



JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NO. 37 OF 2017

BETWEEN:

CLIMITON GWAZENI PHIRI.....PLAINTIFF

AND

DIGNITAS INTERNATIONAL (MALAWI).....DEFENDANT

CORAM: **K. BANDA, ASSISTANT REGISTRAR**

Thabo Chakaka Nyirenda, Counsel for the Appellant

Kaduya, Counsel for the Respondent

Chimang'anga, Court Clerk

ORDER ON ASSESSMENT

Brief background:

This is an order on assessment of damages for proceedings had on 27th July, 2017 resulting from the judgment on Appeal from the Industrial Relations Court delivered by the High Court on 29th September, 2016. The premise of the appeal in the main was the decision of the lower court to award the Appellant the minimum compensation under the Employment Act on his uncontested claim for unfair dismissal against the respondent. Legally the appeal was heard pursuant to section 65(2) of the Labour Relations Act. And in its orders on appeal the High Court ordered that the appellant subject to assessment be awarded the following:

1. Twelve months salary as a compensation for unfair dismissal
2. One month pay as notice pay
3. Ten days payment of untaken leave.
4. Interest on severance allowance awarded by the lower court. The same was to be on compounded. And that severance was to be calculated using the first schedule to the Employment Act.

At the assessment hearing, the parties requested the court for time to make submissions. They were allowed a space of two weeks from the said date, that is 27th July, 2017. However despite reminders, the appellant's counsel only did so on 9th October, 2017. This delay coincided with courts busy schedule hence this lateness of the order.

The applicable law

That said the starting point in the assessment is the Employment Act (hereafter called the "EA"). Under this Act, the applicable section on compensation for unfair dismissal is covered in detail under s.63 of the EA. The High Court on appeal touched on most aspects of this law. I will therefore not belabor myself so much in repeating the law as espoused here. However just for purposes of our discussion herein, the said section is coached in the following ways;

63. Remedies for unfair dismissal

(1) If the Court finds that an employee's complaint of unfair dismissal is well founded, it shall award the employee one or more of the following remedies—

(a) an order for reinstatement whereby the employee is to be treated in all respects as if he had not been dismissed;

(b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties; and

(c) an award of compensation as specified in subsection (4).

(2) The Court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.

(3) Where the Court finds that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.

In the situation before us here, issues of reinstatement and re-engagement are out of question. The High Court and the lower court already examined those and other possibilities and the remedy opted was for s.63 (4). As such in this assessment I am not reinventing the wheel. I am simply doing the assessment within the parameters of the orders of the High Court on Appeal. The same if looked at critically is so much based on s.63 (4) as quoted below. That is :

(4) 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.

Coming to the matters herein, the high court orders as alluded earlier were on specific areas. I now in this assessment consider one by one.

1. Twelve months salary as a compensation for unfair dismissal

In respect of this, it was submitted by the appellant that his monthly salary was MK319,169.22. This statement was not supported by evidence made available to the court. According to **Exhibit**

“CGP3” tendered in court, which is the purported copy of the pay slip of the Appellant as at 24th July, 2012, the gross amount is **MK316,169.22** and not MK319,169.22 as reflected in the Appellants witness statement and calculations all along his submissions. I take the correct version for the purposes of this assessment though the wrong version was not contested. Further even if it be contested that at the time of leaving employment such was the sum, I would still maintain this figure as no evidence was tendered different from the one before me. However it must be mentioned that this is gross and that it is before tax. Therefore for twelve months it will translate to:

$$\text{MK316,169.22} \times 12 = \text{MK3,794,030.64}$$

The respondents are therefore ordered to pay this amount.

2. One month pay as notice pay.

On this aspect, during assessment the appellant through his counsel asked the court to consider awarding compound interest on the sum despite the same not being part of the order on appeal. He argued that the court has discretion. In the main, his argument was that the Appellant had been denied use of the sum over a considerable time and that to be fair and just to him it would be proper for the court to exercise its discretion and grant the prayer of interest. He argues that the same was not objected to by the Respondents.

