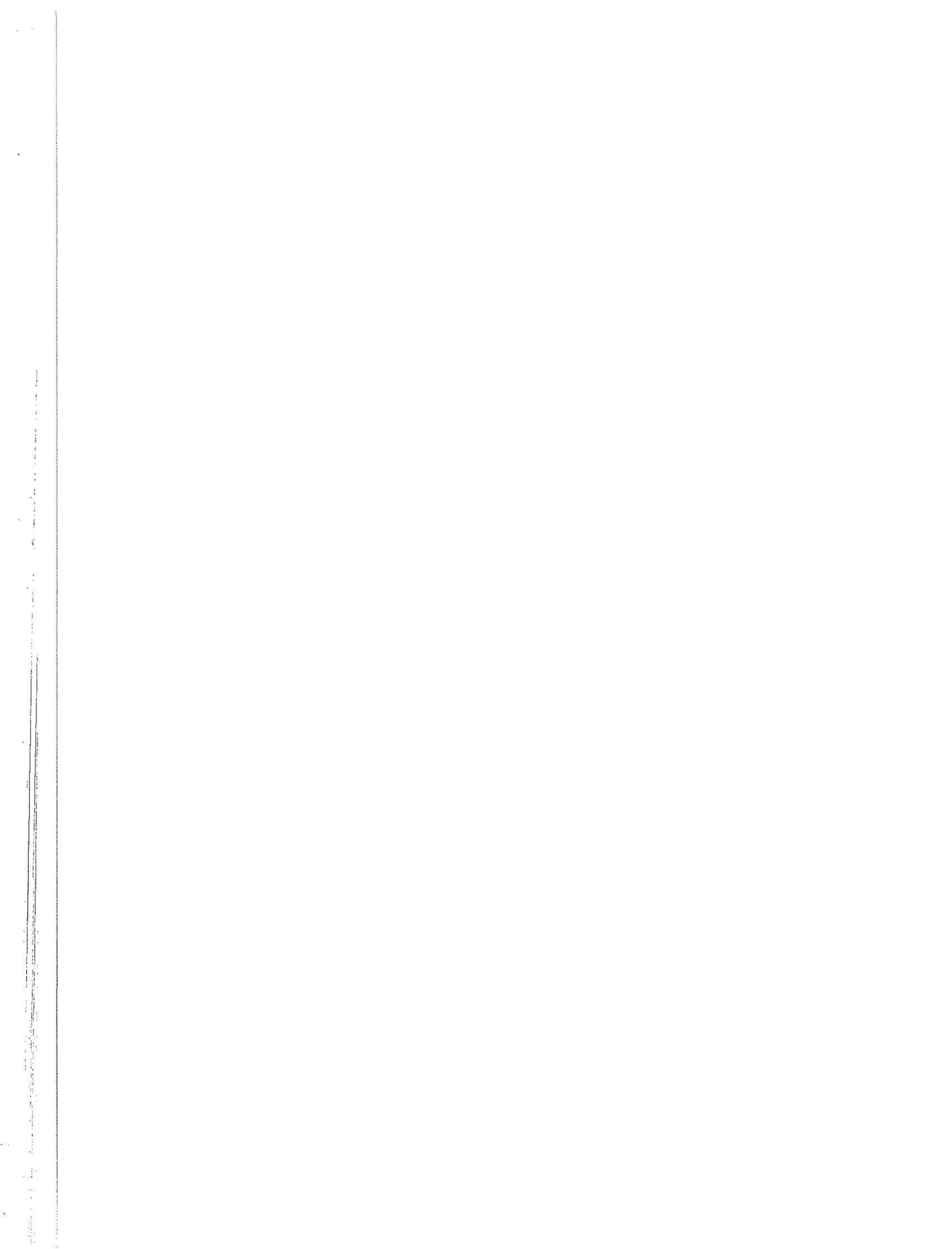


Recovery (MFREP) in 2016. At the end of the initial year the contracts were tacitly renewed for a period of three years. On or about the 17th day of August, 2018 three months into the third year of the contract, the defendant wrote letters to the claimants refusing to renew their contracts when the contracts had already been tacitly renewed by the conduct of the parties.

3. During the subsistence of the contracts of employment under (MFREP) the defendant introduced to the claimants an extra responsibility to manage another project known as (Malawi Drought Recovery and Resilience Project (MDRRP). The parties agreed that the new project will also be paid salaries but there was no agreement as to how much would be the salary. The claimants continued to work on the two projects as the defendant did not recruit new staff for the new project. The claimants are therefore claiming:
 1. loss of earnings for the remainder of the contract period
 2. 60% pay for the extra work done on the new project.
 3. Underpayment for Leah Dindi
 4. Interest on salary claims for all
 5. Costs of the arbitration.

EVIDENCE

4. Pursuant to Order 12 Rule 19(1) of the Courts (High Court Civil Procedure Rules, 2017 the court conducted the assessment of damages the same way as a trial. During the hearing for assessment all the 15 applicants adopted their witness statements and 13 of them were not cross-examined except Lackson Ngalu and Leah Dindi were subjected to cross examination by the defendants.
5. Wyson Spencer Kamala was employed by the defendant as Regional Public Works and Monitoring and Evaluation Coordinator on 11th July, 2016 for a project known as MFERP. His contract was terminated on 31st October, 2018 when he still had 8months to the expiry date. His salary was USD 3,800. He wants to be paid 60% for the extra work done on the MDRRP project.
6. Eric Duddley Chidzungu 2nd witness was employed as a Senior Engineer on 20th April, 2016 for one year contract renewable to work on MFER Project. The contract kept being renewed tacitly until when it was terminated three months into the third year in 2018. From January 2017 to the termination of contract he also worked on the MDRRP project without pay. He had 7 months to the expiry of contract when it got terminated. His salary was US\$4,700. He wants to be paid 60% for the extra work done on the MDRRP project.
7. Chisomo Chibwana 3rd witness who adopted his witness statement as evidence in chief. He stated that he was employed as Communications Officer under the MFER Project in 2016 for one year renewable. The contracts kept being renewed tacitly until on 30th September 2018, when it was terminated when he still had 10 months to the end of the contract. He said his salary was USD2, 800. He further said the defendant engaged them for new project known as MDRRP which started on 18th January 2017 and worked on the project to September, 2018. He is therefore claiming 60% of his salary for the work rendered on the new project.



