THE REPUBLIC OF MALAWI

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

SITTING AT BLANTYRE

CIVIL APPEAL NO. 10 OF 2022

(Being Matter NO. IRC 330 of 2019)

BETWEEN

CHIBUKU PRODUCTS LIMITED…….APPELLANT

-AND-

HARRY CHILONGO…….....RESPONDENT

CORUM: PETER M.E KANDULU, DEPUTY CHAIRPERSON

Ndhlovu, Counsel for the Respondent

Bvundula, Counsel for Appellant

Kakhobwe, Court Clerk

JUDGEMENT ON REASSESSMENT OF COMPENSATION

Introduction

There is a default judgment that was entered in favour of the Applicant. The court in that Judgement held that the Applicant is entitled to compensation for unfair dismissal and severance allowance.

The Respondent (the Appellant on Appeal) appealed against the decision of the Registrar of the Industrial Relations Court upon having its application to set aside the said default judgment dismissed.

The High Court upheld the decision of the Registrar of the Industrial Relations Court but ordered the reassessment of compensation.

On 15th November 2023, the Court reassessed compensation for unfair dismissal and severance allowance payable to the Applicant. This is now the Judgement of the reassessment of compensation.

Issue for Determination

How much is the Applicant entitled to compensation for unfair dismissal and severance allowance pay?

The Applicant's and Respondent's Evidence

On the part of the Applicant, he testified on his behalf. On the part of the Respondent, there was Mr. Rodgers Chirwa who testified on their behalf. They filed their witness statements which are on the Court's record.

The Evidence of the Applicant

The Applicant filed his witness statement which he adopted as his evidence in chief. He was cross-examined and re-examined. Mr. Harry Chilongo stated that he was employed by the Respondent on 2nd January 2007 and worked until 21st March 2019 when he was dismissed from employment. His last salary was K157, 796. 10 per month. At the time of the termination of his contract of employment, he was working as a production supervisor in an acting capacity. He was also working as a container clerk. He exhibited a copy of the letter of his promotion and it was marked**.**

He knew that he was also on a contributory pension scheme. This is provided for in clause 5 of the letter of his promotion which he had tendered and was marked. Under the scheme, the Respondent was contributing 10% and he was contributing 7.5%.

Further, he stated that he was also entitled to medical aid which was limited to him, his "spouse and up to a maximum number of four children not exceeding 18 years of age." The Respondent contributed 60% whilst he contributed 40%. This is also clear in clause 6 of the letter of his promotion which he had exhibited and tendered.

MASM rates for the Executive Scheme are as follows: a) for a member it is MK18, 000.00 and b) for a dependent it is MK17, 000.00. A copy of the circular on the rates from MASM to its customers dated 25th May 2021 was exhibited and marked**.**

He stated that he knew that he had a judgement against the Respondent and the written witness statements form part of his evidence for the assessment of compensation for unfair dismissal and severance allowance.

Since the termination of employment, he has tried to look for work but he has not been successful. He is just staying at home doing nothing. He has suffered because of the termination of his employment and he is still suffering.

He further stated that he tried to mitigate his loss by gaining employment with K-Marc Shop where he was receiving a monthly sum of K70, 000.00 but it stopped trading within 2 months after having been employed which inevitably led to the termination of his employment.

In cross-examination, Mr. Harry Chilongo confirmed that at the time of the termination of his employment, his designated position was that of a Container Clerk. He confirmed that he was found guilty at the disciplinary hearing and that he had not attached any applications that he had been making in search of the job as his evidence.

In re-examination**,** he stated that the reason why he sued the Respondent despite that he had attended a disciplinary hearing was that during the day in question, he had worked beyond 8 hours from the morning of the day to 3 am of the next day and could not count with those who were loading the goods. He also stated that he did not bring any application letter as he had heard about a job at K-Marc shop by word of mouth and he attended interviews without an application letter where he was offered a job.

The Evidence for the Respondent

Mr Rodgers Chirwa adopted his witness statement and the documents attached as his evidence in chief. He stated that he is a Senior Human Resource Business Partner for the Appellant. The Respondent was employed with the Appellant Company in 2007. The Respondent was employed

in the position of General Worker and later promoted to Acting Production Supervisor and placed on an on-job training for one year on the condition that upon successful completion of the training, he would be confirmed in the position of Production Supervisor.

