



THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL APPEAL NO. 244 OF 2015  
(Being IRC LL Matter No. 44 of 2012)

BETWEEN

TIONGE GONDWE.....APPELLANT

and

OPPORTUNITY INTERNATIONAL BANK LIMITED.....RESPONDENT

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CORAM:	<i>Madalitso Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>E.D Salima</i>	<i>Counsel for the Appellant</i>
	<i>Nyanda</i>	<i>Counsel for Respondent</i>
	<i>Kaferanthu</i>	<i>Court Clerk</i>

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**ORDER ON ASSESSMENT OF DAMAGES FOR UNFAIR DISMISSAL**

**INTRODUCTION**

1. The hearing on assessment of compensation was concluded in March 2017 before His Honour Kishindo following the judgment of the High Court on appeal dated 31<sup>st</sup> January, 2017, where it upheld the finding of the lower court that the appellant was unfairly dismissed and specifically ordered that and I quote "*the compensation be assessed by the Senior Deputy Registrar who shall consider whether the heads of compensation for which enhancement was prayed for are permissible under the scheme of the law*".  
For the avoidance of any doubts this court shall proceed to assess compensation as the evidence from both parties and their submissions are clear and un-ambiguous, therefore there is no need for a re-hearing of the matter.

**Brief Facts:**

2. The appellant was employed by the respondent in 2006 as a micro-banking assistant on pensionable and permanent basis. She was promoted to the post of Loans Officer (Relationship Officer) in August, 2008. The respondent terminated the appellant's employment on the 5<sup>th</sup> of September 2011 on allegations of poor performance, namely that the appellant had failed to collect loan arrears amounting to MK 2,593,352.00 from clients. The respondent did not accord

the appellant an opportunity to be heard before terminating her contract. She therefore sued for unfair dismissal and sought the following reliefs:

Reinstatement or alternatively

Compensation for unfair termination of contract of employment;

unfair labour practices,

loss of earnings and benefits to the period she should have retired,

payment in lieu of accrued leave days,

payments of two months salary and benefits of in lieu of notice.

3. She appealed against the decision of the IRC which awarded her minimum compensation of two weeks wages for each completed year for unfair dismissal, two months notice pay and accrued leave days. The appeal succeeded on technical grounds because the respondents although they filed their response to the appeal they did not appear before Court to argue their case on appeal, hence the assessment proceedings.

#### Issues for determination

- How much compensation should be awarded
- Whether interest is payable on notice pay, accrued leave pay or pension benefits
- Whether pension benefits are payable to the employee

### THE GENERAL LAW ON COMPENSATION IN EMPLOYMENT MATTERS

4. The law under **Section 63(4) of the Employment Act** provides guidance on how an award of compensation for unfair dismissal should be done.

An award of compensation for unfair dismissal shall be such amount as the court considers 'just and equitable' in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to the action taken by the employer *and the extent if any, to which the employee caused or contributed to the dismissal. (emphasis supplied)*

5. The employee has the duty to prove loss suffered as a result of the dismissal and must show that the loss is attributable to the actions of the employer. It is not expected that precise and detailed proof of every item of loss be presented. 'Loss' is generally what the employee who has suffered unfair dismissal loses. In the case of **Magola vs Press Corporation Limited Civil cause NO. 3719 of 1998 unreported** the High Court suggested some heads of damages that can be awarded are immediate loss, future loss, manner of dismissal, loss of protection in case of unfair dismissal or redundancy.
6. In computing compensation, the court shall take into account the remuneration that the employee was receiving at the time of termination of employment. In the case of **Stanbic Bank Ltd vs Mtukula [2008] MLLR 54 (SCA)** the Court held that 'wages', 'salary', 'Pay' and 'remuneration' are used interchangeably and includes allowances, benefits and basic salary. Therefore the court may consider the award of fringe benefits if the employee can show that they were part and parcel of his contract of employment. These benefits may include benefits in cash and in kind. However this does not apply mere expectations, the benefit must have formed part of the contract.
7. Although **Section 63(4) of the EA** is silent on mitigation of loss it is implied in the phrase 'just and equitable'. The basic rule of mitigation of loss is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendants

wrong and he cannot recover damages for any such loss which he could have avoided but failed to do so by unreasonable action or inaction. See **Mwafulirwa vs Manica Malawi Limited IRC No. 134 of 2004**.

