



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 1 OF 2013

BETWEEN:

BNC PACKAGING LIMITED.....APPELLANT

AND

JONATHAN MKUMPHA.....RESPONDENT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mndolo- of Counsel for the Appellant

Maganga- of Counsel for the Respondent

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF COMPENSATION

Factual Background

1. The claimant, now respondent, was employed by the defendant, now appellant, on the 1st of February, 1997 and was dismissed on the 4th of May, 2006. He commenced legal proceedings against the appellant in the Industrial Relations Court claiming re-instatement or alternatively damages for wrongful dismissal from employment and severance allowance. By its Judgment of 8th May 2011, the court found that the respondent was wrongfully dismissed and that the appropriated remedy be assessed.

2. By its order of 11th January, 2013, the court determined that compensation was the appropriate remedy for the respondent. The court awarded the respondent immediate loss in salary and housing allowance from the date of dismissal to date of judgment totaling K3,192,651.00 (63 months) as compensation and K506,770.00 as severance allowance for ten years making a grand total of K3,699,421.00.
3. The appellant was dissatisfied with the order of the 11th January, 2013 and consequently lodged an appeal to this court. The respondent also cross-appealed. Prior to the hearing of the appeal, the appellant applied for stay of execution of the order of 11th January, 2013 and granted on the 25th of January, 2013 on condition that the sum of K1,849,71.00 was to be paid into court within the same period of 7 days.
4. By its judgment dated 13th May, 2019, it was adjudged as follows:
 - a. *The respondent shall be paid his salary and benefits in full from the date of the dismissal to the date of the mandatory retirement.*
 - b. *The respondent shall be paid severance allowance in respect of the nine years completed service.*
5. The court considering that there was no evidence as regards when the respondent would have been required to proceed on mandatory retirement, referred the assessment of his dues to the Registrar if otherwise not agreed by the parties. It is on this basis that the matter finds itself before this court.

Issues for Determination

6. The way I see it, the main issue that this court has been called upon to determine is the salary and benefits payable to the respondent from the date of the dismissal to the date of mandatory retirement.

Submissions by the Parties

Respondent's Submission

7. It is submitted on behalf of the Respondent that the court adjudged that the Respondent be paid salary arrears till retirement age. It is pointed out that the Respondent used inflationary rates from the National Statistics Office which is a reputable office with valid figures to determine the economic movements affecting living costs because the Respondent could not access the salary increase rates from the office.

8. They contend that although the Appellant stated that salary increases were stopped, there was no proof or evidence in court to determine that indeed the salary increases were stopped. At the time of the Respondent's dismissal, his monthly salary was MK47, 177.00 as such calculating from the inflationary rates upwards, and using 60 as a median, a total of K93,466,608.27 is payable as salary up to retirement age. They further submit that following the case of **Zgambo v Kasungu Tobacco Farm 15 MLR 1992**, because this money was not paid to the Respondent, this now become a debt which accrued interest and using the interest rate from two reputable banks, namely National Bank of Malawi and First Capital Bank Limited, interest accrued totals **K302,119,625.73**.
9. Apart from that, it is submitted on behalf of the respondent that a sum of **K1,849,711.00** being severance allowance is payable as well as Pension calculated at 5%, on the salary coming up to **K6,834,449.28** and Medical at **K2,516,00.00**.
10. Essentially, the respondent submits that a total sum of **K398,102,234.00** is payable to the Respondent.

Appellant's Submission

11. The appellants submit that the benefits referred to in the Order of 13th May, 2019 are only those the Respondent pleaded in his statement of claim as his benefits. They point out that in paragraph 3(d) of his statement in the Industrial Relations Court, Exhibit FR, the Respondent only indicated housing allowance of MWK3, 500.00 as a benefit besides his salary. They further point out that in paragraph 6 of the said Exhibit FR, the Respondent claimed for re-instatement or in the alternative damages for wrongful and unjustified dismissal from employment and severance allowance. They contend that he never pleaded any other benefits he is now claiming, namely medical aid, food allowance, 13th cheque, leave grant and pension benefits. They argue that throughout the proceedings, it was never an issue between the parties whether the benefits being claimed now were payable following the Respondent's dismissal.
12. It is further submitted that per the Order of assessment of 11th January, 2013, **Exhibit FR2** the Respondent was awarded compensation representing his lost salary and benefits (house allowance) from date of dismissal to the date of judgment. They argue that the court could have awarded the Respondent benefits that he had not pleaded. Thus, the Respondent only pleaded housing allowance amounting to MWK3,500.00 as his only benefit.