One of the conditions for confirmation was that he should pass the Sorghum Opaque Beer Brewing Academy (SOBA) Test assessment. If he failed the test, his services were supposed to be terminated. The Respondent, in 2015, failed the said test and was supposed to be terminated. However, instead, he was reassigned to the position of Container Clerk a copy of the Staff Movement Form dated 11th May 2015 indicating the movement of the Respondent to the position of Container Clerk was exhibited and marked by the court.

At the time of termination, the Respondent was serving in the position of Container Clerk but was given an Acting Position as Team Leader (Production Controller). A copy of the Respondent's acting in Higher Position Form, indicating that his position as of 2019 was that of Container Clerk was exhibited and it was marked. A copy of the Clearance Certificate upon issued upon termination of the Respondent's employment, dated 28th March 2019, indicating that the Respondent's position at the time of termination was that of a Container Clerk.

The Respondent was dismissed from employment in March 2019 following disciplinary proceedings at which he was found guilty of misconduct. A copy of the minutes of the disciplinary hearing dated 18th April 2019 was exhibited and marked. He told the court that he believed the Respondent contributed to his dismissal on account of his misconduct."

In **cross-examination**, the witness admitted that the document minutes arising from the disciplinary hearing were not signed and that he was not the one who took the said minutes. He also admitted that the report of the Applicant regarding the events that led to the disciplinary hearing was not attached to the said minutes.

He confirmed that there is always a salary increment for the Respondent's employees at the annual rate of 10% on average. He admitted that if the Applicant was still in employment to the date of assessment of compensation, his salary could have increased.

He admitted that despite the fact the Applicant was working as a Container Clerk, he was dismissed for the work that he carried out in the acting capacity. He confirmed that the Applicant failed the assessment that could have warranted him to work on the position that he was dismissed from.

He disagreed with counsel for the Applicant when a question was put to him that it was wrong of the Respondent to give a position to a person who had failed an assessment that would qualify him for that said position.

In re-examination, the witness stated that it was not practicable that he should attend every disciplinary hearing including the one for the Applicant which is why he was not part of the disciplinary hearing. He reiterated that despite that the minutes for the disciplinary hearing were not signed and that the person who made them was not in court, they were a true reflection of the hearing process. He stated also that even though the Applicant failed the assessment for the position he was dismissed from, it was right for the Respondent to give him the position. He also reiterated that there is always a salary increment for the Respondent's employees at an annual increase of 10% on average.

The above is the evidence of both parties. The court is so grateful for the submission filed with the court. However, the court would like to state that it will not reproduce all that was submitted. The court shall strive to use the relevant and material facts as presented in the final written submission. The court would also wish to state that the present proceedings is as a result of a direction given by the High Court for a reassessment of compensation due to the applicant a respondent at appeal. The High Court has guided this court that the amount to be used when calculating compensation for the applicant / respondent in this matter must be his last known salary which was MK157, 796. 10 and not more.

The Law

Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.

In determining the sum payable as compensation, the starting point is the sum of money that the Applicant was getting as wages. Section 3 of the Employment Act defines 'wages' to mean all earnings, however, designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law, which is payable by a written or unwritten contract of employment by an employer to an employee for work done or to be done or for service rendered or to be rendered.

An award of compensation for unfair dismissal is made under Section 63(4) of the Employment Act, ("the Act") which states:

> *"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 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."

It follows that in assessing compensation the court has to consider the following:

(I) Award amount that is just and equitable.

(ii) Amount shall be determined by loss sustained by the employee.

(iii) Cause or contribution to the dismissal by the employee.

Section 63 (5) of the Employment Act prescribes minimum awards that the court may award. It must be noted that this provision does not take away prescription in Section 63(4) of the Act.

Section 63 (5) of the Act provides:

The amount to be awarded under sub-section (4) shall not be less than:

A) One week's pay for each year of service for an employee who has served for not more than five years.

b) Two weeks' pay for each year of service for an employee who has served for more than five years but not more than ten years.

c) Three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years and.

d) One month's pay for each year of service for an employee who has served for more than Fifteen years.