8. In the case of **Norton Tool Company Limited vs Tewson** [1973] 1All ER 183, the court held that an amount which is just and equitable is within the discretion of the court. Similarly in the case of **Terrastone Construction Limited vs Solomon Chatuntha** MSCA Civil Appeal No. 60 of 2011, the Supreme Court held that in awarding damages for unfair dismissal, courts are not bound by the provisions of Section 63(5) of the Employment Act as the said section merely provides for the minimum consideration that the court may award.
9. In the circumstances of this case it has not been challenged that the claimant should be awarded compensation. It is the duty of this court to exercise its discretion to award compensation to the claimant. It is well to remember that the award of compensation is discretionary. The discretion is exercised judicially and judiciously. Therefore the allowable head of compensation under the scheme of the law are as follows:
10. **Immediate loss:** As already stated this is the period of loss from the effective date of dismissal to the date of judgment or the date that the employee secures alternative employment with comparable or better benefits, whichever comes earlier. **Mwafulirwa vs Manica Malawi Ltd IRC Matter No 34 of 2004 (Unreported)**. However it is not automatic that the employee will be awarded for the whole period, the employee has a duty to prove his/her loss and if at all he/she tried to mitigate the loss. On this head of damages the claimant wants to be paid loss of earnings from the time of dismissal to the date of judgment which she claims to be 5 years.
11. In determining what is just and equitable the court considers marketability of the plaintiff in the labour market, qualifications and experience of the employee would help to determine whether the employee would have problems to secure alternative employment in his chosen field after loss of a job and whether the claimant mitigated her losses. Being a person with Agri-business qualifications the claimant has not demonstrated that she tried to do business in agricultural or farm produce. Her applications for employment alone do not suffice as proof that she tried to mitigate her loss. There is no evidence of negative responses that can be attributed to the defendant, that made her fail to mitigate her loss. The Court will take into account this fact when making the award for immediate loss.
12. The claimant stated that at the time of her dismissal on the 5<sup>th</sup> September, 2011, her salary was K98,000.00. However witness for the defendant stated that she was getting a salary of K94,346.00 at the time of dismissal in September 2011. The claimant also said she getting USD10, and transport allowance of K40,000.00 per month. Both witnesses did not tender pay slip to prove these figures. The witness for the defendant was in a better to provide the pay slips but they did not therefore the court will adopt the basic pay as provided by the claimant.
13. In her witness statement filed on 6<sup>th</sup> March 2017, the Claimant requested the court to consider her salary to be at K300,000.00 because there had been salary adjustments

during the years as a result of rising cost of living and she tendered a pay slip for her colleague who was also at the her level marked as **TG3**. She said she could not produce her own pay slip because they are company records and she used to get them through company emails which she could no longer access.

Interestingly the said pay slip which she claimed to be for a person on the same position as she was before she was fired does not show any payment for airtime or transport or MASM as claimed by the claimant.

14. The claimant did not produce her contract of employment where such benefits were said to be payable. The law is clear that an employee is entitled to her salary and benefits as long as they form part of her contract of employment. In the absence of that it is difficult for the court to award the claimant what was not in the contract of payment i.e. airtime, and transport more especially where a more recent pay slip that she is relying upon is telling a different story.

In view of the above circumstances, the Court adopts the 2017 salary K300,000 as per evidence tendered TG3 for purposes of calculating compensation but it will not include transport or airtime as they are not part of it. The court will award her immediate loss for 2 years only as the claimant was expected to mitigate her loss which she did not do satisfactorily.

For immediate loss of earnings the claimant is awarded:

K300,000 x 36 months = **MK10,800,000.00**

#### **15. Medical scheme**

In her submissions the claimant is also claiming MASM contribution to have formed part of her benefits. This Court is mindful that when an employee is placed on MASM by the employer the payment is made direct to the service provider and not the employee. Therefore in any case the claimant could not have been paid this money and it lacks merit to be paid at this stage.

#### **16. Future loss:**

This head of damages represents the period between the judgment and retirement or to the date when the claimant would secure alternative employment. The claimant wants to be paid up to the time she would have retired if it was not for the dismissal. In her evidence she said she has not been able to find another job because the defendant had damaged her reputation. She did not explain how. This court finds this argument to have no basis because she has not been able to produce evidence of any negative response from the defendant regarding her references. She tendered her application letters for various institutions to demonstrate that she tried to mitigate her loss, but she has not given any evidence of negative responses that can be attributed to the defendant.

17. In the case of **Kamoto vs Limbe leaf Tobacco Company Ltd, MSCA Civil Appeal No.24 of 2010** the Court stated that "In considering future loss the court considers first that the employees employment could not have been for 'life'. An employer could have terminated the contract of employment just like the employee could opt out of a contract of employment before the expiry date. It is not safe to assume that an employee would be available for the employer until the age of his/her retirement or the expiry of a fixed contract".

18. The other factors the court will consider in determining the award for future loss are the period already served with the employer and the remaining period to the expiry of the contract for fixed contract or to retirement age for unspecified period of employment, the characteristics of the claimant including age, qualification, job opportunities, health and mitigation of loss. See **Chawani vs Attorney General [2008] MLLR 1 (SCA)**.
19. In the case of **Garry Tamani Makolo vs AON Malawi Ltd, Civil Appeal No. 46 of 2015 (being IRC Matter No. 505 of 2011)** in the judgment of the court delivered on 22<sup>nd</sup> October, 2015 in making the award for future loss the Court remarked that the appellant was awarded a period of 8 years being one third of 24 years which was the period to his retirement. The Court remarked that the award had exceeded the minimum prescribed in section 63(5) because the dismissal was unfair substantively." 2-10-2015).
20. In the present case the Court found that the claimant was unfairly dismissed only that she was not given an opportunity to be heard. As regards the reason for dismissal it was clearly spelt out as incompetence in the letter of dismissal. For the reasons stated above that employment is not meant to be for life and that the claimant failed to mitigate her loss and basing on the grounds that the dismissal was procedurally unfair and not substantive the court is awarding the claimant 6 months salary for future loss. Therefore the claimant is awarded K300,000 for 6 months = **MK1,800,000**

**WHETHER INTEREST IS PAYABLE ON NOTICE PAY, ACCRUED LEAVE PAY OR PENSION BENEFITS:**

21. 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.

