



The Malawi Judiciary
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION
CIVIL CAUSE NUMBER 1510 OF 2015

Between:-

SEARGENT RASHID JILANI.....CLAIMANT

-And-

ATTORNEY GENERAL (MALAWI POLICE SERVICE).....DEFENDANT

Coram:

Hon Brian Sambo, Assistant Registrar

Mr. Umali Mataka, of counsel for the Claimant

Mr. Chiletso Mataka, of counsel for the Defendant

Mr. H.L. Matope, Court Clerk/Official Interpreter

ORDER ON ASSESSMENT OF COMPENSATION

Introduction

The present assessment follows the judgment entered by the judge for the Claimant on the 25th of June, 2021 for the following;

- i. Compensation for unfair dismissal
- ii. Severance pay
- iii. Withheld salaries from 29th January, 2014 to 2019
- iv. Pension benefits
- v. Unpaid leave days – leave grant from 2014 – 2016

- vi. Notice pay
- vii. Costs of this action.

On 2nd March, 2022 I heard the evidence on assessment, *interparte*. Both parties filed submissions for the assessment which I will talk about later on. In the meantime, let me turn to brief facts of this matter.

Brief Facts

The Claimant was a police officer in the Malawi Police Service stationed at Limbe Police Station. His employer found him with a misconduct for which he was dismissed on 29th January, 2014. Upon being subjected to an initial hearing, he sought review of the decision by the first Disciplinary Hearing Committee. The Review Committee upheld the first decision on liability but set aside the verdict of dismissal and instead meted out a different punishment; his one week salary was deducted as a means of punishment, and he was eventually re-instated. He was, however astonished that in a short-while, he was handed a letter of dismissal despite the re-instatement. He was dismissed at the rank of 'sergeant'.

Evidence in Brief

The Claimant was the sole witness in his case. Having adopted and tendered his witness statement, he sought an amplification to the extent that the Defendant had dismissed him without following procedures and in the absence of evidence against him. He said, at the time of his dismissal, he was on the rank of a sergeant, and was receiving a monthly net salary of MK42,000. He tendered three pay slips (marked PEX 1a) in support of his assertion. He further told the court that he was also entitled to 21 leave days and an attendant leave grant of MK9000.00/year.

During cross examination he said he was dismissed after being heard. He said he did not accept to have done anything wrong warranting his dismissal. He told the court that he received his last salary in January, 2014. He said because of the dismissal he was deprived of the 10% annual increment given to public servants. He told the court that he had no evidence that salaries had been increased by 10% in those years. He said he was on pension scheme. He went on to tell the court that he knew that pension money was not being kept by his employer. He added that he had 10 years to go before mandatory retirement. He said, apart from damages for unfair dismissal, he was also praying for his benefits that he had missed because of the dismissal, such as leave grants.

In re-examination he told the court that he was suspended in August, 2014. He said he did not know why he was suspended from his duties. He went on to tell the court that he asked the administration to review their decision

suspending me. He told the court that he was finally dismissed in August, 2019, and by that time, he had already worked for 24 years, and he was remaining with 10 years to reach his mandatory retirement age. He said, at the time of his dismissal he was receiving between MK39, 000.00 and MK49, 000.00 monthly salary. He stated that he was justified to ask for salaries for the 10 years that were cut short by the unfair dismissal because he did not resign from the service but was unlawfully dismissed.

Issues for Determination

The only issue is the quantum of damages and terminal benefits payable by the Defendant to the Claimant in the circumstances.

Determination

The present matter revolves around issues of dismissal and attendant remedies. What took place here should automatically draw the court to issues of respective obligations between the employer and the employee in the employment relationship.

On the part of the employer, the first obligation that comes to mind is the duty to act in good faith. This duty entails that an employer should not act towards an employee in such a way that would erode the employee's trust and confidence in him- **Imperial Group Pension Trust vs. Imperial Tobacco Ltd** (1991)2 ALL ER, 597. Admittedly, this duty is reciprocal.

This duty prohibits unreasonable conduct on the part of the employer which conduct an employee would not ordinarily be expected to take. In **Banda vs. Dimon (Malawi) Limited** (2008) MLLR, 92, Ndovi, J stated at 100:

"There is also an implied term of the contract of employment that the employers will not behave in a way which is not in accordance with good industrial practice to such an extent that the situation is intolerable or is such that an employee cannot be expected to put up with any longer ..."

Such practice may include discrimination and variation of terms of contract (**Banda vs. Dimon (MLW) Ltd**, (cited above) and demotion (See: **Nazombe vs. Malawi Electoral Commission** (2008) MLLR, 460). See also: **Kamkosi vs. Office of the Ombudsman** (2008) MLLR, 418 where the boss; ombudsman invited secretary for dinner.

The employer has also a duty to pay remuneration. The very existence of employment contract, entails provision of services in exchange of payment of remuneration- see definition of an employee under section 3 of the EA.

An employee will still be paid even where he is temporarily absent from work on justifiable grounds. See: **Hartwell vs. Central African Transport Co., 1** ALR (Mal), 29 and **Banda vs. Cilcon Ltd**, 14 MLR, 21. The employer is not

however, under obligation to pay an employee who has absented himself without permission and without reasonable cause. It is also settled that, before an employer can withhold payment, he first needs to conduct a hearing against the concerned employee as this is like a punishment. See also **Kakande vs. Beta Ltd**, 16(1) MLR 143 and **Maonga & Others vs. Blantyre Print & Publishing Co. Ltd**, 14 MLR, 240.

The employee has duty to obey employer's orders. From time to time, the employer may give instructions on what and how it should be done. The employee is therefore under obligation to obey any reasonable and lawful instructions from the employer. Failure to do so is what has also been termed insubordination and entitled an employer to summarily dismiss the employee according to section 59(1) (e) of the EA. See also **Magalasi vs. National Bank of Malawi Limited** (2008) MLLR, 45 (SCA).

It should, however be borne in mind that for failure to obey orders to amount to misconduct, two things must be satisfied. First, the orders must be within job description, according to **Ntaba vs. Continental Discount House** (2008) MLLR, 472 where the boss asked his secretary to accompany him to the lake over the week-end, and also **Gladys Matiki vs. Cure International**, Matter No. IRC 234 of 2004 where the secretary was subjected to a disciplinary action for refusing to attend a party.

In addition to the above, the orders must be reasonable and lawful as observed in **Sam Nthini vs. Energem Petroleum Limited**, Matter No. PR 513 of 2007, and **Magalasi vs. National Bank of Malawi Limited** (above-cited).

An employee has a duty to preserve mutual confidence and trust. Employment relationship entails mutual trust and confidence between the parties.

In **Kettie Mukamba vs. Malawi Revenue Authority, Matter No. IRC 101 of 2008**, the Court stated:

"One of the mutual implied term of the contract of employment is preservation of mutual trust and confidence. Thus both the employer and the employee are prevented from conducting themselves in such a manner that breaches this duty."

The other area to consider in this case has to do with statutory implied rights and obligations. Regard being had to the unequal bargaining power between the employer and the employee, statutory law has come in to protect the employee by imposing on the employer some obligations to ensure minimum standards to be complied with in every employment contract.

According to section 2(3) of the Labour Relations Act, any term of employment contract which infringes on these statutory provisions is void. See also **Mwanamanga vs. Malamulo Mission Hospital** (2008) MLLR, 457.

Regarding the issue of fair labour practices, by section 31 of the Constitutions, every person has a right to fair labour practices. It has been held that fair labour practices entail reasonable, fair and even handed practices by an employer towards employee. In **Gwemba vs. Namiwawa Hotels, Matter No. 132 of 2003**, the Court stated:

“S. 31 of the Constitution entitles the employee to a right to fair labour practices. Fair labour practices have not been defined in our laws. But surely they constitute fair, reasonable and even-handed practices by the employer towards the employees”

According to **Chilala and Others vs. Petroleum Service (Mw) Ltd, Matter No. IRC 158 of 2000**, one cannot outline an exhaustive list of what may be included within the scope of fair labour practices as the expression may apply to and include wide range of issues within employment relations. In **Chilala and Others vs. Petroleum Service (Mw) Ltd**, (above) the court stated:

“The term ‘unfair labour practices’ includes a wide range of issues. For example, unfair conduct by the employer relating to promotion, demotion or training of an employee or provision of benefits to an employee”

What is clear is that no exhaustive list can be given of what amounts to unfair labour practices. It is the duty of the court to determine on the facts of a particular case whether there was unfair labour practice. In **Kachinjika vs. Portland Cement Co (2008) MLLR, 161**, Chikopa, J stated at 172:

“Whereas we generally agree that neither the Constitution nor the Labour Relations Act define what fair labour practices are, we think that courts should where possible not refrain from expressing an opinion on whether or not a particular practice in a particular set of circumstances amounted to fair or unfair labour practices.”

Finally, it has to be noted that a practice does not cease to be unfair simply because it is in accordance with the law or in accordance with the employment contract. According to Mwaungulu, J (as then he was) in **S. Kalinda vs. Limbe Leaf Tobacco Limited**, Civil Cause No. 542 of 1995, the practice may so be in accordance with the law but still be unfair. See also **Kachinjika vs. Portland Cement Company** (2008) MLLR, 161.

It has to be noted that the right to fair labour practices is not exclusively for the employees but it equally accrues to the employers. Again, the right is not restricted to natural persons but it extends to legal persons. See: **Dickiel Kusainda vs. Petroleum Importers Limited**, Matter No. 187 of 2007.

This court appreciates that the Claimant herein was duly charged and tried by the Defendant, and was found liable for the wrong that he was accused of. His wages were deducted as a punishment for the wrong he had committed and was re-instated on review. To his surprise, and to the surprise of this court, he was still dismissed. This is where the unfair dismissal took place. The same defendant that had meted the punishment on the Claimant and re-instated him acted in the contrary by dismissing him, even without hearing him. It is true he was heard at first, and also on review where he was re-stated but was not heard when the defendant overruled their own decision by dismissing the Claimant. Looking at the circumstances above, one could simply draw an inference that the Defendant had acted in bad faith; one cannot re-instate an employee and at the same time dismiss him. He should nevertheless be adequately compensated. I know the Claimant will not be entitled to full compensation because he was, somehow an architect of his own fait by committing that wrong. He thus failed to mitigate his own damages, and must, equitably suffer the consequences of his own misconduct. Assuming the Claimant was never caught into any misconduct, I would have awarded him **MK9, 000,000.00**. For that reason, I award him **MK4, 500,000.00** being damages for unfair dismissal.

Severance Pay and Notice Pay

Severance Allowance is not necessarily, strictly speaking, a remedy for unfair dismissal as it is awardable even in cases of mutual termination. It has however been discussed here because of the closeness it has with unfair dismissal. By section 35(1), on termination of contract, by mutual agreement with the employer or unilaterally by the employer, the employee is entitled to severance allowance to be calculated in accordance with the first schedule to the Act.

Severance allowance is statutory. It is defined in simple terms a 'thank you' from the employer to the employee for the service rendered over a given period of time. However, in the present case, severance pay cannot be awarded as the Claimant is entitled to pension benefits. The mere fact that pension is attendant, it is as if the Claimant's contract of employment was never terminated; he gets the benefits for the whole period that he was, by contract, entitled to receive if he had remained in service until mandatory retirement time.

To that extent I concur with counsel for the Defendant to the extent that under section 73 of the Police Act, the Inspector General of Malawi Police Service may exercise his powers to retire any of his staff including the Claimant; as such severance pay and notice pay do not arise. Therefore, if the Claimant

has been retired, he cannot claim notice pay and severance pay. Admittedly, I will be wrong to award them.

Unpaid Salary

Salary is a fundamental term of any employment contract. In the present matter, the Respondent did not pay the Applicant her salary for the remaining 56 months. According to Twea, J (as he then was) in **Stanbic Bank Limited v Richard Mtukula**, MSCA Civil Appeal Case No. 34 of 2016 (Being High Court Civil Appeal Case No. 24 of 2004), stated that an employee terminated in these circumstances is entitled to her remaining wages.

The Claimant in his supplementary witness statement for assessment averred that he was receiving a monthly salary of MK190, 000.33 per month but the pay slips he attached and tendered showed that his monthly net salary was MK39, 865.40. The three pay slips that he had tendered carried different amounts. Actually, the pay slip with the highest amount was inclusive of special salary arrears. What is clear is that his true monthly net salary at the time of his dismissal was MK39, 865.40. This being a court of evidence, I will go for the amount that was duly supported by the evidence of pay slips.

Calculating his total withheld salary from January, 2014 to June, 2019 (a total of 78 months) comes up to **MK3, 109,501.20**. (78 months x MK39, 865.40). This is what he will get as withheld salaries.

Pension

The Defendant herein is also required to pay other contractual terminal benefits such as pension. These however are contractual. By section 53(1) of the Employment Act, wages and other remuneration due to the employee on the termination or completion of his employment must be paid within 7 days from the termination or completion. By sub-section 2, pension due, must be paid within 6 weeks. It has however, been held that mere delay in paying terminal benefits does not of itself entitle the employee to interest on the same. See: **Kankhwangwa vs. Liquidator, Import & Export Malawi Ltd**, (2008) MLLR, 26. In the instant case, the Claimant is entitled to **MK8, 437, 877.43** ((Lump Sum x 0.75/12) x Service Period) being pension due. The Defendant submitted MK6, 437,877.33 as total pension while the Claimant found MK16, 929, 028.51 as his pension. None of the parties showed how they had arrived at their respective answers.

Unpaid Leave Grants

These were contractual. They have to be assessed. It is in evidence that the Claimant was entitled to MK9000/Annum as leave grant. He did not receive his leave grant for 6 years (2014 - 2019). He is therefore entitled to **MK54,**

000.00. I do not know why the Claimant exaggerated the amount of leave grant payable to MK168, 000.00 when he himself under paragraph 14 of his initial witness statement submitted that he was entitled to 21 days of leave and MK9, 000.00 leave grant. I will award him what has been duly supported by evidence; and that is **MK54, 000.00.**

Party and Party Costs.

This is a labour matter, and ordinarily costs should have been thrown away. However, this is a 2015 matter and, obviously costs should be synonymous. Costs are within the discretion of the court. It has exercised my mind that I should not occasion further delay by allowing costs to be assessed separately. I have the court record with me, and therefore, I can ably determine the level of costs attendant. I know the level of work output showcased. I know the experience at the bar of counsel for the receiving party, and definitely, I should be able to, justly and fairly, prescribe the amount of party and party costs to be awarded. In this case I award the receiving party **MK3, 000,000.00** under this head.

Conclusion

In conclusion, I award the Claimant as follows:

- a. **MK4, 500,000.00** being damages for unfair dismissal.
- b. **MK3, 109,501.20.** being unpaid salaries for the remaining 56 months
- c. **MK54,000.00** being outstanding leave grants.
- d. **MK8, 437, 877.43** being pension.
- e. **MK3, 000,000.00** being party and party costs.

The total sum awarded to the Claimant is, therefore **MK19, 101,378.63.** The Defendant should pay the whole sum within 6 weeks from the date of this order.

Made in Chambers today Monday the 4th of April, 2022.

Brian Sambo
Assistant Registrar