The Malawi Supreme Court of Appeal and High Court of Malawi have expounded these two provisions:

In ***Willy Kamoto v Limbe Leaf Tobacco Malawi Ltd*** MSCA Civil Appeal Cause no. 24 of 2010 the Supreme Court of Appeal held that:

"Compensation could never be aimed at completely protecting the employee into the future."

In ***Terrastone Construction Ltd v Solomon Chatantha*** MSCA Civil Appeal Cause no. 60 of 2011, the court held that:

"Our labour law is concerned with the attainment of fairness for both employer and employee. In weighing up the interest of the respective parties is of paramount importance to ensure that a balance is achieved to give credence not only to commercial reality but also to a respect of human dignity". (Emphasis supplied).

Furthermore, in the same case of ***Terrastone Construction Ltd vs Solomon Chathuntha,*** (Supra), the Supreme Court of Appeal determined the question of what amounts to a just and equitable compensation and how the Court would apply its discretion to arrive at a just and equitable compensation concerning Section 63(4) of the Employment Act.

The Court held that

> "a *court has to take into account the loss sustained by an employee as a result of the unfair dismissal but the assessment does not have to end on the inquiry of loss. The court has to determine the matter on reasonable terms and that reasonableness will be achieved, if the interests of both the employee and the employer are taken into account."*

The court in that case (Supra) then guided and advised that Section 63 (4) of the Employment Act should be read together with Section 63 (5) of the same Act and added that

> *"It is important that reasons should always be given for coming up with the assessment of damages which are more than what is set down in the law."*

In the case of ***Sothern Bottlers (SOBO) vs Graciam Kalengo,*** [2013] MLR 345 the Supreme Court of Appeal also stated the following on Page 348:

> *"Let us reiterate what was said* ***in Standard Bank vs R. B Mtukula,*** *Misc. Appeal No. 24/2007 (High Court) that where the court wishes to exceed the minimum compensation in Section 63(5) of the Employment Act, it must give clear reasons so that the employer, employee and also the appeal or review court can appreciate why the award was enhanced."*

Section 63 (4) is not a blank cheque for the court to decide any amount to be paid. It needs to be read with Section 63 (5) whenever compensation is awarded. In our view, it is a guideline on how a court may give an award under subsection (5) and should not be read in isolation". (Emphasis supplied).

> *"It is important that courts must not be seen to award damages, with elements of punishment to the employer".*

In ***Stanbic Bank Ltd v Mtukula*** [2008] MLLR 54 the Malawi Supreme Court of Appeal said on p. 62:

> *"We, therefore, think that for the 19 years of service, the respondent would receive three months' pay for each year which would translate to 57 months' pay".*

In ***First Merchant Bank Ltd v Eisenhower Mkaka and Others*** Civil Appeal no. 1 of 2016 Mkandawire J (as he was then) stated the following:

> *"In assessing compensation, the Industrial Relations Court 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 compensation that falls 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 loss does not matter. Therefore, one cannot talk of loss of earnings up to the time the former employee would have retired, certainly, which is not in the spirit of the Employment Act. (Emphasis supplied).*
>
> *"There are 17 respondents and each one of them had worked for the appellant for a different number of years. Each one of them gave evidence during the assessment. Each respondent should therefore have been treated separately in assessing compensation.*

In all, the above-cited decisions do (inter alia) hold that the period of service by the employee is the most important factor when computing compensation under Section 63 (4) as read with Section 63(5) of the Employment Act. Other factors will be taken into account but this is the most important one.

It follows for example that someone who has served for 16 years may not get the same compensation as someone who has served say 5 years.

This approach has been applied in this court. The point is the order of assessment in ***Eisenhower Mkaka and Others v First Merchant Bank Ltd*** IRC Matter no. 137 of 2012 (LL)

In fact, in the case of ***First Merchant Bank Ltd vs Eisenhower Mkaka and*** Others (supra), which is relatively the recent Supreme Court of Appeal decision, it was well articulated that employment is not a lifetime commitment and that it would not be in the spirit of Section 63 (4) and (5) of the Employment Act to award the Applicant up to retirement age. The Court stated as follows which we also find quite illuminating, instructive, and illustrative:

> *"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".