8. Geoffrey Chamhanya 4th he was employed on 20th April, 2016 as an Office Assistant under the MFER project and he also worked under the MDRR which started in January 2017 to the termination of a contract which was 7 months expiry of the contract. His salary was US\$440 per month. He wants to be paid 60% of his salary for the work done under MDRR project and interest.
9. Emmanuel Chole 5th witness he was employed on 20th April 2016 as an Office Assistant under the MFER project and he also worked under the MDRR which started in January, 2017. His contract was terminated with 7months to the time of the expiry of the contract. His salary was US\$440 per month. He wants to be paid 60% of his salary for the work done under MDRR project and interest.
10. Victor Kaonga 6th witness he was employed on 17th May 2016 as Project Accountant for a one year renewable contract under the MFER and he also worked under the MDRR project from January 2017 to the termination of his contract which had 7months to the expiry of the contract. His salary was US\$1,200 per month. He wants to be paid 60% of his salary for the work under MDRR project and interest.
11. Davis Chikayenda 7th witness he was employed on 12th May 2016 as a driver under the MFER project and he also worked under the MDRR project which started in January, 2017 to the time his contract was terminated with 8months to expiry of the contract. His salary was US\$440 per month. He wants to be paid 60% of his salary for the work done under MDRR project and interest.
12. Ezekiel Luhanga 8th witness he was employed on 11th July 2016 as Regional Public Works and Monitoring and Evaluation coordinator on a one year renewable contract under the MFER project. He also worked on the MDRR project from January 2017 to the time of termination of his contract on 31st October, 2018. His salary was US\$3,800 per month. He wants to be paid 60% for the extra work done on the MDRRP project and interest on all salary arrears.
13. Herbert Chikazingwa 9th witness he was employed on 1st July 2016 as a driver on a one year renewable contract under a project called MFER and he also worked under the MDRR project from January 2017 to the date of termination of contract which had 9 months to expiry. He was not paid salaries for the new project. His salary was US\$444.44 per month. He wants to be paid 60% for the extra work done on the MDRRP project.
14. Amon Banda 10th witness he was employed on 3rd May 2016 as a driver on a one year renewable contrat under a project called MFER and he also worked under the MDRR project from January 2017 to the date of termination of contract which had 6months to expiry. He was not paid salaries for the work done under the new project. His salary was US\$444.44 per month. He wants to be paid 60% for the extra work done on the MDRRP project.
15. George Genesis Pikani 11th witness he was employed on 20th April, 2016 as a Regional Accountant for the MFER project and he also worked on the MDRR project from January 2017 to the time his contract was terminated with 7months to expiry. His salary

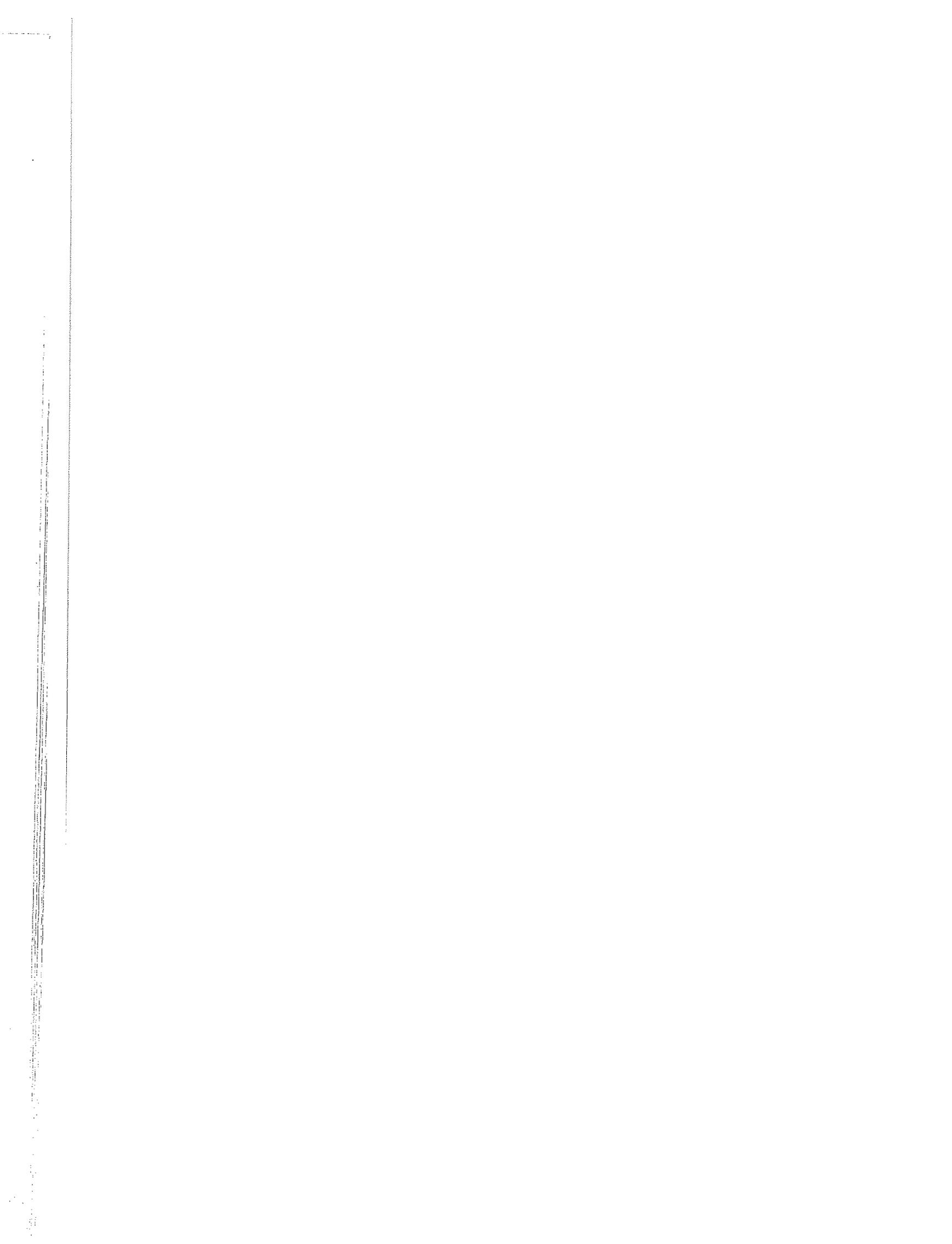


was US\$1,200 per month. He wants to be paid 60% for the extra work done on the MDRRP project.

