IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NUMBER 04 OF 2019

(Being IRC Matter No. 446 of 2016)

BETWEEN

TELEKOM NETWORKS MALAWI LIMITED **APPELLANT**

AND

ELIA BODOLE **RESPONDENT**

CORAM: JUSTICE M.A. TEMBO

Katuya, Counsel for the Appellant
Mwangomba, Counsel for the Respondent
Mankhambera, Official Court Clerk

JUDGMENT

1. This is the decision of this Court following an appeal brought by the appellant against the decision of the Industrial Relations Court made on 2nd February, 2015. Before the lower court the respondent claimed that the appellant unlawfully terminated his employment or breached the employment contract by terminating it prematurely.
2. The respondent was employed by the appellant, Burco Electronic Systems Ltd (Burco), as Financial Controller on 6th October 2006. And according to the terms and conditions of service has was to retire at the age of 60 years. He turned 50 years old on 24th October 2014.

3. In December 2014, the appellant bought Burco. The respondent claimed, before the lower court, that in terms of section 32 (2) of the Employment Act where an undertaking is sold the contract of an employee shall automatically be transferred on similar rights and obligations as were applicable when an employee was under the transferor or previous employer. With regard to this provision, which the respondent termed as mandatory, he asserted that:

    i) A contract of employment where an undertaking is sold is transferred to the buyer as a matter of law and there is no need for any negotiation to be done.
    ii) This provision is mandatory. Where the transfer has occurred the terms and conditions applicable to the employment contract would be those that were applicable when the employee was under the employment of the transferor.
    iii) Any attempt not to comply with this statutory law is illegal and any alleged agreement contrary to this provision would be an illegal agreement and therefore is not enforceable.
    iv) In this case the terms and conditions of employment applicable to him after his contract was transferred to TNM should have been the terms and conditions that the he enjoyed at Burco.

4. He then stated that the appellant sought to comply with section 32 (2) of the Employment Act by doing the following:

    i) Agreeing with Burco that the employment contracts of Burco employees would be transferred to the appellant on similar terms and conditions of service.
    ii) Offered employment contract to the respondent with no negative effect on his benefits.

5. He then asserted that, in terms of terms and conditions of service of Burco (which should have been the applicable terms when the he was transferred from Burco to the appellant) he was to retire at the age of 60.

6. He asserted that in breach of the contract the appellant forced the respondent to retire at the age of 50 years. He asserted further that, without prejudice to his rights and a bid to save his employment and continue work up to 60 years, he applied to continue working up to 60 years per the appellant's Retirement Policy but the application as rejected for no reason at all and indeed no reason was given for the rejection.
7. He then claimed that the appellant unlawfully terminated his employment contract and by reason of that he lost his salary and benefits for the remainder of his employment contract up to the age of 60. As a result he sought the following reliefs before the lower court:

    i) A declaration or order that where an employee's contract has been transferred to the transferee the transferee is bound by provisions of section 32 (2) of the Employment Act.
    ii) An order or declaration that in terms of section 32 (2) of the Employment Act, the respondent's employment with the appellant, ought to have continued on terms and conditions of service of Burco.
    iii) An order or declaration that any agreement (if at all) in breach of section 32 (2) of the Employment Act is an illegal agreement and therefore not enforceable.
    iv) An order or declaration that in this case the appellant was legally obliged to allow the respondent to work up to 60 years which is mandatory retirement age for Burco.
    v) An order or declaration that by forcing the respondent to go on retirement at the age of 60 years the appellant breached the respondent's employment contract and unlawfully terminated his contract.
    vi) An order or declaration that in view of the breach of contract or unlawful termination of contract the respondent is entitled to be compensated and should therefore be paid his salary and benefits for the remainder of his contract.

8. Before the lower court, the appellant asserted that it had agreed to offer employment to the employees of Burco but that such offer would be subject to negotiation with each such employee as per clause 14.3 of the agreement between the appellant and Burco. Further that what was implied was that the negotiations would bring the terms of employment of Burco employees in line with the appellant's terms of employment.
9. The appellant asserted that it offered the respondent employment subject to its terms of service on 9th December 2014. And that its terms as read with its Pension Fund Policy and Retirement Policy are that an employee like the respondent must retire at 50 years of age.
10. It asserted further that by accepting the employment offer subject to its employment terms, the respondent's employment contract with Burco was varied and rendered in applicable to the employment contract with the appellant. And the appellant denies that the respondent was to retire at the age of 60 years. Further, that the respondent is not entitled to rely on the agreement between the appellant and Burco since he was not privy to the said agreement.
11. The appellant then denied forcing the respondent to retire. It asserted that he was retired pursuant to its terms and conditions of employment, Pension Fund Policy and Retirement Policy. It also denied that the respondent had a right to have his retirement age extended from 50 years to 60 years. Rather, that any extensions of years of service were dealt with on the merits of each individual case and that the respondent was not discriminated against.
12. It further indicated that the decision to retire the respondent was not made on 22nd April 2016 but rather on 1st March 2016 and the six months' notice run from that date. The appellant denied the claims of the respondent.
13. The respondent then took out a notice of motion before the lower court seeking determination of the matter on a point of law by determination of the following issues:

    i) Whether where an employee's contract of employment has been transferred to the transferee the transferee is bound by provisions of section 32 (2) of the Employment Act.
    ii) Whether in terms of section 32 (2) of the Employment Act, the respondent's employment with the appellant ought to have continued on terms and conditions of service of Burco.

iii) Whether any agreement (if at all) that is contrary to section 32 (2) of the Employment Act is an illegal agreement and therefore not enforceable.
iv) If the answer to the legal issues is in the affirmative, whether the appellant was legally obliged to allow the respondent to work up to 60 years of age which the mandatory retirement age at Burco.
v) Whether by forcing the respondent to go on retirement at the age of 60 years the appellant breached the respondent's employment contract and unlawfully terminated his contract.
vi) Whether in the premises, the respondent is entitled to be compensated for unlawful termination of employment contract and should therefore be paid his salary and benefits for the remainder of his contract.

14. The lower court, sitting to determine the matter on a point of law without panelists in terms of section 67 (3) of Labour Relations Act, found that the respondent had indeed been sent on early retirement contrary to the existing employment contract which was to be the one with Burco as provided in section 32 (2) of the Employment Act. The lower court observed that the Employment Act provides minimum standards of employment which cannot be negotiated downwards. It therefore ordered that he be paid all his earnings for the remainder of the period from the date of termination of his employment, through the early retirement, up to the agreed retirement age. The compensation was assessed accordingly. By orders dated 27th March, 2019 and 31st May, 2019, the lower court assessed the compensation payable in the sum of K443, 585, 196.00.
15. The appellant being dissatisfied with the lower court decision on liability and the orders on assessment of compensation of the court below, the appellant now brings this appeal. The grounds of appeal are as follows:

i) The court erred in law in holding, in effect, that the parties hereto were not at liberty at any time during or after the transfer of business of Burco Electronic

Systems Ltd to the appellant to negotiate and agree on new terms and conditions of the respondent's employment with the appellant.

ii) The court erred in law in holding that section 32 of the Employment Act prohibits parties to an employment contract from negotiating and agreeing on new terms and conditions regardless of the mutual consent of the parties.

iii) The court erred in law in failing to hold that the terms and conditions of employment of an employee can be varied by the mutual consent of the parties to the contract during or after the transfer of the undertaking in terms of section 32(1) of the Employment Act and that the only instance where the consent of the employee may be dispensed with and the contract of such employee is automatically transferred to the transferee employer without the employee's consent is when the whole undertaking of the transferor employer or part thereof is sold, transferred or otherwise disposed of.

iv) The court erred in law in failing to hold that section 32 does not per se do away with the fundamental principle of freedom of contract.

v) The court erred in law in holding that the appellant had breached the contract when it retired the respondent in accordance with its terms and conditions of employment which the respondent had voluntarily accepted to be bound by in place of those of Burco Electronic Systems Limited.

vi) The court erred in law in awarding the respondent all the remuneration and benefits he would have earned while in employment with the appellant from the effective date of termination of employment on 31 August, 2016 to the date the respondent would reach the age of 60 years on 24 October, 2024 in accordance with the terms and conditions of employment of Burco Electronic Systems Limited contrary to the provisions of section 63 of the Employment Act applicable to calculation of compensation.

vii) The court erred in law in completely disregarding the duty of the claimant to mitigate his loss and the fact that the respondent had admittedly found two jobs after the termination of his employment with the appellant thereby unjustly enriching the respondent at the expense of the appellant.

viii) The award of all remuneration and benefits that the respondent would have earned while in employment with the appellant from the effective date of termination of employment on 31 August, 2016 to the date the respondent would reach the age of 60 years on 24 October, 2024 is both perverse as well as contrary to well established legal authority.

16. A proper starting point for this Court is section 65 of the Labour Relations Act, which is couched in the following manner

1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.

(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered.

17. In essence, a judgment of the lower court may be appealed to the High Court only on a question of law or jurisdiction. An appeal from the lower court to the High Court cannot be based on questions of fact as the findings of the lower court on questions of facts are final and binding. *See Magalasi v National Bank of Malawi Limited* [2008] MLLR 45 at 47 (MSCA), *Stanbic Bank Limited v R. Mtukula* [2006] MLR 399 and *Southern Bottlers Limited v E. Bwanali* [2006] MLR 399 at 402 (MSCA).
18. This Court is satisfied that the grounds of appeal raise questions of law that are suitable for consideration on this appeal.
19. This Court will therefore consider the submissions of the parties on the grounds of appeal. The appellant did not address each ground of appeal separately. Rather it made an argument that deals with the first five grounds of appeal that relate to the lower court's interpretation of section 32 (2) of the Employment Act. The appellant then made another argument that deals with the last three grounds of appeal that pertain to the assessment of compensation.
20. This Court deals with the appellant's argument that relates to section 32 (2) of the Employment Act. Section 32 of the Employment Act provides that

(1) Except as provided in subsection (2), no contract of employment shall be transferred from one employer to another without the consent of the employee.