In this case, the respondent substantively breached the contract of employment for the applicant / Respondent on appeal when they dismissed him unfairly without any good cause. This was held by the default judgement which remains valid to date. The Court held the Respondent liable and responsible when it appointed the applicant / Respondent in an acting capacity after he had failed the interview for the same posts. As a result of this unfair dismissal the applicant lost benefits which could have accrued to him had he not been dismissed. It is a result of this loss that the court is called upon to compensate the applicant.

It is also trite that in considering what is just and equitable compensation, the court takes into account the age of the applicant, education qualification, marketability and contribution to the dismissal see ***Chiumia vs SS Rent a Car Ltd*** Matter No 149 of 2000.

On the issue of compensation, the case of ***Eisenhower Mkaka and Others v First Merchant Bank Ltd*** (supra) in my view should be the guiding and leading case on how compensation ought to be computed in this case. The reason was that the trial Court did not find that the applicants contributed to their unfair dismissal.

The Amended 35 (2) of the Employment Act, provides the meaning of pay or wages to include basic salary, housing and accommodation allowance, car allowance, cash payments, and payments in kind to an employee, except those excluded from the formula.

Section 35 (2) (c) excludes the following items, among others, from the meaning of the word 'wages': cash payments for equipment to enable the employee to work, employer contributions to medical aid, pension, provident fund, or similar schemes, etc.

Counsel for the Applicant has submitted that one of the factors to consider, in determining how much to award as compensation, and it is now trite in all employment cases dealing with issues of compensation for unfair dismissal, is that of mitigation of loss. Under this requirement, the dismissed employee must take the initiative to mitigate the loss. He is not supposed to sit idle on

the pretext that the court will make good no matter what the time. He must move on and try to fetch for himself another job (See ***Archibald Freighting Ltd vs Wilson*** [1974] IRLR 10).

Counsel for the Applicant argued that the reason is that it is not "just and equitable" for the Court to assist litigants who sit idle and fail to make an effort to alleviate their loss (See also ***Msiska vs Dairiboard Malawi,*** IRC, Matter No. 6 of 1999). This takes different forms but the obvious ones include trying to look for alternative employment. If this is not shown at trial, it is a ground on which discretion could be exercised by the court in an unfavourable way to the Applicant.

The court's understanding of the Judgement cited by counsel for the Applicant regarding the mitigation of loss, the principles in those cases are precedents from the Common Law cases which are not applicable, especially after the enactment of the Employment Act 2000 which is the main Act parliament had legislated to regulate how compensation ought to be made. Before the enactment of the Employment Act 2000, the court relied on common law principles to resolve how much a dismissed employee ought to have been compensated.

The common law is part of the laws in Malawi especially where there are no laws to resolve the issue brought before the court. But where the laws are available like in this case section 63 (4) and (5) of the Employment Act, the court is afraid to say that it sees no relevance to resorting to looking at the common law principles when there is clear laws that can easily guide the court to resolve any matter brought before it.

In this regard, the court read the Employment Act and Labour Relations Act to try and understand whether the concept of mitigation of loss is one of the factors the court should consider when calculating how much a dismissed employee should be awarded. The Court did not find these principles in the Labour Relations Act and Employment Act respectively.

The reading of the Judgement of ***Mkaka's case*** demonstrates to me that the issue of common law principles was abandoned when the court held that the IRC must stick to the spirit of section 63 of the Employment Act when assessing compensation. When you read section 63 of the Act, the concept of mitigation of loss is not one of the factors to consider. The question that had always exercised my mind is, how would then the court stick to the spirit of sections 63 (4) and (5) the Employment Act on the one hand and insist to use the principle of mitigation of loss which are principles of common law on the other hand, when the same are not provided in the Employment Act in Malawi.

It is now trite that one would not be compensated up to the retirement age despite the breach of contract which was unspecified. The court has always insisted that it cannot award compensation

to a dismissed employee during the time he was not an employee of the employer because doing so, would mean the employee was never dismissed at all see ***Kachinjika vs Portland Cement Company*** [2008] MLLR 161.

In my understanding of this holding, it meant that the court had refused to accept the concept of common law principles which would have entitled the applicant to receive his compensation up to the retirement age or period because in any contract an innocent party who has not caused any harm to any agreement has the right to be compensated damages.