16. Kako Chakhaza 12th witness adopted his witness statement in which it was stated that, he was employed as driver on 30th May, 2016. His contract was wrongfully terminated by the defendant on 31st October, 2018. He was receiving US\$440 per month. He had 7 months to the end of the contract when it got terminated. He wants to be paid 60% for the extra work done on the MDRRP project.
17. Jafali Mbewe 13th witness he was employed on 3rd May, 2016 as a driver for a one year renewable contract under the MFERP project and he also worked under the MDRR project until the termination of his contract, 6 months to expiry. His salary was US\$440.00. He wants to be paid 60% for the extra work done on the MDRRP project.
18. Lackson Ngalu 14th witness adopted his witness statement where he stated that he was employed by the defendant as a Civil Engineer on a one year renewable contract on 20th April, 2016 for MFERP. His contract was terminated on 30th September, 2018, 7 months before its expiry. His salary was US\$3,900 per month. In the course of executing this contract the defendant brought a new project known as Malawi Drought Relief Resilience Project (MDRRP) of which they did not recruit new staff, but they agreed with the claimants to continue working on it and that they would be paid. However there was no agreement on how much they would be paid for that work. The claimant is therefore claiming to be paid 60% of his salary for the work done on the new project.
19. Leah Dindi 15th witness and she adopted her witness statement in which she said she was offered a contract on 2nd July 2015 to work for the defendant as an Office Manager under the (MFERP) and her salary was US\$1, 333.33 per month. She said she had 9 months to the end of the contract when it got terminated. She said while working for the defendant she noticed that her salary was lower than the grade that she was working for and she raised the issue with the Program Coordinator. She said she followed up the issue of underpayment but it was not resolved until the contracts were terminated. She tendered a salary scale schedule marked as "LD8". She further claims to be paid 60% of the (MFERP) salary for the extra work done under the MDRRP project which started in January, 2017.
20. When cross-examined, the claimant said she was recruited as an Office Manager. She said she came to know that she was being underpaid after she had already signed the contract. She said when she saw the salary structure and raised the issue of underpayment, her supervisor recommended that her salary be raised to USD 2,900. She however admitted that when the issue was referred to Ministry of Finance they never got approval of the salary structure. She said in her claim in court she is claiming USD3, 500 but her supervisor recommended USD2, 900.00. She admitted that her contract was terminated before the recommendation by her supervisor was approved. Therefore her salary at the end of contract was still USD1, 333.33 and she never got USD2, 900 or USD3,500.

REASONED ANALYSIS OF LAW AND FACTS ON COMPENSATION

21. The cardinal principle in awarding damages is *restitution intergrum* which means, in so far as money can do it, the law will endeavor to place the injured person



in the same position as he was before the injury was sustained- Halsbury's Laws of England 3rd Ed. Vol.11p.233 para. 400. The principle was further enunciated in *Livingstone vs Raywards Coal Company*¹, Lord Blackburn observed:-

'Where any injury is to be compensated by damages, in setting a sum of money to be given for reparation you should as nearly as possible get the sum which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.

22. The purpose of compensation is to put the wronged party in a position in which he would have been if he were not wronged: see *Nsaliwa vs MACRA Matter No. IRC 24 of 2015 (PR)*. The objective of 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 at is to strike a balance which should leave both parties happy and feel that justice has been done.

LOSS OF SALARY FOR THE REMAINDER OF THE CONTRACT:

23. The issue of early termination of the contract has not been in contention and the salaries have not been in contention except for one applicant who is claiming underpayment. However they did not provide the court with evidence of the exchange rate they used to arrive at the Kwacha equivalent. The court took sometime to see the conditions in the contract of employment and found that in the witness statement for Lackson Ngalu, exhibit marked LN2 on "Annex C" it clearly stated that the claimant was to be paid a total of USD46,800 in Malawi Kwacha converted at the ruling rate. This contract was signed on 20th April 2016 which kept on being renewed for two years.
24. It is the considered view of the court that intended rate was the rate at the time the contract was being terminated, when the money became due. In the present circumstances the claimants will be awarded the earnings at the rate as applicable at the time their contracts were terminated which was K735.00 to a dollar as at 15th October, 2018. (<https://www.natbank.co.mw>) accessed on 7th August, 2021. The Kwacha continued to be stable on this rate the whole of 2019 as per the National Bank Annual Report for 2019 published in June 2020. Therefore the court proceeds to make the awards basing on this rate which was applicable in 2018-2019 on the understanding that their contracts could have ended in 2019 if it was not for the early termination in 2018 as follows:

1. WYSON SPENCER KAMALA

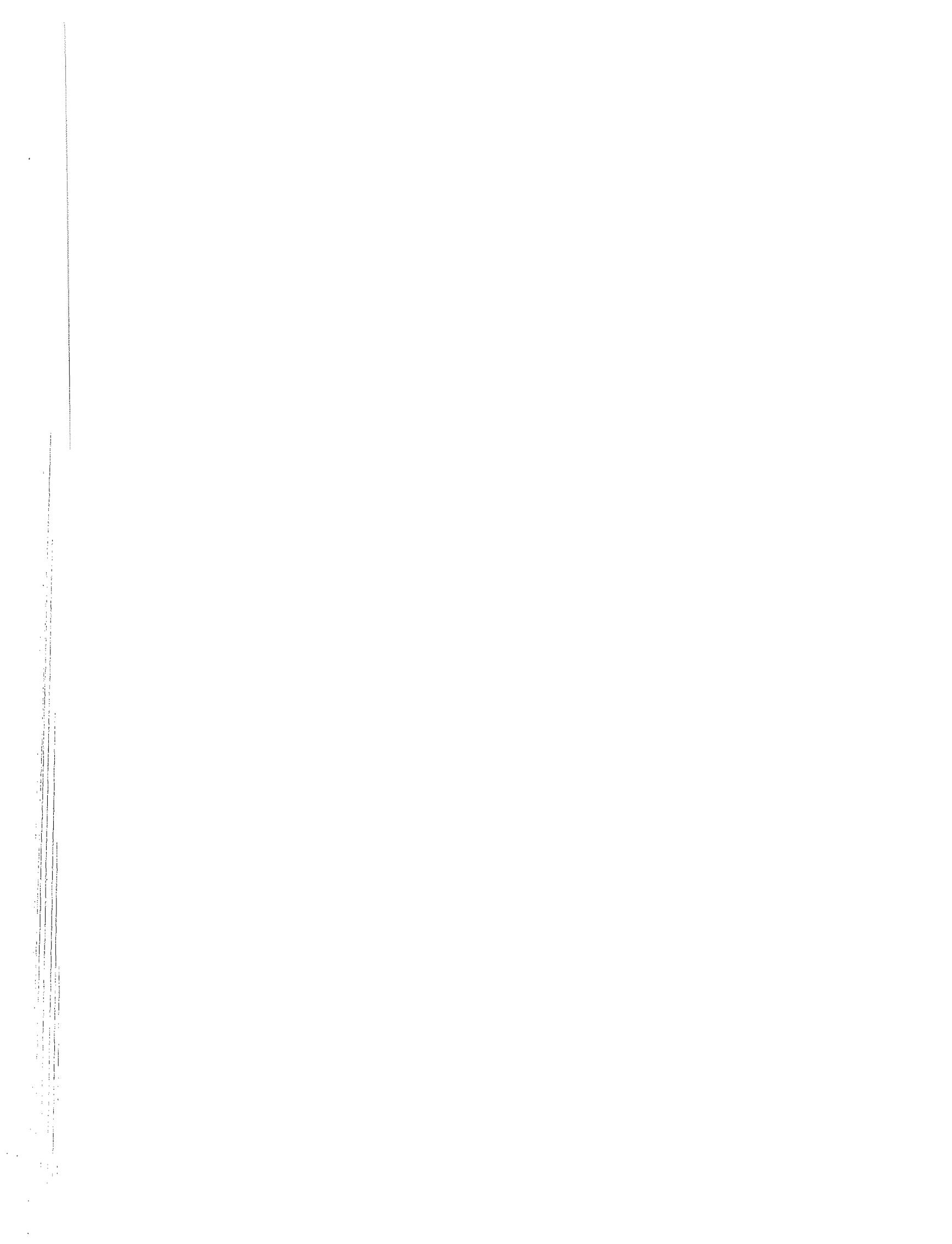
He had 8 months to the expiry of his contract and his salary was US\$3,800.00 per month.

US\$3,800.00x 8months

US\$30,400 x K735.00= MK22, 344,000

2. ERIC DUDDLEY CHIDZUNGU

¹ (1879-80) L.R.APP



He had 7 months to the expiry of the contract and his salary was US\$4,700.00 per month.

US\$ 4,700 x 7months

US\$32,900 x K735.00= MK24, 181,500.00

3. CHISOMO CHIBWANA

She had 10 months to the expiry of her contract and her salary was US\$2,800.00 per month

US\$2,800 x10months

US28, 000.00 x K735.00= MK 20,580,000.00

4. GEOFREY CHAMHANYA

He had 7 months to the expiry of the contract and his salary was US\$440.00 per month.

US440.00 x7months

US\$3,080.00 xK735.00=MK2,263,800.00

5. EMMANUEL CHOLE

He had 7 months to the expiry of his contract and his salary was US\$440.00 per month.

US\$440 x7 months

US\$3,080.00x K735.00=MK2,263,800.00

6. VICTOR KAONGA.

He had 7months to the expiry of the contract and his salary was US\$1,200 per month

US\$1,200 x7months

US\$8,400x K735.00=MK6, 174,000.00

7. DAVIS CHIKAYENDA

He had 8 months to the expiry of the contract and his salary was US\$440 per month.

US\$440 x 8months

US\$3,520 xK735.00=MK 2,587,200

8. EZEKIEL LUHANGA

He had 9months to the expiry of the contract and his salary was US\$3,800 per month