13. They also point out that the Respondent is also claiming housing allowance at 8% of his salary per RW2, Mr. Chisala. They contend that the Respondent cross-appealed against the assessment order that used MWK3,500.00 as his housing allowance but did not challenge that the housing allowance was not MWK3,500.00 but 8% of his salary which is MWK3,774.16. They argue that his cross-appeal was on future losses which the Court below did not award him. They contend that there was no amendment to his statement of claim to add the other benefits he was allegedly entitled to during his employment.
14. Another issue raised by the Appellants is that the Respondent did not claim interest on the salary and the benefit the court awarded in the Order of 13th May, 2019 and yet he is now claiming interest on the salary and benefit the court awarded him. They contend that this Court's mandate is limited to assessing the compensation for unfair dismissal as directed by the Court and severance allowance. They further contend that this Court would be exceeding its mandate if it were to award the Respondent interest at the rate claimed or any at all.
15. Further, they submit that the Court did not order the compensation should be assessed by taking into account the inflation rates in the country between 2006 and 2023. They argue that compensation in employment cases is different from assessment of damages in tort where the Court consider comparable cases and factor in the elapsed between the cases and loss in the value of the Kwacha. In those cases, the aim of compensation is to restore the plaintiff to the position s/he would have been if the tort had not been committed. Undoubtedly, the compensation is aimed at punishing the tortfeasor. The Supreme Court of Appeal warned in **Terrastone limited v Solomon Chathuntha MSCA Civil Cause Number 60 of 2011 (unreported)** against awarding damages with element of punishing to the employer.
16. On the issue of the appropriate severance allowance and compensation, the Appellants are of the view that the Court ordered that the Respondent be paid severance allowance for the nine (9) complete years he worked for the Appellant. They submit that the applicable formula for calculation of severance allowance at the time the Respondent's dismissal is contained in **Exhibit FR5**. Per that formula, the Respondent who had worked for more than one year but less than ten years was entitled to two week's wages for each completed year of continuous service. His severance allowance is therefore **MWK 210,506.42** calculated as follows:

Total monthly wage (salary plus housing allowance)	MWK50,677.00
1 weeks' wages MWK (50,677.00 x 12)/52	MWK11,694.69

2 weeks' wages MWK (11,694.69 x 2)	MWK23,389.38
2 weeks' wages for 9 years MWK (23,389.38 x 9)	MWK210,504.42

17. It is the Appellant submission that this amount was fully paid out of the MWK1,849,711.00 the Respondent received leaving a balance of MWK1,639,206.58 applied towards payment of his compensation.
18. On the issue of compensation, the Appellants submit that the Respondent was 36 years old at the time of his dismissal and the mandatory retirement age being 60 years, the Respondent had 24 years more to work for the Appellant. They point out that the respondent will turn 60 years on 11th February, 2023 and that from 6th May 2006 to 11th February, 2023 there are 286 months. They further submit that per the evidence before the court, the Respondent was receiving a salary of MWK47,177.00 and housing allowance of MWK3,500.00 making a total of MWK50,677.00. They are of the view that this amount multiplied by 286 months the total will be K14,493,622.00. They also point out that the Appellant paid MWK1,639,206.58 to the Respondent in 2013 and MWK1,849,711.00 the Appellant paid into court as evidence by **Exhibit FR4** totaling MWK3,488,917.58.
19. They further contend that this money was deposited in the interest earning account and all the interest will go to the Respondent. They point out that at the conclusion of the appeal on 13th May, 2019, the Respondent applied to court to pay out the money to him as such the compensation remaining due and payable to the Respondent pursuant to the Order of 13th May, 2019 is MWK11,004,704.42 (MWK14,493,622.00 minus MWK3,488,917.58).
20. Lastly, they submit that the Appellant already indicated in its evidence that once the assessment is completed, it will proceed to appeal against the court's Order of 13th May, 2019 awarding the Respondent compensation up to retirement. They aver that the Order has not been appealed against yet following the practice direction in the Supreme Court of Appeal that appeals to that Court be lodged after assessment is done.