(2) Where an undertaking or a part thereof is sold, transferred or otherwise disposed of, the contract of employment of an employee in employment at the date of the disposition shall automatically be transferred to the transferee and all the rights and obligations between the employee and the transferor at the date of the disposition shall continue to apply as if they had been rights and obligations between the employee and the transferee and anything done before the disposition by or in relation to the transferor in respect of the employee shall be deemed to have been done by or in relation to the transferee.

21. The appellant correctly emphasized the primacy of the freedom to contract or agree on an employment contract like is the case with any other type of

contract. It refers to section 32 (1) of the Employment Act which requires consent of an employee to transfer a contract of employment on transfer of an undertaking. It also cited a number of cases in that regard. See *Council of the University of Malawi v Mkandawire* MSCA civil appeal number 38 of 2003 (unreported).

22. The appellant then submitted correctly that indeed a contract of employment is amenable to variation by the parties and that a signed contract is best evidence of such a variation. It referred to *Gascol Conversions Ltd v Mercer* [1974] ICR 420.
23. The appellant then contended mainly that the contract of employment between Burco and the respondent was varied by the consent of both itself and the respondent upon the appellant's agreement to purchase and take over Burco. Such that the appellant and the respondent agreed that the respondent would be bound by the appellant's terms and conditions of service that peg retirement at 50 years of age. Hence that the retirement of the respondent pursuant to the appellant's terms and conditions of service is regular.
24. The crux of the appellant's argument before the lower court and before this Court is that section 32(1) of the Employment Act having started with prohibiting the transfer of an employee's contract from one employer to another without the employee's consent (that is, a right of consent to the employee and a duty on the employer to obtain such consent), sub-section (2) creates an exception to that right or duty, as the case may be. And that it takes away the employee's right to give consent if the transfer of employment is under the circumstances set out in that subsection. It creates the right in favour of both initial employer (transferor) and the new employer (transferee) to proceed with the transfer of the undertaking including the employees' contracts without seeking their consent.
25. The appellant then reasoned that if the employee does not have a right under that subsection, it is difficult to rationalise as to why the parties cannot negotiate for new terms. Further, that it is the employers that have the right under subsection (2) and it is perfectly within their right to waive that right and still seek consent from the employees on transfer if the employees make certain demands on the employers and the employers can mutually agree with the employees on any proposals/demands made by the employees. And that no one could suggest that such a course would be illegal. Further, that no one

could reasonably suggest that the employees must be forced to transfer on the pre-existing terms and conditions of employment even where the employers are willing to let them have their wish.

26. It contended further that the variation cannot be negated by the provisions in section 32 (2) of the Employment Act. And that, hence, the conclusion reached by the lower court was reached in error as advanced in the first five grounds of appeal.

27. On his part, the respondent contended that the issue on this appeal is not an ordinary issue of ordinary contract. Rather, that the issue is about transfer of employment contract and how the transfer is supposed to be done. This issue is not regulated by common law. The issue is regulated by Malawi's Employment Act and not English common law.

28. He asserted that the authorities cited by the appellant, with the exception of section 32(2) of the Employment Act, are not applicable to this case because they are not authorities on transfer of employment contract and what terms are applicable to the contract after such transfer.

29. He then submitted that the starting point should be section 32 (2) of the of Employment Act which provides that

> Where an undertaking or a part thereof is sold, transferred or otherwise disposed of, the contract of employment of an employee in employment at the date of the disposition shall automatically be transferred to the transferee and all the rights and obligations between the employee and the transferor at the date of the disposition shall continue to apply as if they had been rights and obligations between the employee and the transferee and anything done before the disposition by or in relation to the transferor in respect of the employee shall be deemed to have been done by or in relation to the transferee.

30. He submitted further that, according to this provision, the following shall happen when an undertaking is sold:

(i) The contract of employment at the date of disposition shall automatically be transferred to the transferee (the buyer).

(ii) What is transferred is the whole employment contract and not part of it.

(iii) It must be emphasized that according to this law the transfer happens automatically. In other words, the transfer happens by operation of law.

(iv) Once the contract is so transferred the rights and obligations between the employee and the transferor (in this case Burco) shall continue to apply as if they were rights and obligations between the employee and the transferee (in this case TNM).

31. He then submitted that, it is trite law that the duty of the judiciary is to give effect to the law as enacted by Parliament. And that in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 at p. 541 the court said:

> When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or lacuna in the existing law whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the Judges in decided cases, the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing is intention what that intention was and giving effect to is. Where the meaning of the Statutory word is plain and unambiguous it is not for Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be expedient, or even unjust or immoral.

32. He submitted that in this case the lower court was right to give effect to the law as it is. He submitted further that section 32 (2) of the Employment Act is so clear and straight forward. He pointed out that:

(i) The respondent's employment at Burco included the terms and conditions of service of Burco. This includes the term that retirement age is 60 years.

(ii) The whole contract of the respondent's employment was automatically transferred to the appellant once it bought Burco. What was transferred was the whole contract not part of it.

(iii) The contract transferred to the appellant automatically by operation of section 32 (2) included the term that retirement age is 60 years.

(iv) By operation of Section 32 (2) the rights and obligations between the respondent and Burco continued as the rights and obligations between the respondent and the appellant. Therefore, in so far as the retirement age is concerned, the respondent had a right to work up to the age of 60 and the appellant had a contractual obligation to employ the respondent up to age of 60 years when he was expected to retire except where he was to be dismissed for some employment offence.

33. He also pointed out that Burco and the appellant agreed in clause 14.2 of their sale agreement (exhibit EB3 attached to document 5 in the record of appeal) that the employment contracts of employees at Burco were (after the sale) to continue and uninterrupted and the contracts were to be transferred from Burco to the appellant. He observed that this clause provides that:

> Each of the employee's term of contract shall be treated as continuing from the seller's employment and each employee from the seller to the purchaser in accordance with Section 32 of the Employment Act.

34. He noted that, Burco and the appellant agreed that the contract of employees would be transferred in accordance with Section 32 of the Employment Act. He observed that this Court will note that the appellant has conveniently refrained from commenting on this important clause.
35. He then observed that in clause 14.3 Burco and the appellant also agreed that each transferred employee would be employed on similar terms and conditions. And that this clause provides that the employees shall be offered employment by the purchaser on similar terms and conditions to their current employment contracts with the seller. And that this indeed this is clearly in line with Section 32 of the Employment Act which provides for automatic transfer of the contract and on similar terms as argued above.
36. He then asserted that it must also be noted that clause 14.3 having stated that employees would be offered employment on similar terms and conditions obtaining at Burco, it proceeds in the second sentence to state that the stated offer would be subject to negotiation. He submitted that this second limp of the clause is illegal because it does not comply with the law. He contended that section 32 (2) of the Employment Act is mandatory and does not provide room for negotiation.
37. He argued that, in any case, the clause having stated in the first sentence that the employment would be on similar terms and conditions as those obtaining at Burco the second sentence that is stating that there would be negotiations contradicts the first sentence. He insisted that his submission remains that the first sentence being a mandatory prescription of law carries the day and should strictly be applied by this Court.
38. He then noted that there is an attempt by the respondent to state that Section 32 (1) of the Employment Act provided that an employee had to consent

to the transfer for his contract and that therefore this means that the employee and the new employer may agree new terms as long as that is with consent of the employee. He submitted that section 32 (1) of the Employment Act is very clear and should be given an ordinary interpretation and be given ordinary meaning. And that this provision is saying any transfer of employment contract has to be with consent of the employee. And that is what it is saying. He observed that, however, this provision cannot be used as a basis for tampering with the employment contract at the point of transfer.

39. The respondent then submitted that the offer letter has no legal effect. He observed that the offer letter that the appellant gave him has no legal effect at all. He stated that it must be remembered that according to Section 32 (2) of the Employment Act the contract of employment is transferred by operation of law and the transfer happens automatically. And that the contractual rights and obligations just continued to apply as they applied at Burco before the transfer of the contract. He pointed out that there was legally no need for the appellant to give the respondent an offer letter. He asserted that giving an offer letter entails that the contract is starting afresh which is not in line with this statutory provision. Further, that it is not in line with the prescription of continuity of the contract under Section 32 (2) of the Employment Act which idea was adopted in clause 14.2 of the contract between Burco and the appellant.
40. He then observed that, as deponed in the affidavit in support and affidavit in reply to the determination of the matter on a point of law before the lower court (document 10 in the record of appeal), the appellant knew that the applicant's employment contract was to continue on same terms as those that applied to him at Burco. And that this is why in the contract between Burco and the appellant (exhibit MG1 attached to document 9 in the record of appeal), the parties agreed in clause 14.23 that each employment of Burco's employees shall be deemed transferred in accordance with Section 32 (2) of the Employment Act. He observed further, that the appellant also agreed with Burco in Clause 14.3 of exhibit MG1 that the appellant was to take employees of Burco on similar terms and conditions applicable at Burco.
41. He then asserted that section 32 (2) of the Employment Act does not provide for negotiations. And that the contract is supposed to be transferred automatically and in full. Further, that there is no room for negotiations as is clear from the provision itself. He contended that had the legislature intended that the transfer of contract is subject to negotiations of its terms then the provision could have stated as such. He submitted that section 32 (2) uses the word "shall" which means that this provision is mandatory and must apply every time there is a transfer of contract of employment by virtue of a sale of business.