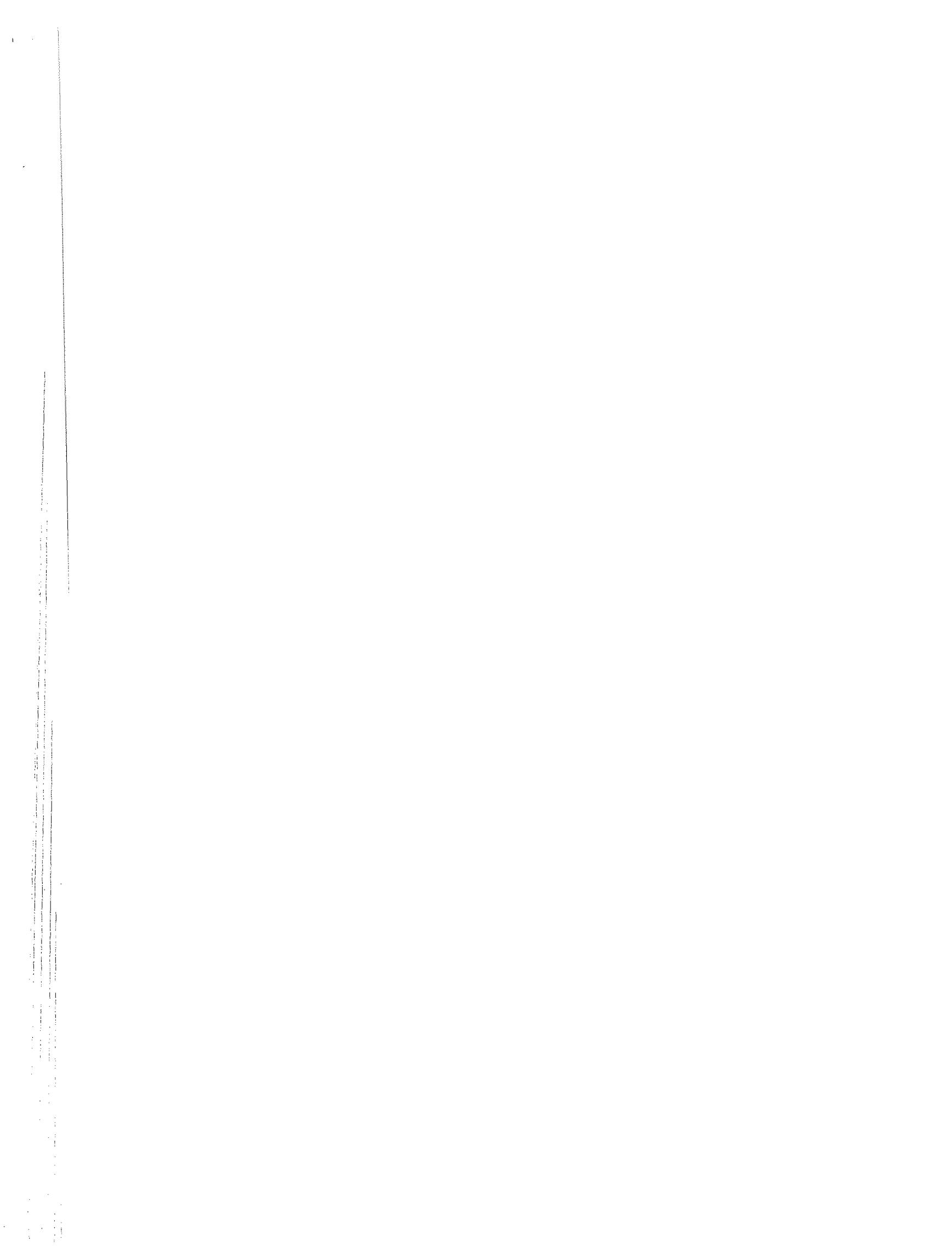
US\$3,800x9months

US\$34,200 x K735.00= MK25,137,000

9. HERBERT CHIKAZINGWA

He had 9 months to the expiry of the contract and his salary was US\$444.44 per month.

US\$444.44x9months



US\$3,999.96 x K735.00 = MK2, 939,970.60

10. AMON BANDA

He had 6 months to the expiry of the contract and his salary was US\$ 444.44 per month

US\$444.44 x 6 months

US\$2,666.64 x K735.00 = MK1, 959,980.40

11. GEORGE PIKANI

He had 7 months to the expiry of the contract and his salary was US\$1,200 per month.

US\$1,200 x 7 months

US\$8,400 x K735.00 = MK6, 174,000.00

12. KAKO CHAKHAZA

He had 7 months to the expiry of the contract and his salary was US\$440 per month.

US\$440 x 7 months

US\$3,080 x K735.00 = MK2, 263,800

13. JAFALI MBEWE

He had 6 months to the expiry of the contract and his salary was US\$440.00 per month per month.

US\$440 x 6 months

US\$2,640 x K735.00 = MK1,940,400.00

14. LACKSON NGALU

He had 7 months to the expiry of his contract and his salary was US\$3,900 per month

US\$3,900 x 7 months

US\$27,300 x K735.00 = MK20, 065,500

15. LEAH DINDI

She had 9 months to the expiry of her contract and her salary was US\$1,333.33 per month:

US\$1,333.33 x 9 months

US\$11,999.70 x K735.00 = MK8, 819,779.50

ON WHETHER OR NOT THE CLAIMANTS ARE ENTITLED TO INTEREST ON SALARY ARREARS:

25. The law regarding payment of interest is as follows: Under Section 11(a) (v) of the Court Act Cap.3:02 of the Laws of Malawi which provides as follows:

- (1) Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have jurisdiction to direct interest to be paid on debts, including judgment debts, or sums found due on taking accounts between parties or on sums

found due and unpaid by receivers or other persons liable to account to the High Court.

Section 4 of the Courts Act provides that:

Every judgement in civil proceedings shall carry interest at the rate of five per centum per annum or such other rate as may be prescribed.

Order 23 rule 7 of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR) provides that:

Every judgment in a proceeding shall carry interest at the rate of 5% or such other rate as may be prescribed.

26. The above law clearly states that interest is payable. However the position of the law has been applied in a number of cases where it has been determined that a court will not exercise its discretion to award interest on compensation or damages.

In the case of *John Bryan Tabord vs David Whitehead & Sons (Malawi) Ltd*, MSCA Civil Appeal No. 11 of 1988 Chatsika JA, re-iterated the position of the Supreme Court on payment of interest on damages by stating as follows:

“Finally, the appellant claims interest on the damages we have awarded in this matter. It is to be observed on this aspect that section 11 of the Court Act confers jurisdiction on the High Court to award interest, but as was stated by this Court in Gwembere vs Malawi Railways Ltd, 9 MLR 369, this jurisdiction is confined to cases of debts, as distinct from damages.

27. Further the position in the case of *Gwembere vs Malawi Railways Ltd*, 9MLR 369 was applied by Mwaungulu, J in the case of *A.N.E Salaka vs The Registered Trustees of the Designated Schools Board* in Civil Cause No. 2652 of 1999 (PR) High Court, where he made the following observations:

The plaintiff is therefore entitled to six months salary, six months gratuity and six months house allowance totaling to K455,853.60. Mr Tembenu for plaintiff argues that the Board pay interest on the money because the money should have been paid way back. He contends the delay entitles the plaintiff to interest. He relies on the Supreme Court decision in Gwembere vs Malawi Railways.

In this case Counsel argued that the Supreme Court had decided that a Court had discretion to award interest to a party to whom money was due and is driven to litigation to recover the money owed when the Supreme Court laid no such general rule... The High court has no general powers to award interest generally except in the circumstances mentioned and under statute. Under the Courts Act this court can only award interest on debts. It cannot award interest on damages or compensation.

28. On delay being the reason for claiming interest the Court in *J.L. Kankhwangwa & Others vs The Liquidator of Import and Export (Malawi) Ltd*, MSCA Civil Appeal No.4 of 2003, Tambala J made the following pertinent observations:

Mere delay in the payment of severance allowances does not automatically attract an award of interest at the punitive lending rate of Commercial Banks. Interest is awardable as a matter of law when it is payable pursuant to an express or implied term of a contract.