In the ***National Bank of Malawi vs Benjamin Khoswe*** (supra), Chipeta J, as he then was stated the following on the award of compensation for unfair dismissal and salary increments on pages 25 and 26 of the judgment:

> *"In this case, however, instead of the Respondent seeking just and equitable compensation that is by Section 63(5) as might or might not be increased in the court's discretion, he wants full salary and increments for each day he was out of employment to date of assessment of damages. Subject to discretion the law gives me about whether to stick with the minimum or to increase it,* ***my opinion is to follow the guidance offered by Section 63(5) of the Employment Act****. At the minimum, therefore, regardless of whether it will come to more than or less than what the Deputy Registrar had awarded him, I hold the view that the Respondent would be entitled to a* ***just and equitable award of a month's pay for each of the 21 years he had served the Bank.*** *Considering, however, that this case is virtually at all fours with the* ***Stanbic Bank vs Mtukula*** *case, where the Supreme Court of Appeal upheld an award at the rate of* ***three month's pay for each of the completed years of service****, I see no reason why the Respondent should be treated differently in this case. I accordingly* ***set aside the award he got of full salary for the whole period between dismissal and assessment of damages. Instead, I award him three months' salary per year for each of the 21 years he served the Appellant*** *…which is what I would consider granting him as his due compensation under the current legal formula as legislated by the Employment Act."*

In the case of ***Kachinjika vs Portland Cement Company*** [2008] MLLR 161, 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'.

In the Employment Act, 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 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. Factors to consider when calculating compensation for unfair dismissal include whether the dismissal is wholly attributed to the employer or whether the employee contributed to his loss. The law has only indicated that the award must be fair and equitable.

If the applicant or applicants contributed to the termination of employment, they ought to be compensated with the minimum which is one week's pay for each completed year of service if the employee worked not more than 5 years according to the Employment Act.

If the termination is wholly on the respondent, the court is called to award compensation more than the minimum and when deciding how much more to compensate the victim, the issue of just and equitable comes into play.

The compensation must not aim at punishing the employer or to unnecessarily and unjustly enrich the applicants. But the compensation must be just and equitable to any reasonable person.

Section 35 (2) (c) of the Employment Act (as amended in 2010) stipulates that in the calculation of severance allowance, such benefits as fuel, airtime, phone allowance, and internet allowances which were in the form of cash are excluded by section 35 (2) (c) (I) of the Employment Act. These were cash payments or payments in kind which were provided to enable the applicants to work efficiently. Pension and medical schemes are excluded in Section 35 (2) (c) (VI),

The only applicable benefit that ought to be calculated for the applicant's severance allowance is the basic salary he was entitled to at the time he was unfairly dismissed.

In terms of First Schedule – Part 1 of the Employment Act the severance allowance should be two weeks' wages for each completed year for the first 5 years, 3 weeks' wages for each completed year for the second 5 years, and four weeks' wages for each completed year for the third 5 years.

The court shall take into consideration the aspect that if the respondent had not attempted to offer promotion of a high grade to an employee who had failed the test, he could not have been unfairly dismissed. In my view, the applicant did not contribute to his unfair dismissal as the Respondent decided to promote a person who had no prerequisite competence for the position he was offered

to act upon. The court has a legal responsibility to balance the interest of the applicant and the respondent when it is computing compensation to be awarded to the applicant.

The court would like to state it shall only use salary known and ordered by the High Court and MASM contribution by the employer to form part of a wage for the applicant for the sake of calculating compensation for unfair dismissal except when calculating severance pay which only considers the aspect of salary in the case of the applicant.

It is trite, these days that the most important factor the court takes into consideration when calculating compensation due to the applicants is the duration the applicant had been in employment with the respondent.

In this case, the applicant worked for the respondent for 12 years. He was entitled to K157, 796.10 per month as his salary. It is also the evidence of the applicant that he was on pension and the Respondent was contributing 10%. He was also on a medical scheme that was provided by MASM for himself, his spouse and 4 children and the Respondent was contributing 60% towards this.

According to the exhibit marked by the court which shows the rates of MASM as of May 2021, adults were contributing the sum of K18, 000.00 and K17, 000.00 was for children which translates to K103, 000.00 per month and 60% of this as the contribution of Respondent translates to K61, 800.00.

This means MK157, 796. 10 plus MK61, 800.00 shall form part of the applicant's monthly wages that shall be used to compute the applicant's compensation for unfair dismissal save for severance allowance.