42. He then contended that the alleged agreement to vary terms of the contract of employment was illegal and not enforceable. He noted that the only defence that was presented by the appellant is that there was an agreement between itself and the applicant to vary the contract he had with Burco. He observed that the appellant is relying on the offer letter it gave to him. He asserted that he has however argued above that the transfer of the contract was by operation of law as prescribed under section 32(2) of the Employment Act. And that therefore, the offer letter has no legal effect at all.
43. He asserted that, he duly explained in paragraphs 10-13 of his affidavit in support of the application before the lower court (document 5 in the record of appeal) his understanding of the offer letter. He noted that he stated that:

    (i) TNM offered me employment to put in effect the transfer of my employment from Burco to TNM as provided under Section 32 of the Employment act. I hereby exhibit a copy of the offer letter and mark it EB4.

    (ii) As at the date of this offer I was already over 50 years and some months.

    (iii) I had no doubt at all that my employment with TNM would on similar terms as the ones I had at Burco, after all the offer letter clearly stipulated that my employment with TNM was not to have any negative effect on the benefits I had at Burco. Further, when I looked at terms and policies for TNM I noted that one could work up to the age of 70 years which was within the 60 years retirement age I enjoyed at Burco.

    (iv) Therefore, I accepted the offer that was made to me by TNM.

44. He observed that this evidence was not challenged in any way during the hearing before the lower court. He then submitted that his explanation makes sense. And that this is so because at the date of the so called offer letter he was already over 50 years. So that, if the understanding was that he would retire at 50 years there would have been no need to offer him employment in the first place.

45. Finally, he submitted that assuming that there was indeed agreement to vary the contract, which variation happened before transfer of the contract, such agreement would be illega**l** and not enforceable. He reminded this Court that he has already argued that section 32 (2) does not give room for negotiations to vary the contract. Since the law say the contract "shall" automatically be transferred.
46. He then argued that, in any case, breach of provisions of Employment Act is a criminal offence. And that this is clear from the Act itself. He noted that section 64 (2) of the Employment Act provides that:

> Any person alleging a violation of a provision of the Employment Act may file a complaint with the District Labour Officer who may institute or cause to be instituted a prosecution in order to enforce the provision of this Act.

47. He also noted that section 66 (1) of the Employment Act states that:

> Any person who contravenes a provision of this Act for which no offence is specifically provided shall be guilty of an offence and liable to a fine of MK5000 and to imprisonment for one year.

48. He then argued that section 66 (1) of the Employment Act confirms his submission that section 32 (2) of the said Act is mandatory. And that if one breaches it, he would be committing a crime punishable by imprisonment and a fine. He added that that this also confirms that there is no room to negotiate terms when the transfer is being done.
49. He then contended that she law is that parties cannot agree to do something that is prohibited by law. He observed that in the case of *Bartlett v Vinor* 90 ER 750 the court said:

> Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is void contract though the statute itself doth not mention that it shall be so, but only inflict a penalty on the defaulter, because a penalty implies a prohibition, though, there was no prohibitory words in the statute.

50. He then submitted that this law has been applied by Katsala J. in *Burco Electronic Systems Ltd v David Anthony Varndell (Deceased) and Nico Life Insurance Company Limited* Commercial Case no. 59 of 2014 (High Court)

(unreported). He noted that Katsala J. in this case laid down a principle of law and said at page 7 that:

> It is clear to me that limiting the cover under the life policy to a sum that is below the statutory minimum would be a contravention of the law. As a matter of public policy this court cannot enforce such limitation. The defendant contends that it was the duty of the plaintiff to comply with Section 15(1) of the Act and not its duty. Yes this is very true. But it must be remembered that parties are not at liberty to agree on something that the law prohibits.

51. He then submitted that section 66 (1) of the Employment Act makes it criminal for anyone to contravene even those provisions of the Act in which an offence has not been specifically enacted. And that the alleged agreement to vary the applicant's contract before it was transferred from Burco to the appellant would be in complete breach of section 32 (2) of the Employment Act which clearly states that the transfer of the employment contract happened automatically from Burco to the appellant and that the rights and obligations were by law supposed to continue as rights and obligations between the respondent and the appellant.
52. He also submitted that a contract that contravenes a statute is null and void and cannot be enforced by the court. See *Burco Electronic Systems Ltd v David Anthony Varndell (Deceased) and Nico Life Insurance Company Ltd*. And that, therefore, even if it were to be the case that there was alleged agreement to attempt variation to the respondent's employment contract as alleged by the appellant such agreement would be illegal, null and void and cannot be enforced by this Court. He concluded that, upon carefully considering the law the lower court agreed with the respondent on the legal position advanced above.
53. This Court has considered the arguments advanced by both parties and agrees with the respondent that at this point this Court must give primacy to the relevant statutory provisions instead of simply looking to the English common law that is merely persuasive and not binding on this Court as it interprets section 32 (2) of the Employment Act.
54. The argument that the respondent was not privy to the sale agreement between the appellant and Burco and that he cannot therefore rely on what was agreed cannot really stand in the face of the statutory provisions in section 32 (2) of the Employment Act which is clear as to what happens when there is an acquisition of a business. When the respondent alluded to the acquisition

agreement he was simply showing that even the agreement in question points to what the Act indicates as the implication on acquisition of a business in relation to employee contracts. He legally benefits from the agreement by reason of statute and doctrines of law such, as privity of contract, are not relevant.

55. This Court is persuaded that the import of section 32 (2) of the Employment Act is as expounded by the lower court and by the respondent. Section 32 (3) of the Employment Act is indeed couched in mandatory terms as to the effect of purchase of a business on the contracts of employment of employees of the said business in relation to the purchaser. The contracts of employment of the employees shall automatically transfer on the sale and shall do so on the same terms as between the two business owners.
56. There is the element of automatic transfer and continuity of contract which are mandatory things as at the time of transfer of ownership of the business in question.
57. Notwithstanding that there is freedom of contract in employment alluded to by the appellant, the statute has come in to regulate what happens in the specific situation that it has provided for. That provision does not allow for renegotiation of the contract of employment by way of an offer of a new contract by the new business owner to the employees in question. As correctly observed by the respondent and found by the lower court, if the employment contract transfers automatically then there is no room for any offer of employment as was purportedly made here by the appellant to the respondent. Making a fresh offer of employment is against the spirit of section 32 (2) of the Employment Act. An offer of employment as made by the appellant presupposes that the old employment contract is at an end. And that stands in opposition and contrary to the provision in section 32 (2) of the Employment Act. That offer is contrary to statute and is unenforceable as argued by the respondent.
58. There is persuasive authority on this point as discussed in the South African case where a similar question arose where there was a similarly worded provision in section 197 (2) of the South Africa Labour Relations Act 66 of 1995 that provided that there shall be automatic transfer of a contract of employment and of rights and obligations on purchase of a business. The Constitutional Court of South Africa reasoned that automatic transfer of a

contract precludes the idea that a contract of employment comes to an end before the new owner takes on the employees for the previous owner of the business. See *Horn and Others v LA Health Medical Scheme and Another* [2015] ZACC 13, particularly Zondo J. from page 30.

59. This Court is therefore persuaded that the appellant could not offer a new contract to the respondent prior to the automatic transfer of his existing employment contract with Burco herein and thereby vary the employment contract that was due to automatically be transferred at a later date by operation of section 32 (2) of the Employment Act as happened in the present matter. Such a scenario is precluded by section 32 (2) of the Employment Act. There was no room to offer a new contract.

60. Indeed it may be a statutory offence to contravene the Employment Act as did the appellant herein as submitted by the respondent. And this Court would not enforce such a contravention of the Act.

61. The respondent's argument therefore holds and this Court agrees with the reasoning of the lower court and accordingly finds that the first five grounds of appeal raised herein fail. Namely, that the lower court erred in law in holding, in effect, that the parties hereto were not at liberty at any time during or after the transfer of business of Burco Electronic Systems Ltd to the appellant to negotiate and agree on new terms and conditions of the respondent's employment with the appellant. That the lower court erred in law in holding that section 32 of the Employment Act prohibits parties to an employment contract from negotiating and agreeing on new terms and conditions regardless of the mutual consent of the parties. that the lower court erred in law in failing to hold that the terms and conditions of employment of an employee can be varied by the mutual consent of the parties to the contract during or after the transfer of the undertaking in terms of section 32(1) of the Employment Act and that the only instance where the consent of the employee may be dispensed with and the contract of such employee is automatically transferred to the transferee employer without the employee's consent is when the whole undertaking of the transferor employer or part thereof is sold, transferred or otherwise disposed of. That the lower court erred in law in failing to hold that section 32 does not per se do away with the fundamental principle of freedom of contract. And that the lower court erred in law in holding that the appellant had breached the contract when it retired the

respondent in accordance with its terms and conditions of employment which the respondent had voluntarily accepted to be bound by in place of those of Burco Electronic Systems Limited.

62. The lower court decision is therefore upheld that the appellant breached the employment contract herein by unlawfully retiring the respondent before he reached the age of 60 years as provided in his continuing contract as entered with Burco and transferred to the appellant.