29. In the present case the reason for demanding interest is that there has been inflation and devaluation of the Kwacha due to the delay. Much as the reasons are valid but this was a claim for damages and as per the cases cited above interest is not payable as of right. This was not a commercial transaction and it cannot be claimed that the defendant were withholding the money deliberately to profit from it.
30. Further court has noted the interest rate being proposed is 40%. The relationship between the claimants and defendants was an employment relationship, it does not entitle the claimant to claim interest at that punitive rate as if it was a commercial transaction that they could have made that huge profit.
31. Finally, this court finds the claimant's claim for interest to be wanting as it was not pleaded in the statement of claim. This is an infringement on the rules of pleadings which require that a claim for interest should be pleaded in the body and prayer section of the statement of claim.
32. In the case of *United Freight Forwarders Limited vs First Merchant Bank Ltd Civil Cause No. 233 of 1997 Kapanda J*, made the following observation:
- '...I have noted that plaintiffs claim for interest has not been pleaded in the body of the pleadings. Furthermore, the plaintiff has not identified precisely the ground or the basis upon which it is claiming the said interest at 1% above the bank rate. Pausing here I want to repeat what I previously said in the case of H.M.H Khan versus Prime Insurance Company Limited, Civil Cause No. 2447 of 1998 (unreported) that it is an infringement of the rules regarding pleadings for a party who, in an action claims interest, to claim the said interest in the prayer only. It was my further observation that in that case a party who is claiming interest above the bank rate must identify precisely the ground or the basis upon which he is claiming interest at a rate above the bank rate... in view of these observations, I reject the claim for interest as pleaded by the plaintiff.*
33. In the case of *Attorney General vs Masauli [1999] MLR 28* the Supreme Court instructively stated that:
- 'It is trite that interest must be specifically pleaded to be recoverable. It was not so pleaded in the present case. The award of interest cannot therefore be supported.'*
34. As observed in this case the claimant's statement of claim did not include a claim for interest and this court will not allow the claimants to adduce evidence for interest on the salaries claim, for the reason of inflation and devaluation. Therefore interest on salaries is not awarded.

WHETHER THE CLAIMANTS SHOULD BE PAID FOR EXTRA WORK DONE UNDER MDRRP PROJECT

35. It has not been challenged and it is found as a fact that in the course of performing their work under the MFERP the defendant came up with another project known as MDRRP which was assigned to the claimants because they were already on the ground working on the first project. It is not in dispute that the salaries for the new project were not agreed upon.



36. It was stated in the case of *Salimu vs Bestobell (MW) Ltd, Matter No. IRC 25 of 2005* that it is trite law that parties to a contract are bound by the express or implied terms of the contract unless it can be shown otherwise.
37. It has been stated that the contracts of the claimant were being renewed tacitly and every time the claimants were discharging their duties the defendants were paying for the same. It was therefore an implied term that the claimants were to be paid for the work done and in this case where there was no agreement as to the exact salaries, it is implied that the defendants had intended to pay for the work. Therefore the court is compelled to award the claimants salary for the second project.
38. However, since there was no agreement as to the exact amounts to be paid, the pay will have to be commensurate with the amount of work done under the said project. In the present case the claimant are claiming 60% of their salaries for the work done. The defendant proposed that they should be paid 5%.
39. According to the evidence of the only defence witness Chimvano Thawani who was working as the Word Bank Desk Officer in Debt and Aid Management Division, she was assigned to manage the MFERP and MDRRP project in 2017 because they were inter linked. When the court sought clarification as to what key areas the claimants were supposed to deliver under the MDRRP, she outlined the following:
- a. Construction and rehabilitation of selected irrigation schemes
 - b. Public works to provide support or improve the livelihood of the communities
 - c. Reconstruction and improvement of roads and bridges
 - d. Procurement of maize
 - e. Procurement and distribution of goats
 - f. Rural water supply and sanitation\water resources management.
40. When asked by Court to clarify the works that had been implemented by the claimants she stated that
- i. Rural water supply and sanitation/ water resource had not been done due to lack of safe guards.
 - ii. Construction and Rehabilitation of selected irrigation schemes had not yet started
 - iii. Public works to provide support or improve livelihoods of the communities not done
 - iv. Reconstruction and improvement of roads and bridges not done
 - v. Procurement and distribution of maize and other drought resistance crops done
 - vi. Procurement and distribution of goats done
41. During cross examination the claimants witness Lackson Ngalu stated that he could not state the major output of the project that he achieved under the new project. He stated it was meant to achieve smart irrigation, Rural water supply and water resources. He said the project was supposed to run for 4-5 years. He worked on the project from 2017 to the time his contract was terminated in January 2018. he said he was claiming 60% of his present salary to be paid for the work done on the new project because of the amount of work that they had done.
42. When re-examined he said on the new project they implemented the purchase and distribution of maize, distribution of goats, rural water supply and smart irrigation.

Therefore out of the above key areas, according to the evidence of Lackson Ngalu, the claimants had implemented three key areas.

43. The claimant did work for one year and some months thereby leaving a big part of the project not yet implemented. To award the claimants 60% would be unreasonable and will not be making economic sense because the remaining part of the project still has to be implemented and it is the biggest than what was actually implemented.
44. According to the submissions by Counsel for the claimants, on para 5.2 there is no formula shown or described as to how the figures submitted were arrived at. The defendants in their final submission submitted that the claimants should be paid 5% of their salaries for the work done on the new project. This, in the view of the court is too low considering the amount of work done under the project.
45. For the reason that the project was meant to run for 4-5 years and they only worked on it from 18th January 2017 to the dates of termination of contract in 2018, according to the witness statement of Leah Dindi marked 'LD' on page 6 paragraph 6.14 and 6.15 this Court will exercise its discretion and award the claimants 25% of their salaries for the work done on the new project.
46. For the avoidance of any doubts, the awards for extra work will be calculated basing on the period from January 2017 to the date of termination of the contract for each claimant but it will not include the period after the termination of contract. This is for the reason that the work is continuing and had no specific salary and what will be awarded is ex-gratia for specific work that was carried out as follows:

1. WYSON SPENCER KAMALA

His contract was terminated on 31st October, 2018. He worked on the new project from January 2017 (23 months) and his salary was US\$3,800.00 per month. Therefore 25% of US\$3,800 is:

25% of US\$3,800 x K735.00 for 23 months = MK16, 059,750.00

2. ERIC DUDDLEY CHIDZUNGU

His contract was terminated on 30th September, 2018 and he worked from January 2017 (22 months) on the new project and his salary was US\$4,700.00 per month. 25% of US\$4,700 is: 25% of US\$4,700 x K735 for 22 months = MK18, 999,750.00

3. CHISOMO CHIBWANA

Her contract was terminated on 30th September, 2018, she worked on the new project for 22 months. Her salary was US\$2,800.00 per month. Therefore 25% of US\$2,800 is:

25% of US\$2,800 x K735.00 for 22 months = MK11,319,000.00

4. GEOFFREY CHAMHANYA

His contract was terminated on 30th September, 2018 he therefore worked for 22 months on the new contract. His salary was US\$440.00 per month. Therefore 25% of US\$440.00 is:

25% of USD440 xK735.00 for 22months= MK1, 778,700.00

5. EMMANUEL CHOLE

His contract was terminated on 30th September, 2018 he therefore worked for 22 months on the new contract. His salary was US\$440.00 per month. Therefore 25% of US\$440.00 is:

25% of USD440 xK735.00 for 22months= MK1, 778,700.00

6. VICTOR KAONGA

His contract was terminated on 31st October, 2018. He worked for 22 months in the new project and his salary was US\$1,200 per month. Therefore 25% of his salary is:

25% of USD1, 200.00 xK735.00 for 22 months=MK4, 851,000.00

7. DAVIS CHIKAYENDA

His contract was terminated on 30th September, 2018 and his salary was US\$440 per month. He worked 22months on the new project. Therefore 25% of USD440 is:

25% of USD440 xK735.00 for 22months= MK1,778,700.00

8. EZEKIEL LUHANGA

His contract was terminated on 31st October, 2018. He worked on the new project from January 2017 (23 months) and his salary was US\$3,800.00 per month. Therefore 25% of US\$3,800 is:

25% ofUS\$3,800 xK735.00 for 23months=MK16, 059,750.00.

9. HERBERT CHIKAZINGWA

His contract was terminated on 31st October 2018. Therefore from January 2017 he rendered service on the new project for 22months. His salary was US\$ 444.44 per month. Therefore 25% of US\$444.44 is:

25% of USD444.44 xK735.00 for 22months=MK1, 796,648.70

10. AMON BANDA

His contract was terminated on 31st October 2018. Therefore from January 2017 he rendered service on the new project for 22months. His salary was US\$ 444.44 per month. Therefore 25% of US\$444.44 is:

25% of USD444.44 xK735.00 for 22months=MK1, 796,648.70

11. GEORGE PIKANI

His contract was terminated on 30th September, 2018. Therefore he worked for 22 months on the new project and his salary was US\$1,200 per month. Therefore 25% of USD1,200 is:

25% of USD1, 200 x K735.00 for 22months=MK4,851,000.00

12. KAKO CHAKHAZA

.....

His contract was terminated on 31st September, 2018 he therefore worked for 22 months on the new project and his salary was US\$440 per month. Therefore 25% of USD440 is:

25% of USD440 x K735.00 for 22 months = MK1, 778,700.00

13. JAFALI MBEWE

His contract was terminated on 31st September, 2018 he therefore worked for 22 months on the new project and his salary was US\$440 per month. Therefore 25% of USD440 is:

25% of USD440 x K735.00 for 22 months = MK1, 778,700.00

14. LACKSON NGALU

His contract was terminated on 30th September, 2018 and he worked on the new project for 22 months. His salary was US\$3,900 per month. Therefore 25% of US\$3,900 is:

25% of US\$3,900 x K735.00 for 22 months = MK15,765,750.00

15. LEAH DINDI

Her contract was terminated on 30th of September, 2018. She worked on the new project for 22 months and her salary was US\$1,333.33 per month. Therefore 25% of US\$1,333.33 is:

25% of US\$1,333.33 x K735.00 for 22 months = MK5,389,986.53

WHETHER LEAH DINDI WAS UNDERPAID AND OUGHT TO BE DUE TO UNDERPAYMENT

47. The first question to be answered on this head is whether there was underpayment at all?

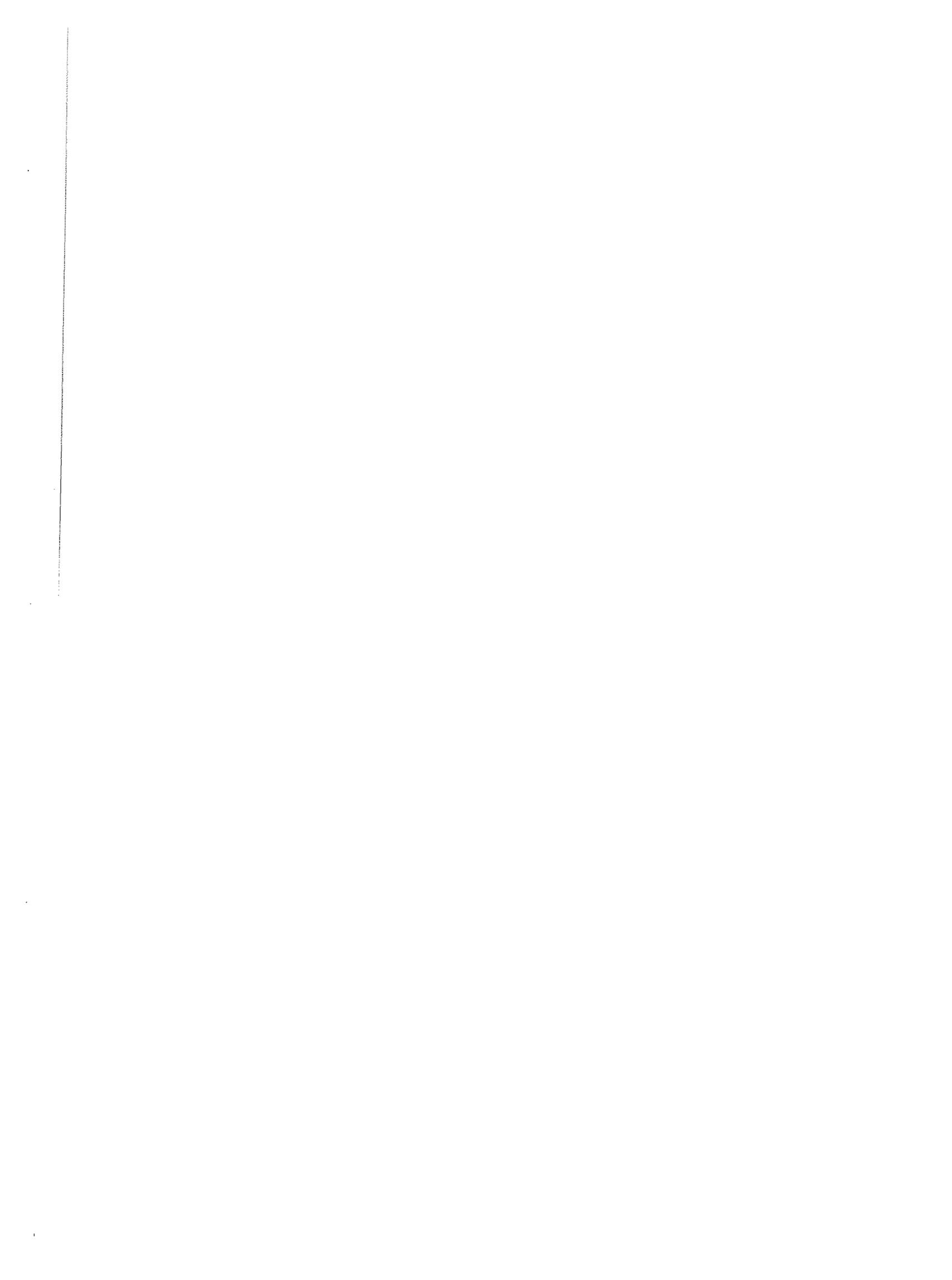
In her own evidence when cross examined Leah Dindi admitted that she signed her contract document and she read and understood the contents thereof the time she was appointed. Basing on that contract document she started working and was getting the salary that was indicated for the position of Office Manager in the contract.