With due respect I remind counsel that as rightly observed by him, the Court on appeal did not award interest on this particular aspect. I also agree with him that the court has discretion but the same is supposed to be exercised judiciously and not arbitrary. I therefore refrain from deviating from the matter before the court on appeal.

Counsel should be reminded that assessment in a matter of this nature is not an independent proceeding but rather a continuation of the main action. Again I remind counsel that submissions are not evidence and should not be a backdoor way of squeezing in what was left out at the hearing. In fact it was incumbent upon counsel to raise such issue before the court hearing appeal and not at this stage. On the foregoing premise I decline to exercise my discretion in that direction.

Reverting to the matters herein, the pay slip as indicated earlier showed that gross salary per month was MK316,169.22. The court on appeal ordered the respondent to pay the Appellant an equivalent of one months pay. This is not in contention or objected to by the respondent. This therefore implies that the Appellant will get **MK316,169.22 as notice pay.**

3. Ten days payment of untaken leave.

The court on appeal also ordered payment of leave for the 10 days not taken. Counsel in his submission asked this court to exercise its discretion and award a compound interest on the basis similar to that in (2) above. In respect of this prayer I maintain my position in (2) and the reasons given thereof and decline to grant the Appellants prayer and therefore award only such sum as ordered by the court, that is strictly the sum for ten leave days.

The formula for daily wage is as follows:

Salary x 12 months/52 = weekly wage

Weekly wage/number of working days = Daily wage

Daily Wage x Number of leave days.

In our case herein, the salary before tax as on pay slip, was pegged at MK316,169.22.

As for number of working days per week, I note that the pay slip indicates that month had 22days. Impliedly this meant a 5 day working week.

Using the formulas as above;

Weekly wage will be:

MK316,169.22 x 12 months/52 = MK 72,962.13

And for daily wage it will be:

Weekly wage /number of working days

MK72,962.13 /5 = MK 14,592.43

It follows therefore that for 10 days it will be:

Daily wage x Number of days

MK 14,592.43 x 10 = MK 145,924.30

The Respondent is therefore ordered to pay the appellant the sum of **MK145, 924.30** as assessed.

4. Interest on severance allowance awarded by the lower court.

The law on severance is covered by section 35(1) of the EA. The said section states as follows:

35. Severance allowance

(1) On termination of contract, by mutual agreement with the employer or unilaterally by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule.

In line with appellate court and the law, severance allowance is calculated using the first schedule to the EA. The said first schedule to the EA considers first the number of year's served and weekly wages received by an employee at the time of termination. The number of years is divided into three categories namely, one to five years, six to ten years and eleven plus years.

As such for a service extending to not less than one year, but not exceeding five years, severance allowance payable is two weeks' wages for each completed year. And for service exceeding five

years, but not exceeding ten years, the sum payable is three weeks' wages for each completed year and so is the case when service exceeds ten years that four weeks' wages for each completed year would be paid.

Following Part 1 of the First Schedule to the Employment Act, as amended in 2010, the Appellant is entitled to "Two weeks' wages for each completed year of service" for the first five years of service under the first category. Then three weeks wages for the 6th and 7th year. The total of the sum for the first and second category is what will form the basis for calculating interest on severance on compounded basis as awarded by the appellate court.

Note that the word "wage" is defined in the Act. See section 35(2) as amended by the Employment (Amendment) Act, 2010. That section excludes pension, medical aid and leave grants for purposes of calculating the severance allowance. Accordingly, the operative salary for the appellant is the one that excludes these items.

Reverting to the matter herein, the court on appeal after quoting section 63, at page 11 under paragraph 3 deferred to the lower court findings of fact and only proceeded on matters of law. As such based on the findings of the lower court, the appellant was employed on 1st September, 2004 and was dismissed on 16th August, 2012. This spurns a period of 7 years, 11 months and 2 weeks. As per pay slip earlier discussed, his salary unlike what was continually quoted both in the submissions and the judgment was MK 316,169.22. Again it was our finding based on the pay slip that in the absence of conditions of service which could give a proper guide, he had a five day working week such that all calculations for weekly wage and daily wage were based on this.