However, in the Judgement by Justice Kacheche, Civil Appeal No. 10 of 2022 (being matter No IRC 330 of 2019) ***Chibuku Products Limited v Harry Chilongo***, the Judge directed that the assessing court should also consider the contribution the applicant contributed to his dismissal. I hold the contrary view of the guidance issued by the Honourable Judge. The reason I hold a view contrary to the Hon Judge's guidance is based on his finding that the assessment came as a result of a default judgement which found the respondent liable for unfairly dismissing the applicant without valid reasons. No court heard the matter between the applicant and the respondent at trial which held that the applicant contributed to his dismissal.

In my view, the admission of evidence of the applicant during cross-examination that he made a mistake when he failed to load 100 5-litre jerry cans in the motor vehicle could not conclusively form the view that the applicant contributed to his dismissal. More so, the applicant qualified the reason for the mistake which had happened. He told the court that he worked two shifts that day

without resting hence, he was exhausted that humanly he could not have performed well than to delegate this responsibility to one of his subordinates who failed to execute the assignment.

In my view, since, this, only came during cross-examination and in re-examination he qualified his mistake, the said mistake could not have conclusively contributed to his unfair dismissal when actually it was the respondent who had failed to rest the applicant and allowed him to work more than 16 hours continuously.

Counsel for the applicant has argued that the question then becomes, is the minimum compensation in this regard just and equitable? The totality of the evidence before the Court has shown that the Applicant had his service terminated while carrying out duties in an acting capacity for the post which had already failed its assessment. The Respondent was well aware that the Applicant could not discharge duties in that position.

The evidence by the Applicant was that on the material day, he had overworked beyond the maximum required on a shift from the morning of the day to 3 am of the day next. The Respondent is well aware of this event. On the contrary, the Respondent relies on the fact that the Applicant admitted at the disciplinary hearing about the charges that were levelled against him and therefore, he is, according to the Respondent, entitled to the minimum compensation only.

It is important to note that signed minutes of the disciplinary hearing were not before the court nor was there a report of what the Applicant had written regarding the events that had happened. It is based on these facts that I find the order of the Hon Judge to consider the applicant's contributed to his unfair dismissal as ***per in curium.***

In this regard, there are important points that support that the Applicant is entitled to the award of more than the minimum compensation. Firstly, the Applicant was assigned to act in a position that the respondent knew that he did not have the capacity for. The argument could be, that he was able to do the job. The question then becomes: why was there a need within the Respondent's hierarchy that if one is to discharge duties on that post, there was a need for him or her to pass the SOBA examination? This entails clearly that the Respondent was well aware that the Applicant could not take up that position.

Secondly, the evidence indicates that the alleged offence was caused by fatigue as the Applicant was unable to count that which was loaded in the track as he had worked longer hours than what the law prescribes. Thirdly, the Respondent's witness admitted during cross-examination that about the official position that the Applicant was holding as a container clerk, there was no fault on the part of the Applicant in that capacity.

The Applicant cannot be faulted for having failed to carry out his duties well when the Respondent had full knowledge that he could not work in that position. The Respondent therefore did not act with justice and equity towards the Applicant in dismissing him when it knew that the Applicant could not work in that position and that he had been overworked due to the Respondent's negligence for failing to change the applicant with another officer.

The applicant is a human being who also needs time to rest. This is the reason the Employment Act has provided that a person must work 8 hours per shift. Exceeding 8 hours to work 16 hours continuously in my view is a factor which the respondent would have considered before it unfairly dismissed the applicant. I would therefore conclude that if the applicant contributed to his unfair dismissal, his contribution can only be minimal perhaps 20% while the 80% is attributed to the respondent's failure to give time to the applicant to rest and assign him to perform work he had failed its interview.

The applicant therefore, partially contributed to his dismissal as there is no judgement which holds that the applicant wholly contributed to his unfair dismissal. If the respondent had exercised caution when promoting the applicant to work in a senior position in which he did not have competence and given him time to fully rest before assuming a new shift, the applicant would have still been a container Clerk. The court shall only consider that the applicant contributed 20% of his unfair dismissal.