The Law and Applicable Legal Principles

21. This court is alive to the legal position that the purpose of compensation is to put the wronged party in a position in which he would have been if he were not wronged. In this case therefore, the task of the court is to assess such compensation in monetary terms that would put the respondent in a position where he would have been if he was not constructively dismissed by the appellant. This court is also

aware that in employment matters, there are statutory as well as case law guidelines on how compensation is to be assessed.

22. The starting point is section 63 of the Employment Act. Subsection 4 reads as follows:

“An award of compensation 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 loss can be attributable to the action taken by the employer and extent, if any, to which the employee caused or contributed to the dismissal.”

Analysis

23. To begin with, I observe that there are two preliminary issues to be settled which by and large would influence the assessment herein. The submissions by the parties reveal that the parties have taken two diametrically opposed positions on the issue of heads of compensation to be assessed and on the issue whether or not interest should be included.

24. On the issue of heads of compensation to be assessed herein, the appellants are aggrieved with the respondent's inclusion of benefits like medical aid, food allowance, pension, leave grant, and a 13th cheque. The appellants contend that the respondent's benefits as pleaded by him was only housing allowance. The Appellant submits that the Respondent was awarded only the benefits he specifically pleaded in his statement of claim and cannot at law introduce new claims at assessment. They cite the case of **Attorney General V Misheck Soldier Kanjanga (2002-2003) MLR 4** in which the Supreme Court dismissed an award of loss of use of business because it had not been pleaded and therefore not awarded.

25. I have perused the submissions by the respondent. It would appear the strength of their case on the issue of heads to be assessed herein is supported by the case of **Magola v Press Corporation Ltd** Civil Cause No. 3719 of 1998 (unrep) (HC) in which the court outlined that possible heads of damages for the employee unfairly dismissed: (a) her immediate loss of wages; (b) the manner of her dismissal; (c) her future loss of wages; and loss of protection in respect of his unfair dismissal or dismissal by reason of redundancy.

26. I have gone through the judgment dated 13th May, 2019, I take note that it was adjudged that the respondent shall be paid his salary and benefits in full from the date of the dismissal to the date of the mandatory retirement. The question this court ought to grapple with is whether payments of “benefits in full” encompasses even those benefits that the respondent had not pleaded. The appellants contend that the respondent’s benefits as pleaded by him was only housing allowance. I find it pertinent at this stage to state that the object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision. In the case of **Imprefed [Pty] Ltd v National Transport Commission** 1993 [3] SA 94 A at 107C - E it is stated that at the outset it need hardly be stressed that the whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.
27. Further to that, it is highlighted in the case of **National Director of Public Prosecutions v Phillips and others** 2002 [4] SA 60 W at 106E-H that a litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. It is further stated in that case that a litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance.
28. Unquestionably, the court may not grant a relief beyond that which is prayed for in the pleadings. A judgment that includes a relief not embraced within the pleadings, ought to be void. In this case, the respondent during cross-examination admits that he did not claim other benefits apart from the house allowance. He further stated that he did not claim the same at the Industrial Relations Court and that he did not amend his Form 1 to reflect the addition of other benefits. In my view, the inclusion of other benefits other than the house allowance at this stage, is erroneous. This court ought to confine itself to the house allowance that was prayed for and upheld on appeal.
29. I am fortified in this position considering that the Court’s Order of 13th May, 2019 also suggests that the court did not intend for the Respondent to claim benefits that he did not plead. On page 6, the Honourable judge stated the following:

“There being no evidence as regards when he would have been required to proceed on mandatory retirement I refer the assessment of his dues to the Registrar, if not otherwise agreed”.

30. It is clear that if the Honourable Judge had evidence on the mandatory retirement age, and when the respondent would have reached that age, he would have proceeded to award the Respondent compensation using the evidence so far on the record at that stage. At that point, the evidence on the record did not cover claims for medical aid, food allowance, pension, leave grant, and 13th cheque the respondent is now claiming at assessment. I believe the Respondent could have been awarded what he had pleaded. It is only proper that this court should proceed and assess his salary and house allowance in full from the date of the dismissal to the date of the mandatory retirement.