63. The remaining grounds of appeal relate to the assessment of loss suffered by the respondent. Namely, that the lower court erred in law in awarding the respondent all the remuneration and benefits he would have earned while in employment with the appellant from the effective date of termination of employment on 31 August, 2016 to the date the respondent would reach the age of 60 years on 24 October, 2024 in accordance with the terms and conditions of employment of Burco Electronic Systems Limited contrary to the provisions of section 63 of the Employment Act applicable to calculation of compensation. That the lower court erred in law in completely disregarding the duty of the claimant to mitigate his loss and the fact that the respondent had admittedly found two jobs after the termination of his employment with the appellant thereby unjustly enriching the respondent at the expense of the appellant. And, that the award of all remuneration and benefits that the respondent would have earned while in employment with the appellant from the effective date of termination of employment on 31 August, 2016 to the date the respondent would reach the age of 60 years on 24 October, 2024 is both perverse as well as contrary to well established legal authority.

64. The appellant again did not submit on each ground specifically but rather submitted a main argument on the approach on assessment of damages by the lower court which it faulted as specified in the grounds of appeal.

65. The appellant observed that section 63 (4) and (5) of the Employment Act lays down guidelines in to be used by the court in arriving at compensation payable to an employee in cases of unfair dismissal. It noted that section 63 of the Employment Act provides as follows:

> (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.

(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.

(5) The amount to be awarded under subsection (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 week's 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 week's 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, and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57 (3).

66. The appellant then submitted that in *Southern Bottlers Ltd v Kalenga* MSCA Civil Appeal Number 18 of 2011 (unreported), the Supreme Court highlighted that where the court wishes to exceed the minimum compensation stipulated 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 are able to appreciate why the award was enhanced.

67. It submitted that according to section 63 (4) of the Employment Act in determining compensation, the court has to consider what is just and equitable and in deciding what is just and equitable the court shall consider the marketability of the applicant in the labour market: Rachel Sophie Sikwese*: Labour Law in Malawi* (2014). It pointed out that this view is also supported by the Supreme Court. And that in the case of *Malawi Revenue Authority v Kandulu* MSCA Civil Appeal No. 51 of 2016, the Supreme Court opined that:

> The determining event in employment cases is not the time when the employee would have retired. Rather, it is the time when the employee can reasonably find another job. An employee unfairly dismissed is supposed to mitigate damages by seeking for alternative employment. Where the employee finds an alternative job, damages will only be up to a point when the job is found. Where the employee has not demonstrated the likelihood of another job, Courts have, in a roughshod kind of way, have put that period to be one year.

68. It then submitted that mitigation of loss as one of the elements the court considers in awarding compensation requires that the injured party must take measures to mitigate his loss. And that the basic principle is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's 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 *Macgregor on damages*, 14th edition, para. 933 page 635.
69. The appellant submitted that in *Phiri v Dignitas International (Malawi) Limited* Miscellaneous Application No. 37 of 2015 (High Court) (unreported), the appellant was dismissed unfairly and the lower court awarded him minimum compensation under section 63(5) of the Employment Act on account of his contribution to his own dismissal. The appellant appealed against the decision and submitted that he should have been compensated up to the end of his contract, which was until the age he was to retire. The appellant had 16 years to retire. The lower court reasoned that it was not just and equitable to award the appellant until his retirement age and consequently awarded the minimum compensation as provided under the Act. The High Court in its appellant jurisdiction held that courts must award compensation that is just and equitable and take into consideration the circumstances of the

case. The court considered the evidence and factors like the appellant's marketability and enhanced the compensation. However, the court refused to award the appellant the sum until the period he was to retire. Instead the High Court found that what was just and equitable in the circumstances was one year pay as compensation for unfair dismissal. It was the view of the court that in the then prevailing market the appellant could get an employment within one year.

70. The appellant next referred to *Gunton v Richmond Borough Council* [1980] WLR 714, in which Lord Justice Brightman stated at pages 735 and 736 that it is clear beyond argument that a wrongfully dismissed employee cannot sue for his salary or wages as such, but only for damages. And further that Lord Justice Shaw, had this to say:

> An employee cannot remain idle and demand his salary, for he has not earned it. The principle of the law here is that where an employer has wrongfully repudiated a contract of employment the innocent employee cannot sue to recover his salary as damages, because a salary is supposed to be earned.

And that the Lord Justice said that the "measure of his damage is to be determined on ordinary and elementary principles."

71. The appellant noted that, similarly, in *Hill v CA Parsons and Co Ltd* [1972] Ch 304, Lord Denning, MR, stated at p. 314 that

> If an employer wrongfully dismisses an employee, the employment is effectively terminated, although there is a breach of contract. Accordingly, and as a general rule, the employee cannot claim specific performance of the contract of employment. He cannot also claim his salary or wages after the relationship of employer and employee has come to an end. He is left with a claim in damages against the employer for breach of contract. As regards the measure of damages, the dismissed employee gets damages for the time that he would have served if he had been given proper notice.

And that he also said that "the employee cannot be granted damages for the loss of expected benefits to which he had no contractual right."

72. The appellant also observed that in *Dr Chawani v Attorney General* MSCA Civil Appeal No. 18 of 2000 (unreported) the Supreme Court summed up the principles surrounding compensation in cases of unfair dismissal as follows:

> 1. Where an employer has wrongfully, but clearly, terminated a contract of employment, the termination is effective, although it is in breach of contract.
> 2. The relationship of employer and employee is brought to an end, following a clear termination of a contract of employment.
> 3. Where there is a wrongful, but clear termination of a contract of employment, the dismissed employee:
> (a) cannot insist that the contract of employment still subsists; and
> (b) cannot sue for specific performance of the contract.
> 4. The dismissed employee cannot sue for the salary or wages which he could have earned if the employer had not wrongfully terminated the contract because a salary or wages must be earned.
> 5. As the relationship of employer and employee is brought to an end the dismissed employee cannot claim the reward for services which are no longer rendered.
> 6. When there is a breach of contract, the innocent party is entitled to be compensated only for the defendant's failure to perform his legal obligations. The law of contract is concerned only with legal obligations, created by mutual agreement, and not with expectations, however reasonable those expectations might be.
> 7. An employee cannot be granted damages for loss of expected benefits to which he had no contractual right.
> 8. As regards the measure of damages, an employee who is wrongfully dismissed gets damages which cover the period which he would have served, if he had been given proper notice.

73. The appellant then observed that in *Malawi Environmental Endowment Trust v Kalowekamo* [2005] MWIRC 17, the appellant appealed against a judgment of the court below where the respondent was awarded 24 months' salary as compensation being the amount he could have received had his contract been renewed by the appellant. The appellant argued that this level of compensation was immensely excessive and unfounded in law. The appellant made reference to section 63 (4) and (5) which provides guidance in arriving at compensation in cases of unfair dismissal. The High Court in its appellate jurisdiction found in favour of the appellant and ordered that the compensation

order of the Registrar be set aside instead the respondent be paid one week's pay for every year of service in accordance with section 63 (5) of the Employment Act.

74. It then referred to *Mbewe v Reserve Bank of Malawi*, Matter Number IRC PR 381 of 2012 (unreported), in which the lower court made the following observations:

> Suffice to say, as has been stated elsewhere, that the court has discretion to award compensation under section 63 of the Employment Act. Where compensation is awardable, the Act, in section 63(5), only provides the minimum award that a court can make. The making of the actual award is left to the discretion of the Court after having recourse to the evidence and all circumstances of the case which might include mitigation of the loss and contributory fault on the part of the dismissed employee. The guiding principle is that the compensation must be just and equitable ...

75. It then referred to Sir John Donaldson, the President of National Industrial Relations Court who in *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183 said that:

> The amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle. First the object is to compensate, and to compensate fully, but not to award a bonus . . . Second, the amount to be awarded is that which is just and equitable in all circumstances having regard to the loss sustained by the complainant. Loss … does not include injury to pride or feelings.

76. The appellant then submitted that all the above authorities point to one conclusion, that it is wrong in principle to treat an employee whose contract of employment has been terminated, whether unlawfully, unfairly or otherwise, as if his or her contract still subsists after termination and to award him or her all the salary and benefits from the date of termination to the date the court considers to be the employee's contractual date of retirement. It added that in this regard, the High Court decision in *Kachinjika v Portland Cement Company Limited* [2008] MLLR 161 and the Supreme Court decision *in Willy Kamoto v Limbe Leaf Tobacco Company Limited* MSCA Civil

Appeal Number 24 of 2010 (now reported in the 2010 Malawi Law Report) also need mention.