48. The law on contract is clear that a signature on a contractual document or other written agreement demonstrates that a party has read, understood and consents to the terms and conditions in a contract. A party to an agreement is legally bound by his signature, regardless of whether he has actually read the contract or not. *Mishael Kumalakwanthu t/a Accurate Tiles and Building vs Manica Malawi Limited*. MSCA 57 of 2014 (being Commercial Case No. 18 of 2014).

49. Exception to this rule apply in instances where the signature has been obtained unfairly through misrepresentation, duress or undue influence (when one party unfairly influences another to enter into a contract)

50. In the present case the claimant did not raise any evidence that there was any misrepresentation, duress or undue influence or hiding of facts of any sort when she signed the contract.

51. She went on to state that when she came across a document for salary structure, she raised the issue with her supervisor who recommended that her salary would be revisited to US\$2,900. This recommendation was made when the salary difference was



noted and when she had questioned, but after she had already signed a contract which was legally binding on her.

52. Unfortunately, a recommendation being what it is, it requires approval and in this case it was never approved by the Ministry of Finance, PIU or powers that be, who were responsible for negotiating their salaries until the termination. Much as the Court sympathizes with the claimant for the legitimate expectations she had, but this recommendation was not binding on anyone, either the Supervisor to her, or the Supervisor with the employer. It had no legal effect until approval.

53. In the case of Charles Emuhiyemwanalizigeni and other Members of Staff of the Judiciary vs Attorney General, Civil Cause No. 49 of 2017, In a case where members of staff of the Judiciary sought to compel government through the Minister of Finance to implement a clause on Housing Allowance basing on a settlement agreement made in 2012 between government and Judiciary and basing on the proposed Terms and Conditions of Service that were submitted to the Minister for approval which had included a term on housing allowance. The Minister of Finance rejected the term on housing allowance for members of staff although it was recommended by the Judicial Service Commission in the proposed Terms and Conditions of Service of 2012. The Court held:

'...There was no legitimate expectation for housing allowance. There was no promise or representation made on housing allowance. The fact that the Judicial Service Commission had included housing allowance in the 2012 document, it did not mean that automatically this was going to be paid to the claimants, since the recommendation is subject to approval by the Minister'.

54. In the present case the recommendation that was made and the assurance made by the Supervisor was subject to approval by the Ministry of Finance which approval never came forth until the contracts were terminated. The recommendation therefore cannot be enforced. It would have been different if the recommendation was approved and was pending implementation at the time of termination.

55. Therefore there was no underpayment as the claimant was bound by the terms of the agreement that she entered into that, at the position of Office Manager her salary was US\$1,333.33, the recommendation was not approved therefore could not be relied upon to claim a salary at US\$2,900 or US\$3,500 as pleaded.

ARBITRATION FEES:

56. This matter went for Arbitration before a Court appointed arbitrator Justice Elton Singini, SC, JA, (Rtd) pursuant to Section 12 of the Arbitration Act. Cap 6:03 of the Laws of Malawi.

57. At the hearing before the Arbitrator the defendant admitted liability on the claims and parties were allowed 30 days to agree on damages which they failed to do. In making the Arbitral award, the parties had agreed that admission of liability by the defendant for damages/compensation to the claimants carried with it liability for payment by the defendant of Arbitration fees to the Arbitrator.

58. The Arbitrator filed a bill of arbitration fees at K80,000.00 per hour for five hours of work for 16 days. This bill was not challenged. The court is of the view that the bill is

reasonable considering that the Arbitrator was a retired Justice of Appeal with vast experience and was not acting as Counsel representing the parties but helping the parties to arrive a solution without resorting to litigation.

The bill is therefore awarded as filed at K6,400,000.00 subject to withholding tax as per the law.

ORDER:The defendants are ordered to pay within 90days the following heads of compensation that have succeeded:

- Loss of salary for the remainder of the contract period for all claimants.
- Compensation for extra work carried out but not paid for all claimants.
- Arbitration fees at K6,400,000.00 less withholding tax to the Arbitrator appointed by Court.

Either party aggrieved by this order on assessment has the right to appeal.

Made in Chambers this 13th day of August, 2021



Madalitso Khoswe Chimwaza

ASSISTANT REGISTRAR