It follows therefore that severance allowance as at the time of termination of employment would be:

- a. Category one- first five years

Weekly wage x 2 x Number of years

$$\text{MK } 72,962.13 \times 2 \times 5 = \underline{\text{MK } 729,621.30}$$

- b. Category two- (two years)sixth year to seventh year

Weekly wage x 3 x Number of years

$$\text{MK } 72,962.13 \times 3 \times 2 = \underline{\text{MK } 437,772.78}$$

Gross severance pay will therefore be:

$$\text{MK } 729,621.30 + \text{MK } 437,772.78$$

$$= \text{MK } 1,167,394.08$$

It follows that severance allowance as at time of termination was **MK1, 167,394.08**

INTEREST ON SEVERANCE ALLOWANCE

In regard to the matter herein, the appellate court ordered that it be computed on compound interest basis.

At page 36 of its ruling the high stated as follows:

“The appellant herein should have been paid his severance in August, 2012 when his employment was terminated. That was not done. This court therefore awards interest on the severance allowance at the commercial lending rate on a compounding basis from August, 2012 to the date of payment of severance allowance. This is because the appellant was put out of use of his money with potential to invest the same”.

The learned Judge went on:

*“The reality of today is that the loss suffered by the appellant can only be properly compensated by compound interest as recently held by the Supreme Court of Appeal in the case of **Kamwaza and Kasote t/a Kamwaza Design and Partners v ECO Bank MSCA**, Civil Appeal Number 45 of 2014 (decision delivered on 20th July, 2016). This interest shall be at the prevailing commercial lending rate...”*

Following this, during assessment the Appellant tendered in evidence banking rates from Stanbic Bank and Reserve Bank of Malawi. Further the rate of 9% above the base lending rate as stipulated by the bank and as used was not challenged by the respondent. I therefore will adopt exhibit “CGP4” suffice to state that the severance amount used as the principal according to my calculations herein changes as such the same alters the total amount. In the circumstances using the rates as indicated below, the appellant gets:

Annual Calculations at 9% on top of base rate

YEAR	INTEREST (%)	SEVERANCE(MK)
2012	44	1,167,394.08
C.I		513,653.40
2013	44	1,681,047.48
C.I		739,660.89
2014	49	2,420,708.37
C.I		1,186,147.10
2015	44	3,606,855.47
C.I		1,587,016.41
2016	41	5,193,871.88
C.I		2,129,487.47
2017	39	7,323,359.35
C.I		2,856,110.15
TOTAL		10,179,469.50

The total amount payable, that is severance plus compound interest from August 2012 up to July 2017 is **MK 10, 179,469.50**.

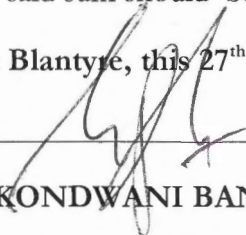
Adding all awards together, that is the Severance with interest from 2012 to 2017 at 9% on top of base rate, the same being charged on non-performing loan facilities + sum for 10 days untaken + Notice pay + 12 months' pay as compensation (.i.e. **MK 10,179,469. 50 + MK 145,924.30 + MK 316,169.22 + MK 3,794, 030.64 = MK 14,435,593.66**)

For the avoidance of doubt the appellant is awarded the total sum of **MK 14,435,593.66**.

The appellant also prayed for costs in this court. On this I am mindful that this matter came into the High Court on appeal by the Appellant but it was originally in the Industrial Relations Court. I therefore decline to award costs of this action as typically costs in the lower court are only paid in particularized circumstances.

That said, it is further ordered that the said sum should be paid within 14 days of this order.

Ordered in Chambers here at Blantyre, this 27th day of April, 2018 in the Republic.



KONDWANI BANDA
ASSISTANT REGISTRAR