77. The appellant observed that in the *Kachinjika case*, Chikopa J, as he then was, made the following important remarks with respect to a claim for lost salary between the period of termination and the date of judgment:

> Loss of Salary
>
> This is for the period between the date of termination and the date of this judgment. As a matter of principle we think it is incorrect to award damages for wrongful termination of the contract of employment while separately making another award in respect of salaries for the period in between the termination and his judgment. That would most likely not only needlessly complicate the compensation process but also result in over-compensation. It would also be a technically and conceptually flawed award. It would proceed on the assumption that the plaintiff was never terminated which is not true. That he continued being an employee of the defendant company which is also not true. It would also assume that the plaintiff in his pleadings prayed for declaration that he should be regarded as having continued in his position from the date of the termination until that of judgment which is not the case. Thirdly, it would give the impression that the plaintiff is being awarded damages for something other than wrongful termination. Like for instance not having been, in between termination and judgment, able to work which might not be true. Fourthly, we might, if we compensated separately for that period, end up paying the plaintiff a salary that he was never in fact lost for the simple reason that he was in gainful employment elsewhere. Compensation in cases like the one before us should on the other hand be based on factual truths. These inter alia are firstly that the plaintiff was terminated on 1st April 1997 and secondly that he has since then done no work for the defendant company for which he should be paid any salary. Instead, the correct way about it is not to pay his salaries for which he did not work but to, as much as possible, award him damages in the "general damages" would for wrongful termination that will take into consideration whatsoever was lost as a result of the wrongful termination. We therefore refuse to make a separate award for loss of salary between the date of termination and that of his judgment.
>
> Retirement benefits

> The plaintiff argues that he could be paid retirement benefits as if he worked up to retirement age. By retirement benefits he means awards on housing allowances, gardener's allowance, water allowance and car allowance. The argument is that had he not been wrongfully terminated he would have worked up to the age of retirement, which in this case is 60, while enjoying these benefits (legitimate expectations). Any which way (sic) you want to look at it such argument is untenable. The truth of the matter is that not only has the plaintiff not worked up to retirement age with the defendant company there is also no bankable guarantee that he would have worked up to such age, the termination notwithstanding. He would have died. He could have resigned. He could have been properly terminated. But even after his wrongful termination it is possible that the plaintiff will find other employment or gainful work before the age of 60 which will not only pay him salary but also extend to him the same fringe benefits for which the defendant would have paid him up to the age of 60 as compensation. The immediately foregoing, we think, should be enough to show the folly of paying the wrongfully terminated employee benefits as if he retired at normal retirement age whatever that might be. If it is a matter of legitimate expectations we think that is a matter that can be dealt with in the context of the terminated employee's marketability (or a lack thereof).
>
> We would therefore also decline to order that the plaintiff be paid retirement benefits calculated on the basis of his retirement at 60. The correct way is to calculate them up to the point of termination of service or dismissal whatever the case might be. If anything, the loss of benefits might, in an appropriate case, be considered as a relevant consideration in calculating the "general" damages awardable for wrongful termination.
>
> Accordingly we cannot fail to observe that he is a well trained and experienced person in his field. We doubt whether he would have or has had serious difficulty in securing other employment or securing other paying engagements in his chosen profession after the loss of the job with the defendant. Whether or not the plaintiff tried to mitigate his losses is another relevant consideration. Unfortunately for us we did not hear testimony one way or the other how unsuccessful or not the plaintiff had been in mitigating his losses. Fortunately, we have already discussed how unlikely it is that the plaintiff would fail to get alternative employment.

78. It then pointed out that it is worth noting that in the *Kachinjika case*, like in the present case, the plaintiff's contract was terminated when he was 50 years old and the retirement age was 60 years, just like what is contended for by the respondent in the present case.

79. Further, that the views expressed by the High Court in the *Kachinjika case* to the effect that it is wrong to treat a dismissed employee as if he or she continued in employment and to award him or her all the salary and other benefits that he or she would have earned until retirement, are reinforced by the Supreme Court decision in *Kamoto v Limbe Leaf Tobacco Company Limited* cited above. It observed that, delivering the unanimous judgment of the Court, Nyirenda, SC, JA (now Chief Justice) had this to say:

> Both Courts (i.e. the IRC and the High Court) found, consequently, that the appellant's dismissal was unlawful.
> The appeal to this Court does not seek to question that finding. The appeal is only against the amount of compensation that the appellant was awarded. The Industrial Relations Court awarded the appellant 12 months' salary as compensation pursuant to section 63(4) of the Employment Act. The High Court raised the award to 15 months' salary. The appellant is still dissatisfied and seeks that the multiplier be raised. He does not however suggest what level would be considered sufficient.
> Both the Industrial Relations Court and the High Court observed, and rightly so, that compensation under these provisions is discretionary. Both Courts went on to observe that the circumstances of the case will guide the court's discretion.
> During the hearing of the appeal what took centre stage was what would be considered appropriate as a multiplier for compensation other than what the lower courts determined in the circumstances of the appellant's dismissal.
>
> A couple of considerations exercised our minds in determining the issue here. The first consideration is that the appellant's employment could not have been for life. Unfortunately the record does not include the appellant's contract of employment. It occurs to us therefore that this was an ordinary employment which could ordinarily be lawfully terminated by the respondent and from which the appellant himself could have lawfully opted out. We acknowledge that the appellant had served the respondent for 17 years. This was a clear sign of commitment to duty and permanence. That nonetheless could not be equal to a commitment for life. It is equally unsafe to assume that the appellant would have been available for the respondent until the age of his retirement as suggested by the appellant.
>
> In Clarkson International Tools Limited v Short [1973] ICR 191 the approach (sic) is that compensation is not to express disapproval of industry

> policy but to compensate the plaintiff employee for loss occasioned by the unfair dismissal. All in all compensation must take into account such matters as immediate loss of wages, to some degree future loss of wages and the manner of the dismissal. Compensation could never be aimed at completely protecting the employee into the future.
>
> In arriving at 15 months' salary as compensation the learned Judge below took a number of factors into consideration including the circumstances of the appellant's dismissal, the effort made by the appellant to mitigate loss, the possibility of the appellant finding comparable employment on the market, the appellant's age, fitness and qualifications. As it were, the Judge below took into consideration what we ourselves would have taken into consideration. We find nothing else in what has been presented before us by the appellant to compel us to depart from what the learned Judge determined.

80. The appellant then contended that the foregoing statement of the law shows how fundamentally flawed the award of compensation by the lower court is.
81. The appellant then submitted that, as earlier discussed the basis of assessment of compensation in cases of unfair dismissal is section 63 (4) (5) of the Employment Act which among other things advocates for an award which is just and equitable in the circumstances. And that sub section (5) further sets the minimum compensation to be considered by the court. Further, that in determining what is just and equitable, the court must factor in considerations of the employee's marketability and mitigation of loss. It reiterated that a dismissed employee is not entitled to treatment as if the contract of employment still subsisted and to be paid all the remuneration until retirement.
82. The appellant then argued that, as highlighted in the case of *Malawi Revenue Authority v Kandulu*, the determining event is not the time the employee would have retired rather, it is the time when the employee should reasonably find another job. And that where the employee finds an alternative job, compensation will only be up to a point when the job is found. Further, that where the employee has not demonstrated the likelihood of another job, the period is up to one year. And that, in the case at hand, the respondent was about 51 years old at the time of the mandatory retirement.

83. The appellant observed that, within 12 days of the effective date of termination of employment (that is, 31st August, 2016), the respondent found another job with Peoples Trading Centre Limited ("PTC"). See exhibit TM5 to the witness statement of Tayesa Mvula which is document number 20 in the record of appeal.
84. The appellant observed that, at the time of assessment of damages in November, 2018, the respondent admitted to have been offered a job as Anti-Corruption Bureau Deputy Director subject to Parliamentary approval through its Public Appointments Committee. And that, as that position is a public office, this Court must take judicial notice of the fact that the respondent is still in employment of the Bureau as its Deputy Director. And that this, in a very robust way, exposes the folly of awarding the respondent salary and all other benefits from 1st September, 2016 to 24th October, 2024 when he will attain the age of 60 years as if he was still the appellant's employment, working and earning that remuneration.
85. The appellant therefore submitted that the respondent is only entitled to compensation for the 12 days he was out of employment, or utmost one month remuneration as nominal compensation.
86. On his part, the respondent observed that this is not a case of unfair dismissal in terms of Section 57, 58 and 60 of the Employment Act. And that therefore, it is distinguishable from a litany of authorities cited by the appellant on the issue of compensation. Further, that at the risk of repetition this is a case of an innocent citizen contracted to work up to retirement age of 60 years and forced to retire before reaching that age.
87. The respondent contended that all the cases cited by the appellant with the exception of the case of *Dr Chawani v Attorney General* [2008] MLLR 1 are not relevant to this case because they deal with cases of unfair dismissal. And that this is not a case of unfair dismissal. He added that in his arguments below he will show the proper relevance of the *Chawani Case* to this case.
88. The respondent noted with sadness the attempt by the appellant to mislead this Court by alleging that in the case of *Malawi Revenue Authority v Kandulu* MSCA Civil Appeal no. 51 of 2016 the Malawi Supreme Court of Appeal made remarks cited by the appellant. He asserted that this is very misleading. He pointed out that the cited remarks are in the dissenting opinion of

Mwaungulu JA and cannot be attributed to be views of the whole Supreme Court of Appeal. He asserted that, in fact, at page 12 of the judgment the majority of the court clearly stated the following in respect to the dissenting opinion of Mwaungulu JA:

> We also wish to stress that the views expressed in the dissenting opinion in relation to the substantive appeal or any grounds of appeal relating thereto should not be considered as in any way pre-determining the appeal, should the appellant or the respondent properly appear before this court in due course.

89. He asserted further that, the substantive appeal was not determined by the full court as the matter was aborted after hearing of preliminary issues. And that therefore, it is wrong and quite misleading for the appellant to allege that the Supreme Court (the full Court) made the cited remarks. He submitted that the court must have recourse to the Employment Act.
90. The respondent then submitted that he has a right to an effective remedy. He noted the long title to the Employment Act sets the tone on what the Act wants to achieve. He pointed out that it states that the Act is:

> An Act to establish, reinforce and regulate minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice and for matters connected there with and incidental thereto.