As alluded, to earlier, the issue of mitigation of losses is a common law principle. This is not statutory within the Employment Act hence the court shall not consider the issue of mitigation of loss as a factor when computing compensation for the Respondent. More so, the issue of mitigating losses was relevant when the court at the time was factoring the principles of immediate and future losses in computing compensation which were abandoned when we read ***Mkaka's case.***

In this case, the factor that the court shall consider seriously is whether the applicant contributed to his unfair dismissal. The court has already held that if the applicant contributed to his unfair dismissal, the contribution is 20% as there is no judgement which holds substantively that the applicant contributed to his unfair dismissal. It is because of this holding that the court finds that this is a proper case that the applicant must be awarded more than a minimum as prescribed in section 63 (5) of the EA.

The court is of the view that 6 months' compensation for each completed year of service would be just and equitable. The court has decided to compensate the applicant with 6 months' pay for each completed year as compensation for unfair dismissal to balance the interest of the employer who

deliberately chose to ignore the proper procedure when he dismissed the applicant and the interest of the applicant especially for the loss and suffering which was inflicted on him by the respondent. However because the court has held that the applicant contributed 20% to his loss, the court shall **reduce 1 month's salary** for the said contribution and award the applicant with 5 months for each completed year of service instead of 6 months.

The 5 month's pay in my view would be just and equitable considering that it would be very unlikely that the applicant can find alternative employment in the shortest period following the impact of the economic turndown the country is experiencing at the moment. Considering his qualifications and availability of employment in this country, it would be very unlikely that the applicant have the chance of getting employed soon. The court factored this as a reason to award the applicant with 5 month's pay.

The court has made a holding that the monthly wage of the applicant consists of MK157, 796. 10 monthly salary plus MK61, 800. 00 MASM contribution by the employer. This means the monthly total wage for the applicant is MK219, 596.10 X 5 months = MK1, 097, 980. 50

5 Months' salary for each completed year of service X 12 years. = **MK13, 175, 766. 00**

I therefore award the applicant **MK13, 175, 766. 00** for unfair dismissal.

Severance Allowance

The calculation of severance follows the provision of Section 35 of the Employment Act and Part I of the First Schedule it. The said section 35 (1) provides that 'on the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstance, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated by Part I of the First Schedule.

The first schedule of the Employment Act provides that a person who has worked for a period exceeding ten years shall be entitled as severance allowance to "Two weeks' wages for each completed year of service for the first five years, Plus, three weeks; wages for each completed year of service from the sixth year up to and including the tenth year, plus four weeks' wages for each completed year of service from the eleventh year onwards."

Pursuant to the said Part I of the First Schedule, the Applicant worked for 12 years.

1st 5 years of service MK157, 796.10 / 2 = MK78. 898. 05 X 5 years= MK394, 490. 25

2nd 5 years of service MK157, 796.10 / 3= MK118, 347. 08 X 5 Years= MK591, 735.38

3rd 2 Years of service MK157, 796.10 = MK 157, 796.10 X 2 years =MK315, 592.20

Total Severance pay **MK1, 318, 817. 83.**

The awarded sum was due to the applicant in March 2019. However, there has been a devaluation of the kwacha over time since 2019. Cumulatively, the kwacha has been devalued by slightly over 82.1 % if we have to factor in all the monthly devaluation that the Reserve Bank of Malawi has been effecting every month. It is therefore crucial that the awarded figure should be boosted to retain the purchase value or purchasing power of the amount awarded to the applicant if the same had been paid in March 2019 the time the applicant was dismissed.

In the case of ***Museum and Chillida -vs- Reserve Bank of Malawi*** Matter No. 30 of 2014, the court boosted the awards by 50% owing to inflation.

In ***Kandonje v Malawi Housing Corporation*** [2008] MLR 433 in the court said

> *"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 the discretion to award interest to cater for devaluation and inflation ...in this case, court awards 40% of the total awards to cater for devaluation since 1998"*

Not every case requires that the award be boosted. Compelling reasons have to be shown to warrant such an award and the percentage thereof. Thus, in ***Frackson Chitheka v Attorney General (Ministry of Finance),*** Civil Appeal No. 67 of 2008 (unreported an award of compensation was boosted by 100%, whilst in ***Mrs Catherine Kamwendo v Portland Cement Company (1974) Limited,*** Civil Appeal No. 25 of 2012, the court deemed it fit to boost the award by 75%.