22. 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.
23. 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.*

24. 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.*

25. 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.*

26. In the present case Counsel for the claimant submitted that the lower should have added interest to the notice pay, accrued leave days pay and pension, just as it is done in other cases of similar nature handled by other courts of concurrent jurisdiction. Counsel went to town trying to cite cases where interest had been awarded on heads of damages to reflect inflation and devaluation.
27. With due respect to Counsel who insisted that the Court should have crafted in to the awards the payment of interest which was not pleaded in the statement of claim. Much as the reasons are valid but this was a claim for compensation for unfair dismissal 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.
28. This court finds the claimant's claim for interest wanting as it was not pleaded in the statement of claim. It only came up in the submissions for assessment of damages after the appeal. This is an infringement on the rules of pleadings which require that a claim for interest should be specifically pleaded in the body and prayer section of the statement of claim.
29. 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.*

30. 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.'*

31. As observed in this case the claimant's statement of claim did not include a claim for interest on notice pay, leave days accrued or pension therefore this court will not award interest to these claims.

#### **Notice Pay**

32. However the Court proceeds to award notice pay since the court found that she was unfairly dismissed and the notice pay that she was given was not in line with the conditions of her employment where it was clearly indicated that notice pay would be three months. Therefore the Court awards her two months notice pay which amounts to **K 196,000** according to the salary that she was receiving at the time of dismissal

#### **Accrued Leave Days**

33. The claimant claimed that she had 15 days annual leave days accruing.

Weekly wage /number of working days

$K22,615.00/5\text{days} = K4,523.00 \times 15\text{days} = \mathbf{K67,845.00}$

#### **Severance Pay**

34. Pursuant to **Section 35 of the Employment Act, (2010 as amended)** provides for payment of severance allowance where contract of employment is terminated as a result of redundancy or retrenchment, or due to economic difficulties, technical, structural or operational requirement of the employer or where a dismissal is unfair.
35. Severance allowance is calculated using the actual period that the employee worked for the employer and it must be one full year. In the present case the claimant was employed on 6<sup>th</sup> March 2006 and dismissed on 5<sup>th</sup> September, 2011 she worked for 5 complete years. Therefore she is entitled to two weeks wages for each completed year.
36. Since the court found that she was unfairly dismissed she entitled to be paid severance pay as follows:

$K98,000 \times 12/52 = K22,615.00$  per week

$K22,615 \times 2 \times 5\text{years} = \mathbf{MK226,150.00}$

#### **WHETHER EMPLOYERS CONTRIBUTION TO PENSION IS PAYABLE TO THE EMPLOYEE**

37. **Section 65 of the Pensions Act, Cap. 55:02 of the Laws of Malawi (PA)** provides as follows:

Subject to this Act, the Registrar may, on application by a member to a trustee, where the member has permanently left the service of the employer, whether because he has resigned or

because the employer has terminated his employment, for any reason otherwise than in the circumstances described under section 64 (a) to (e), permit the trustee of the fund to pay benefits to the member out of the fund if the registrar is satisfied that:-

- a) The member has not secured another employment for a period of more than six(6) months; and
- b) **Benefits paid to the member are limited to that part of the contributions paid by the member, not the employer and any investment income on these contributions.**

In the case of **Climinton Gwazeni Phiri vs Dignitas International (MW)** Miscellaneous application No. 37 of 2015 (Unreported) Justice Tembo re-iterated the position of the law.

38. In the present case the claimant in her witness statement stated that she was claiming 10% employer contribution of her pension. According to law what she is entitled to is her contribution **only** if she does not get another job after 6 months from termination of employment. As for the employers contribution to the pension fund it is transferred to any other Pension Fund of his/her choice that the employee may identify upon securing another employment. Therefore the claim for payment of pension money is dismissed for lacking legal merit.

**ORDER:**

The defendants are ordered to pay the claimant on the following heads:-

Immediate loss K10,800,000

Future loss K1,800,000.00

Severance pay K226,150.00

Accrued leave days K67845.00

Notice pay for two months K196,000.00

**COSTS:**

On Costs this Court is aware that costs are awarded at the discretion of the Court generally. The scheme of law under **Section 72 of the Labour Relations Act**, prohibits the payment of costs generally. Costs are not awardable save in exceptional circumstances determined by the court. Therefore in this case the Court did not find any exceptional circumstances warranting the award of costs. Therefore costs are not awarded.

Made in Chambers this 13<sup>th</sup> day of August, 2021



Madalitso Khoswe Chimwaza

**ASSISTANT REGISTRAR**