31. The other issue that needs to be settled before proceeding with the assessment appears to be whether interest should be factored in to the salary and to the benefit the court awarded him. The appellants contend that, in its Order, the Court did not award interest to the Respondent. They argue that this Court's mandate to assess the compensation is limited to assessing the compensation for unfair dismissal as directed by the Court and severance allowance. They are of the view that this Court would be exceeding its mandate if it were to award the Respondent interest at the rate claimed or any at all. They seek to rely on the case of **Attorney General v Masauli** (1999) MLR 28 in which it is stated:

It is, however, noted that the damages that were awarded by the court on this aspect included interest, to be assessed by the Registrar. With respect, we are unable to agree with the court below on this point. 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.

32. It is argued on behalf on the respondent that when one owes an employee salary that becomes a debt and it attracts interest. They place reliance on the case of **Zgambo v Kasungu Tobacco Farm** 15 MLR 1992 in which the court allowed 8.5% interest to the plaintiff following his averment that this money was held by the defendant from 1 August 1976 up to 1 November 1976 – a period of three months – and that during that time it attracted interest.

33. The way I see it, the general principle behind awarding interest just like damages is to compensate the claimant - to put him/her in the same position as he/she would have been had the defendant paid the sums of money according to agreement. In his determination on the issue of interest Honourable Justice Kapanda (as he was then) in **Kankhwangwa and others v Liquidator Import and Export Mw Ltd** (Civil Appeal No. 52 of 2003) ((MW)) [2003] MWHC 92 (22 December 2003) observes:

As regards the issue of interest the court has noted that one of the reliefs sought by the respondent was interest on the severance allowance. Further, it is observed that this claim of interest only appears in the column for particulars of relief sought. Moreover, the respondents did not indicate that they were claiming the interest at any particular rate. This notwithstanding, the Chairman decided to award interest on the said severance allowance at the then current bank lending rate. Furthermore, the respondents did not plead, in the substantive part of its statement of claim form, the material facts and the basis upon which it was seeking interest on the severance allowance. This was contrary to the provisions of the Industrial Relations Court (Procedure) Rules 1999 which require a party to plead the material facts on which such party relies.

34. In his finding, the Judge states as follows:

As I understand it, the position at law is that a claim for interest must be pleaded not only in the particulars of relief but also in the main body of statement of claim. The same applies with regard to the basis and the rate at which such interest is claimed. The respondents statement of claim was not in compliance with this law. With due respect, this court does not understand the basis on which the Chairman decided to award interest at the current-bank lending rate. The respondents never claimed interest at the rate at which it was awarded. The Chairman erred at law in departing from what the respondents were claiming in their claim form.

35. In this case, the court is not grappling with whether the interest was properly pleaded or not but the fact that it was not even pleaded at all. It has already been stated elsewhere in this ruling that that the whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed. In the case of **Charles Mwasi and Others Vs. Malawi Revenue Authority**; Civil Appeal No. 13 of 2015 Justice Kenyatta reacting to more or less similar circumstances stated that:

In the present case, a perusal of IRC Form I reveals that the Appellants particularized in detail their respective prayers for reliefs into 27 items. Unlike in Kankhwangwa Case, where the claim at least made a mention of interest in the column for particulars of relief sought (Claim for (a) severance allowance (b) interest on the said severance

allowances), none of the 27 items in the IRC Form 1 herein mention or relate to interest. As such, I fail to understand how the Appellants expected the Respondent to appreciate that they were seeking the lower court to award them interest on the compensation.

36. Further, in that case Justice Kenyatta remarks that interest is not awardable anyhow. He cites the Supreme Court decision in the Kankhwanga case in which it is indicated that interest is awardable as a matter of law when it is pursuant to an express or implied term of a contract and that it is also payable as a matter of law where there is a statutory requirement for the payment of interest. Applying the law to the facts before him in Charles Mwasi case, Justice Kenyatta held as follows:

It is plain to see that the situations mentioned by Supreme Court of Appeal in Kankhwangwa Case, which would attract an award of interest in equity do not obtain in the present case. The Respondent did not stand in a fiduciary position in relation to the Appellants. The Respondent was not a trustee or executor of the Appellants. Again there is no issue of misuse or misapplication of funds by the Respondent.