Recently in ***Malawi Confederation of Chambers of Commerce and Industry v Rehema Mvula and 5 others,*** Civil Appeal No. 13 of 2014, Justice Madise on 21st May 2018 confirmed the 50% uplifting of a compensation award.

Mzikamanda J, as he was then, in confirming the 100% boost of the award in ***Frackson Chitheka Case:-***

> "*As will be seen the issue of compensation for unfair dismissal is a matter governed by the law with the discretion of the court built in ...in assessing compensation for unfair dismissal the court takes into account several factors. These include the applicant's effort to mitigate his loss, the employee's age, physical fitness, qualification, and the prevailing labour market. These factors inform the court in determining the multiplier and the formula for calculating is set by the law. In*

matters that come to the Industrial Relations Court, it is the general formula that will apply unless some special formula is pleaded and proved… As regards the boost of 100% per cent that was entirely at the discretion of the lower court considering the devaluation and the rate of living at the time. I confirm that 100% boost"

I am of the view that there are more compelling reasons which entitle the court to boost the money awarded to the applicant by 82 % considering how the kwacha has devalued to the USD in the recent past. I would cite a basic simple example that a 1 kg packet of sugar in 2019 was selling at K750.00 on the market but the same 1 kg packet of sugar price is now selling at MK2, 200, 00. Petrol was selling MK800 per litre in 2019 but now the pump price is MK2, 530.00.

The Court would fail its mandate if it fails to consider factors in the devaluation of the kwacha to retain the purchase value of the awards due to the applicant. To align the value of the awards to the period it was due, my court is of the view that an 82 % boost will be justified.

Let me hasten to mention that the issue of boosting the money awarded to the applicant is always the discretion of the taxing or assessing court if justice has to be achieved especially, owing to inflation and devaluation among other factors.

The court that held the respondent liable has no legal responsibility to instruct the taxing or assessing court that the amount (money) to be awarded must be boosted. However, the assessing or taxing court will weigh all the intervening factors from the date the cause of action arose to the date the awards are determined especially to retain the purchase value of the money as awarded would have been paid to the applicant.

The litigants must understand that the purpose of boosting the award is only to retain the value or the purchase value of the amount (money) owed by the respondent and nothing else. There is no need to plead the boosting of awards in the pleadings. But if the applicant would like to be awarded interest, then interest should be pleaded in the claim against the respondent at the inception of the case.

An interest and boosting of the awards are two different concepts. Boosting of awards is aimed at aligning the amount awarded to the period the cause of action arose or the amount would have been paid, while interest would mean, if the amount awarded to the applicant was not withheld by the respondent, the money could have been used or could have been put to good use by the applicant. An award of interest is statutory while the boosting of the amount awarded is at the discretion of the court computing the awards.

This is the proper case in my view where the awards must be boosted to retain the value of the money which would have been made or paid out to the applicant in 2019. As stated in the previous paragraphs in this judgement the kwacha cumulatively has been devalued to date by slightly over 82.1 % against USD. Therefore with the authority of ***Frackson Chitheka v Attorney General (Ministry of Finance),*** Civil Appeal No. 67 of 2008 boosted the award by 82 %. I now present the award of compensation due to the applicant.

Compensation award due to the Applicant

1. Compensation for unfair dismissal **MK13, 175, 766. 00**
2. Severance Allowance Pay **MK1, 318, 817. 83**
3. **Total Award MK14, 494, 583. 83 X 82 % = MK11, 885, 558. 74.**
4. MK14, 494, 583. 83 + MK11, 885, 558. 74 = **MK26, 380, 142. 57**

The court awarded the applicant the total sum of **MK26, 380, 142. 57** for unfair dismissal and severance pay allowance as ordered by the court

The awards to the applicant must be paid within 10 days from the date of this order.

Any party dissatisfied with the judgement is free to appeal to the High Court within a period stipulated by the IRC Rules, if the respondent shall seek leave of the court to appeal, It is ordered that 60% of the awarded sum shall be paid to the applicant and the other 40% shall be deposited into the court's account and evidence of the 60% payments to the applicant and 40% deposits slip into the court's account shall be attached in the motion seeking leave to appeal.

Delivered in chambers this 14th day of December 2023 at Blantyre.

HON. PETER M.E KANDULU

DEPUTY CHAIRPERSON