91. The respondent then submitted that social justice cannot be achieved if employers who are always having dominance in employer/employee relationship are allowed to do as they please and victimize innocent employees as happened in this case. He submitted further that this is a clear case of employer who knew or ought to have known that what they were doing was wrong but did not care and still proceeded to do the wrong because they are rich and would pay compensation if ordered by the court. And that to make matters worse and in clear show of corporate arrogance, instead of showing remorse for the wrong acts committed which have a life-long impact on his livelihood and that of his family, they come to court and have the audacity to tell the court that the employee it unlawfully retired hence cutting short his illustrious career in the process should be compensated by being paid

12 days remuneration. He added that social justice may not be achieved if this attitude is allowed to persist.

92. He reiterated for the sake of emphasis that this is not the case of unfair dismissal. He noted that indeed the claim that he brought to the lower for determination was not one of unfair dismissal. He reiterated that the dispute in this case is one of breach of employment contract by the appellant who chose to retire him before the contractual retirement age of 60 years. And that this is why in ordering payment of loss sustained, in fact the Court did not even use the word "compensation", the court said:

> There being no dispute therefore to the fact that at Burco the applicant was to retire at 60, the applicant herein even as an employee of TNM is also to be retired at 60 and not any day earlier unless he is terminated on grounds of misconduct or incapacity. The respondent having terminated his services earlier than the stipulated age of 60 years acted in breach of the contract. The applicant is therefore entitled to recover from the respondent all his loss in remuneration and benefits from the time of termination to the time of retirement, less any sums already received.

93. He then argued that the arguments presented by the appellant suggests that the lower court only hear disputes of unfair dismissal and that this case is therefore one of unfair dismissal. He added that that is wrong. He pointed out that section 64(3) of the Employment Act give any person a right to present cases for violation of the Employment Act to court for relief. And that it states, in so far as it is relevant, that:

> Notwithstanding the provisions of subsections (1) and (2), any person alleging a violation of a provision of this Act may, where not otherwise specified, present his complaint to the court for relief….

94. He then submitted that the court of first instance for hearing labour disputes under the Employment Act is the lower court. He added that indeed there was never in this case any challenge to the jurisdiction of the lower court to hear and determine this matter.

95. He pointed out that his complaint in this case is that in terms of section 32(2) of the Employment Act his contract with Burco was transferred to the

appellant on same terms and therefore he should have retired at 60 years but in breach of contract the appellant retired him at 50 years.

96. He stated that having presented his complaint to the lower court he had a constitutional right to be granted an effective remedy for the wrong committed by the appellant. He observed that section 41(3) of the Constitution of the Republic of Malawi provides:

> Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this constitution or any other law.

97. He then noted that the foregoing provision is very clear and it follows that the court was obliged to give him an effective remedy for breach of his contractual right under section 32(2) of the Employment Act to continue working at the appellant on terms and conditions that he had at Burco and retire at 60 years.

98. He asserted that in deciding to give an effective remedy the court took into account his pleadings. And that in Amended IRC Form 1 he clearly pleaded payment of salary and benefits for reminder of the contract. And that this is effective remedy that the he asked from the court. He noted that the lower court agreed and in its reasoning ruled that he recover all his loss in remuneration and benefits from time of termination to time of retirement.

99. He noted that he had worked for over 10 years and had 9 years to go before retirement. He added that his record was good and that he was a senior member of staff. Further, that the loss that he sustained as a direct result of the breach of contract by the appellant is remuneration for the remainder of his contract.

100. He then submitted that had the appellant not prematurely sent him to retirement he could have worked up to retirement age. And therefore he could have earned income up to retirement. And, therefore, he submitted that social injustice demand that he be remunerated up to end of his contract. Further, that this is the loss he sustained as a direct result of the appellant's illegal conduct. He added that this also ensures that an effective remedy is given as stipulated under Section 41(3) of the Constitution. He noted that the jurisdiction of the lower court to award an effective remedy has not been challenged.

101. He then submitted that we are dealing with a serious matter here although the appellant is sheepishly trying to down play it. He observed that his whole livelihood was destroyed here and his social security in terms of pension completely shattered. And that he vividly put this in paragraphs 24, 25, and 26 of his affidavit in support (document 5 in the record of appeal), where he had stated as follows:

> I had worked for Burco and TNM diligently. Having already reached the age of 50.
>
> I had no intention whatsoever to leave employment before my normal retirement.
>
> My plan was to work on until reaching normal retirement age.
>
> By ending my employment early TNM are in breach of employment contract and that breach had directly resulted in me losing salary and benefits I should have earned for the remaining years of employment contract.

102. He then submitted that what the lower court did is not a new phenomenon. He observed that authorities abound of employment related cases where the court has granted an effective remedy of remuneration up to end of contract of retirement.

103. He observed that in *Dr. Chawani v Attorney General* [2008] MLLR 1 the Malawi Supreme Court of Appeal considered the period remaining before the appellant could have reached mandatory retirement and ordered that he be paid damages from date of termination of contract to date of mandatory retirement. He noted that just as in the *Chawani case* this claim is not a common law claim. He observed further that the same approach was adopted by the High Court of Malawi in *Phiri and others v Minister of state in the President's Office and another* [2008] MLLR 264 a case in which the court awarded the plaintiff's salary, allowances, benefits and enhanced pension from the date of unlawful dismissal to retirement.

104. He then submitted that, likewise, in this case considering all the facts and law there was no legal basis justifying sending him to retirement. And that looking at his age, the period served, the remaining period, what he states in his affidavit that his intention was to retire at the appellant, and section 32(2) of the Employment Act which confirms that his retirement age was 60,

then considering the loss that he has sustained, taking all these factors, the only effective remedy that may be given is the one that was granted by the lower court.

105. The respondent then submitted on the alleged failure to mitigate his losses and submitted that the same was not pleaded. He started by asserting that the law on pleadings is as important in the lower court as confirmed by the Malawi Supreme Court of Appeal in the case of *Banja La Mtsogolo v Harriet Chiomba* [2009] MLR 18. The court held in this binding authority that "requests of litigants are contained in their pleadings".

106. He observed that in this case the appellant did not plead the issue of mitigation of loss. And that such an issue is nowhere in IRC Form 2. And that it follows that the issue of mitigation of loss was not before the lower court. He observed that it was incumbent on the appellant to plead the issue. And that had that been done the lower court could have made a finding on the same in its judgment that it referred to assessment.

107. He indicated that it must be remembered that the duty of Registrar in assessment proceedings is to assess amounts ordered in the judgment. He cannot depart from the judgment and substitute the award as ordered in the judgment with his own thinking. He referred to the decision of Kamwambe J. in *Katundu Haulage v Leasing and Finance Company of Malawi Ltd* [2001] MLR 192. He, therefore, submitted that in so far as the issue of mitigation of loss was not pleaded and was therefore not determined in the judgment and properly considered in the judgment as one of issues to be considered during assessment of loss, the lower court doing assessment has no power to alter the judgment and raise issue of mitigation during assessment proceedings.

108. Without prejudice to the foregoing argument, the respondent submitted that the appellant did not discharge its burden of showing that the respondent had failed to mitigate his losses. He submitted that the law on mitigation of loss was well adumbrated by Kenyatta Nyirenda J in *Mwasi and Others v Malawi Revenue Authority* Civil Appeal no. 13 of 2015 (High Court) (unreported) when he said:

> It is commonplace that the burden of proof of non-mitigation is on the employer: see Blantyre Newspapers Ltd v Charles Simango, Civil Appeal Case no. 6 of 2001 (unrepresented) and the Canadian cases of Bird v Warnock Hersy Professional

Service Limited [1981] BC No. 2057 (SC). Michaels v Red Deer College [1976] 2 SC R324. Fast v Western Raail Products Ltd [2000] BC No. (SC) and Edge v Kilborn Engineering (BC) Limited [1987] BC No. 992 (SC).
In Blantyre Newspaper Limited v Charles Simango, supra Mwaungulu J, as he then was, said:

"I was not much impressed however with the effort I should say lack of effort by the plaintiff to obtain other reasonably comparable employment. But the onus is on the defendant to prove not only failure in fact but that had the plaintiff taken reasonable steps to mitigate, he would have been likely to obtain comparable alternative employment. (See Munana v MacMillan Bloedel Limited [1997] 2AC WS 304 (BCSC)"

It is also the law that the defendant must prove that alternative job opportunities were available. This point was put in Edge v Kilborn Engineering (BC) Limited, supra, as follows:

> "Turning now to the question of other potential job opportunities Copies of ads from various newspapers were put into evidence for purpose of indicating jobs that could have been obtained by the plaintiff had he only tried. By way of reply the plaintiff said many of these were outside his field of expertise or were at a lower level of employment, were outside of British Columbia or were unsuitable for various reasons. Again, it seems to me that rather than just produce newspaper ads, if it relies on these ads, it should produce the employer who placed them so he can be cross-examined. A newspaper cannot be cross-examined. The defendant must prove that the job was available, the length of its term its nature and the rate of pay. Only then can a Judge decide whether or not it was reasonable for the plaintiff to turn the offer down".

It is plainly clear from the foregoing authorities that the onus on an employer to prove non-mitigation is by no means a small one: see Michaels v Red Deer College, supra, where I asking CJ said:

> "But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame".

I momentarily pause to observe that the case of Malawi Environmental Endowment Trust v Kalowekamo [2008] MLLR 237 (HC) is often cited as authority for the

proposition that an employee should demonstrate through production of employment application letters and negative responses. The court discussed the issue in three sentences as follows at page 242:

"This leads to ground 2 of the appeal which is that the court erred in ruling that the respondent had successfully mitigated his loss. On this aspect there was no evidence on the basis of which the court could have found that the respondent had through employment application letters and negative responses thereto tried in vain to seek alternative employment in order to mitigate the loss from the non – renewal of his contract. The court would therefore agree with the appellant that the respondent did not mitigate his loss and therefore ground 2 of the appeal succeeds."

With due respect, the decision on mitigation of losses in Malawi Environmental Endowment Trust v Kalowekamo was reached per incuriam: there was no consideration of relevant authorities.

109. He then submitted that the onus to prove that there was no mitigation of loss lay on the part of the appellant. And that it should tell the court which opportunities were available to him at same benefits as those he had at the appellant. And that as it turns from the record the appellant has not discharged that burden.

110. Without prejudice to the foregoing, the respondent asserted that he did find a job at PTC Limited at a much lower salary. And that the appellant and PTC Limited are in same group of Companies. PTC Limited decided not to confirm the respondent after he had worked with them for 7 months.

111. He observed that the appellant has alluded to the issue of job of Deputy Director at ACB. He observed he was eventually offered the job. He then submitted that the court should take judicial notice that these are essentially political appointments. And that with the change of the party in power after 23rd June, 2020 Presidential Elections there is no guarantee that he would continue to be in that position.

112. Further, that the civil service does not pay as the private sector. He asserted that at Burco and later the appellant, he was earning the sum of K51, 700,000 per annum and that this translates to K4, 308, 333.33 per month. He added that the job in the civil service which is only for a 4 years contract from February, 2019 is only paying MK1, 649, 227.

113. He then asked this Court to note the following in respect of the job at Anti-Corruption Bureau, namely, that it is not a permanent job as is only on a 4 years contract; it is only paying K1, 649, 227 gross per month as opposed to MK4, 308, 333.33 per month that he was earning at the appellant and that it is very absurd for the appellant to suggest even for a moment that the job at ACB extinguishes loss that he has suffered as a direct result of illegal action taken by it considering the low pay from this job.

114. The respondent then observed that this Court will note that the appellant has placed total reliance on Section 63 of the Employment Act in its arguments in this matter. But that this case is not one of unfair dismissal. He asserted that all the authorities that the appellant has cited are authorities for compensation for unfair dismissal. But that the judgment of the lower court does not state that the wrong committed by the appellant is unfair dismissal. Further, that the lower Court did not order compensation for unfair dismissal. He stated that it is clear that the appellant clearly misunderstood the issue in this case. He submitted that Section 63 does not apply because that provision is applicable where the court finds that there is unfair dismissal which is not the case in this matter.

115. He pointed out that it has always been his understanding that this is not a case of unfair dismissal. And that this is why even in his submissions on the issue of compensation in the lower court (see document 22 in the record of appeal) he never made reference to unfair dismissal let alone Section 63 of the Employment Act.

116. He asserted that the appellant has continued to mislead itself even in its submissions. That in paragraph 7.2 on page 34 it argues that "if the court finds that the respondent was not unfairly dismissed…". And that this is misleading because this case is not about unfair dismissal and unfair dismissal was not even pleaded in Amended IRC Form 1. He noted that the appellant goes on to argue that in the event that the court finds that he was unfairly dismissed, he should be awarded 12 days remuneration or one month salary. He submitted that it is clear that even the appellant itself is not sure of what position to take when it makes this submission. He asserted that, however, he is not surprised because the compensation being suggested, on the basis that this is a case of unfair dismissal, which is not, is not supported by case

authorities on unfair dismissal which the appellant wrongly think that this case is about.

117. He then asserted that even in matters of compensation for unfair dismissal under section 63(4) of the Employment Act compensations are not as ridiculous as suggested by the appellant in its submissions. For example he pointed out that in the case of *Mwasi & Others v Malawi Revenue Authority* matter no's IRC 448 and 554 of 2010 later on appeal as *Mwasi and others v Malawi Revenue Authority* civil appeal no 13 of 2015 the applicants were awarded 42 months remuneration as compensation. This award was later confirmed by the court on appeal. In *Kamoto v Limbe Leaf Tobacco Company Limited* MSCA Civil Appeal no 248 of 2010. The IRC awarded the applicant 12 months remuneration. Later on further appeal to the Supreme Court of Appeal the award of 15 months remuneration confirmed by the court. In *Banda v First Capital Bank Limited* matter no IRC PR582 OF 2018 the court awarded 26 months' salary as compensation for unfair dismissal. And in the case of *Kachinjika v Portland Cement Company Limited* [2008] MLLR 161 which is one of the cases heavily relied on by the appellant the High Court awarded 48 months remuneration as compensation for unfair dismissal.

118. He concluded that the loss in this matter is colossal. And that the manner of sending him packing is callous so much that even if it proceeded as a claim for compensation for unfair dismissal the only effective remedy could have been what the lower court awarded.

119. The appellant replied to the respondent's arguments and observed that the respondent argues that his is a unique case involving transfer of contract of employment from one employer to another upon sale of the business of the former to the latter employer. Further, that he also argues that his case is also unique because it is not one of unfair dismissal but retirement. And that the implication from the alleged uniqueness of his case is that it must be treated differently from the rest of cases where the court finds that the termination of the employee's employment was unlawful or unfair. And that the respondent advances this argument to justify the lower court's decision in awarding him all the remuneration from the effective date of termination of his employment (i.e. 31 August, 2016) to the date he would have retired from employment in October, 2024 at the age of 60 years in accordance with Burco terms and conditions of service.

120. The appellant then submitted that that it is clear to see, without much difficulty, that the respondent's argument in this regard is tantamount to splitting hairs. And that this is why: that if the respondent's contention is that the applicable terms and conditions of service were those of Burco and that by reason thereof he should have retired at the age of 60 years in October 2024, then, if that position is correct in law, which is denied, the early termination of his employment by the appellant was unlawful. And that it would mean there was no valid reason for such termination as required by section 57 of the Employment Act and it is therefore an unfair dismissal as provided in section 58 of that Act. Further, that the termination that occurred in this case, if found to have been wrongful or unlawful or to have been in breach of the respondent's contract of employment or howsoever characterised, is still one that falls within the provisions of sections 57 and 58 of the Act.

121. The appellant asserted that the Employment Act does not create or recognise, and the respondent's case does not fall into, some special category of cases in respect of which compensation has to be calculated differently. It added that termination of employment is either wrongful or not. And that it is wrongful and therefore unfair if it is made without a legally valid reason (substantive unfairness) or is made without according the employee the right to be heard in a case where hearing the employee first is required (procedural unfairness) in accordance with section 57 of the Act.

122. It concluded that, there is nothing esoteric about the respondent's case that it has failed to grasp as the respondent supposes. And that as it understands, this is essentially a simple case of the respondent's employment contract having been terminated, lawfully or unlawfully, before the date the respondent contends should have been his retirement date.

123. On the amount of compensation, the appellant submitted that, if this Court still finds that the termination of the respondent's contract was wrongful or unlawful, then the termination amounted to unfair dismissal in accordance with section 58 of the Act. And that it means there was no valid reason for terminating the contract as required by section 57. And that, if that is the case, it does not see how the authorities cited on unfair dismissal compensation should not apply.

124. The appellant noted that the respondent has raised arguments about mitigation of loss and says that the appellant did not plead the issue of mitigation of loss. It asserted that it is of the view that the respondent has gotten it all wrong with regard to the issue of mitigation of loss. It asserted further that there is nowhere in its case where it alleged that the respondent failed to mitigate his loss. It asserted that its argument was and still remains the exact opposite of what the respondent is now arguing. It pointed out that its argument was/is that 12 days after the effective date of termination of his employment contract (that is, 31st August, 2016), the respondent found a new job with Peoples Trading Centre Limited ("PTC") on 12 September, 2016 which should count for mitigation of loss. And that he remained in that job until 7 April, 2017. And that it is for that reason that it argued that the respondent should have been compensated for the time he was not in employment between 31 August, 2016 and 12 September, 2016. It asserted that this is a legitimate argument because the authorities require every dismissed employee to mitigate his loss by seeking alternative employment and the respondent having found another job at PTC and later on a job at the Anti-Corruption Bureau as Deputy Director, it really is eye-popping for the court to order the appellant to pay him for all the years up to the date he will attain the age of 60 years in 2024 disregarding the fact that he is in gainful employment. And in short, that it is not its case that the respondent failed to mitigate his loss. Rather, that he did.

125. The appellant noted that the respondent has taken a swipe at it for having cited a dictum from Mwaungulu, JA's dissenting opinion in the Supreme Court decision in *Malawi Revenue Authority v Kandulu* and has argued that the appellant was misleading this Court. It however thinks that the charge is both misconceived and misplaced. It noted that, as rightly pointed out by the respondent, the majority of the members chose to dispose of the appeal on the basis of the preliminary issue on a technicality raised by the respondent in that case which was that the appeal to the Supreme Court arose from the High Court decision in exercise of its appellate jurisdiction in an appeal from the IRC's decision. And that according to the Supreme Court of Appeal Act and the Rules thereunder, the appellant needed to have obtained the leave of either the court below or the Supreme Court for it to appeal to the Supreme Court and it did not. It noted that the majority dismissed the appeal

on that basis. But that this cannot and does not mean that in his dissenting opinion on the substance of the appeal on which the majority did not express their opinion, Mwaungulu JA did not state the law correctly on issue of mitigation of loss. And that, in fact, Mwaungulu JA's statement of law on mitigation of loss is very much in agreement with the authorities cited in its arguments in this appeal.

126. This Court wishes to address this matter straight away by stating that the respondent was properly entitled to take the view he took with regard to the manner in which the appellant cited the dissenting views in the *Kandulu case* representing them as the views of the Supreme Court without specifying that the said views were in fact dissenting views. A dissenting view ought to be indicated as such when cited otherwise it would be misleading indeed to represent such a view as otherwise than what it is.

127. In the premises, the appellant submitted that the appropriate amount of compensation is the remuneration the respondent lost in the 12 days from 31 August, 2016 to 12 September, 2016 before he found another job at PTC. Alternatively, that if the court is of the view that the respondent should get more in compensation than 12 days' remuneration, then that compensation of not more than one month's remuneration would be adequate given the fact that the respondent is in gainful employment. And that in no event should the compensation exceed six months' remuneration which is K25,850,000 given that his gross salary (Total Cost to Employer) per annum was K51,700,000. And the appellant referred to the respondent's final pay slip annexed to exhibit EB6 which is in turn annexed to document 5 of the record of appeal.

128. The first issue for determination is whether the loss herein has to be assessed on the basis of unfair dismissal or other basis. The parties are opposed on that issue.

129. This Court is persuaded by the appellant's argument that notwithstanding that the respondent was sent on retirement in breach of contract the end result is that he was dismissed for no valid reason as per section 57 and 58 of the Employment Act and therefore the assessment of loss has to be on the same footing as on unfair dismissal as provided under section 63 of the Employment Act.

130. The respondent's contention that this case is unique in that it is about transfer of a contract on the prevailing terms under section 32 (2) of the

Employment Act and that in breach of the said terms the respondent has been retired does not make any difference. What matters is that the respondent's employment was terminated and in the circumstances there was no valid reason for such termination considering that he was set to work until retirement at the age of 60 years but for retired before that age.

131. The fact that the respondent chose not to refer to unfair dismissal or that he did not characterize his claims for loss as compensation does not make any difference. The totality of the facts do show that there was an unfair dismissal by reason of breach of contract and consequent retirement of the respondent. His contract of employment was terminated without any valid reason. As a result, his loss has to be assessed in line with the prescriptions under the Employment Act for unfair dismissal.

132. This takes this Court to the next issue of the level of loss suffered by the respondent for which he must be compensated. There are two divergent authorities on the assessment of loss. There are those authorities which hold that the unlawfully retired employee be paid salaries from the date of unlawful retirement to the date the employee was due to retire according to the contract. Then there are those authorities that hold that it is not just and equitable to award such salaries up to the date of retirement but rather that the employee be awarded compensation up to the time he may reasonably get new employment.

133. The first set of authorities as cited by the parties include *Dr. Chawani v Attorney General* [2008] MLLR 1, *Phiri and others v Minister of State in the President's Office and another* [2008] MLLR 264 and *Brigadier Kalumo v Attorney General* [1995] 312 MLR 669. On the other hand there are those authorities where a reasonable sum represented by a number of months' worth of salaries are awarded under section 63(4) of the Employment Act for unfair dismissal and these include *Mwasi and others v Malawi Revenue Authority* civil appeal no 13 of 2015 (High Court) (unreported), *Kamoto v Limbe Leaf Tobacco Company Limited* MSCA Civil Appeal no 248 of 2010 and *Kachinjinga v Portland Cement Company Limited* [2008] MLLR 161.

134. What this Court wishes to state is that it is clear that the first set of authorities was decided before the advent of the Employment Act. It is clear that the Courts were dealing with the employment issues under the judicial review process in the early case such as *Chawani* and *Kalumo*. Since those

cases were decided, Parliament has enacted the Employment Act to govern how compensation for loss due to violation of employment rights is to be determined. This Court must follow the dictates of the Employment Act in determining the loss in cases of violation of employment rights. The determination of loss is supposed to be just and equitable. Parliament determined that the effective remedy for violation of employment rights is to be contained in the Employment Act.

135. It is therefore not correct for claimants to attempt to bypass the Employment Act and fashion claims in such a way that they appear to be outside the Employment Act in terms of determination of loss where there has in fact been termination of employment for no valid reason. It is also wrong for the lower court to be awarding compensation from the date of termination of employment up to date of retirement when that is clearly not just and equitable.

136. With the advent of the Employment Act that is the law that dictates determination of loss. The early cases of *Dr Chawani* and others like it do not hold any longer.

137. This Court observes that the appellant contends that the respondent mitigated his loss by obtaining employment 12 days after he got retired and that he must therefore be awarded loss for a period of one month. As correctly submitted by the respondent, such a decision would be a mockery of justice.

138. As correctly submitted by the appellant, the basis of assessment of compensation in cases of unfair dismissal is section 63 (4) (5) of the Employment Act which among other things advocates for an award which is just and equitable in the circumstances. And that sub section (5) further sets the minimum compensation to be considered by the court. Further, that in determining what is just and equitable, the court must factor in considerations of the employee's marketability and mitigation of loss. A dismissed employee is not entitled to treatment as if the contract of employment still subsisted and to be paid all the remuneration until retirement.

139. The respondent herein served at least 10 years by the time he got unlawfully retired and unfairly dismissed. In terms of section 63 (5) (b) of the Employment Act the minimum compensation due to the respondent is two week's pay for each year of service having served for more than five years but not more than ten years. He was employed on 6th October 2006 and his

employment was terminated in August 2016. Regard must be had to these minimum scales of compensation as noted in the case of *Lemson Chitawo and another v Malawi Property Investment Company Limited* [2013] MLR 168 (SCA).

140. The appellant cannot therefore say the respondent mitigated his loss and should therefore be awarded a month's salary as compensation as that would go below the statutory minimum provided in the Employment Act.

141. The respondent's weekly pay is his annual pay divide by the number of weeks in a year. That is K51 700 000 divide by 52 weeks giving us K994 230. Two weeks' pay is K1 988 460. So for the close to 10 years the respondent served, the minimum compensation due to him is K1 988 460 multiplied by 10 which is K19 884 600. Whatever loss is determined by this Court cannot go below the sum of K19 884 600. This Court cannot therefore award a month's salary or such other nominal sum as suggested by the appellant as it would be below the statutory minimum award due.

142. Again, This Court cannot award the minimum as was the case in *Phiri v Dignitas International (Malawi) Limited* because unlike in that case, in the present case the wrongful conduct was unilateral on the appellant's part and the respondent was completely innocent.

143. This Court has observed that the respondent in fact lost his employment and got employed at a lesser pay that was due to him with the appellant. He got a job with PTC Limited and later the Anti-Corruption Bureau. The respondent is on a four year contract since February 2019 and earns K1, 649, 227 gross per month as opposed to MK4, 308, 333.33 per month which he used to earn with the appellant. His monthly loss has been K2 659 106 since February 2019. For the seven months he worked with PTC Limited between September 2016 and April 2017 he earned a monthly salary of K2 100 000 representing a monthly loss of K2 208 333.

144. In the circumstances of this case this Court considers that it is just and equitable to award the respondent 28 months' pay as his loss considering that he worked for Burco for close to 10 years and got retired before his mandatory age when he had about nine years to go. This Court is also of the view that the earnings that the respondent is getting from the job at the Anti-Corruption, which has held since February 2019 to date, coupled with the lump sum for the 28 months should be just and equitable compensation.

145. Considering what the respondent has been earning at PTC Limited and at the Anti-Corruption Bureau his loss is assessed at 28 months. For the first seven months from September 2016 to April 2017 his loss is K2 208 333 per month multiplied by seven which translates to K15 458 331. For the period between May 2017 to February 2019 his monthly loss, which was without any earnings, is at K4 308 333 multiplied by 21 months and translates to K90 474 993. The total loss for the 28 months is therefore assessed at K105 933 324.

146. All the grounds of appeal advanced by the appellant on assessment of loss therefore do succeed but subject to the new sum of loss ordered as compensation as determined by this Court.

147. Each party shall bear its own costs on this appeal considering that in employment matters costs are not ordinarily given except in the cases specified under section 72 of the Labour Relations Act.

148. In the case of *First Merchant Bank Limited v Mkaka and 13 Others* MSCA Civil Appeal No. 53 of 2013 (Unreported), Chipeta, JA delivering the majority decision of the Court stated as follows on the question of costs in employment matters:

> We remain with the appeal relating to the Order of costs. On this point, upon bearing in mind Section 72 of the Labour Relations Act and upon considering all the arguments the parties have exchanged, we are of the view that the law governing employment matters that are commenced in the Industrial Relations Court clearly points to an approach that does not hinder access to justice in such matters. The law has taken away the obligation to suffer costs on account of petitioning the Court for relief on labour matters. To hope or believe that such matters would begin and end in the Court of first instance would be too idealistic. To then say parties are only free from the yoke of bearing costs when the matter is in the primary Court, but that they must be ready to face even colossal costs should their case graduate into an appeal or appeals thereafter, we believe, would easily freeze any aggrieved person's intentions to even just commence litigation for fear of the unknown. It would stifle the development of jurisprudence in labour matters. We believe therefore that just as the Respondents must have been happy to commence and prosecute their claim without prospect of having to bear the costs of litigation on loss of their case, had they lost it, they would not be entitled to reap costs from the appellant just because of the appellant's desire to try out for a different brand of justice in the higher Courts. We agree, therefore, with the Appellant that it did not deserve to be

condemned in costs as it was done just because it chose to exercise its right to seek justice in two higher courts. We accordingly reverse the High Court's order on costs, and substitute it with an order requiring each party to bear its own costs.

Made in open court at Blantyre this 10th September 2020.

M.A. Tembo
JUDGE