37. In this case, I daresay in as far as the issue of interest is concerned the facts are in all fours with the case of Charles Mwasi. Apart from failure to plead the said interest, the situations herein do not fall under the ambit of the situations mentioned by Supreme Court of Appeal in Kankhwangwa Case. The Appellant did not stand in a fiduciary position in relation to the Respondent neither were the Appellants a trustee or executor of the Respondent and there is no issue of misuse or misapplication of funds by the Respondent. Essentially, there is no basis for awarding interest in this matter.

38. Apart from the foregoing, the appellants also contend the Court did not order the compensation should be assessed by taking into account the inflation rates in the country between 2006 and 2023. Apparently, the Respondent used inflationary rates from the National Statistics Office which they contend is a reputable office with valid figures to determine the economic movements affecting living costs. They submit that this was done because the Respondent could not access the salary increase rates from the office.

39. The appellants argue that interest is awardable in the exercise of the court's equitable jurisdiction and that compensation in employment cases is different from assessment of damages in tort where the Court considers comparable cases and factors in the time elapsed between the cases and loss in the value of the Kwacha. They hold the view that in those cases the aim of compensation is to restore the

plaintiff to the position s/he would have been if the tort had not been committed which is aimed at punishing the tortfeasor. They seek to rely on the Supreme Court of Appeal decision in **Terrastone limited v Solomon Chathuntha** MSCA Civil Cause Number 60 of 2011 (unreported) in which it was stated that it is important that courts must not be seen to award damages with elements of punishment to the employer.

40. Be that as it may, I take note that the appellants in their submissions do not dispute the fact that within the period that the payments were due and the retirement age, the payments must have been adversely affected by the ravages of inflation and devaluation. There is no doubt that the value of the salary and the benefits cannot be same. The only issue they advance is that they made an initial payment which was ordered by the court which must have been deposited to an interest earning account. Essentially, they acknowledge the fact that the amount cannot stay the same. In any case, there is a plethora of cases which recognize the need to boost the award to bring it at par with economic realities. In **Kandoje v. Malawi Housing Corporation** (2008) MLR 433, it was stated that:

"The cause of action arose in 2003 but the events cover a period from 1998. The applicant was lowly paid as noticed from the pay-slip. The local currency has since devalued and the court has discretion to award interest to cater for devaluation and inflation ... In this case the court awards 40% of the award to cater for devaluation since 1998".

41. In my considered opinion, the issue herein is by what percent should the court boost the award. In **Frackson Chitheka v. The Attorney General (Ministry of Finance)**, Civil Appeal No. 67 of 2008 (unreported) the appellant challenged an award of compensation which was boosted by 100%. Mzikamanda J, as he then was, confirming the boost stated that the boost by 100% pension that was entirely in the discretion of the lower court considering the devaluation and rate of living at the time.

42. In terms of compensation, it is submitted and not controverted that the Respondent was born on 11th February, 1970 and that he was aged 36 years at the time of his dismissal on 4th May, 2006. It is also in evidence that at the time of the Respondent's dismissal, the Appellant pension was then administered by NICO Life Insurance Company Limited and the mandatory retirement age was 60 years. It follows therefore that the Respondent had 24 more years to work before reaching the retirement age of 60 years. The total number of months from 14th May, 2006 to February, 2030 is 286 months. The evidence indicates that the appellants paid for 68 months which means that they have 218 to satisfy the full

payment ordered by the court. Further to that, the evidence indicates that the Respondent was receiving a total salary of K50,677.00 comprising the Basic salary – K47,177.00 and Housing allowance – K3,500.00. Essentially, the payment due to the Respondent is

$$218 \times K50,677.00 = K11,047,586.00.$$

43. Considering the devaluation and rate of living at the time, I am inclined to boost the same by 100%. The Appellants must pay the Respondent **K22,095,172.00**. It is so ordered.

MADE IN CHAMBERS THIS 21st OF JUNE, 2021



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR