The Malawi Judiciary

IN THE INDUSTRIAL RELATIONS COURT
SITTING AT THE LILONGWE DISTRICT REGISTRY

MATTER NO. IRC (LL) 723 of 2021

In the Dispute Between:

EMMANUEL MATAPA..... 1st APPLICANT

AUDA MSISKA..... 2nd APPLICANT

AND

THE ROADS AUTHORITY..... RESPONDENTS

CORAM: **Austin B. B. Msowoya,** Chairman
Nthunde, Court Clerk
@ the Bar :
Nkhutabasa & Kubwalo, for Applicants
Chitukula, for Respondents

ORDER ON ASSESSMENT OF COMPENSATION

Msowoya, A. B. B.,

This is an order of compensation for unfair dismissal in a suit applicants brought against their former employer, the Roads Authority. The order itself is made after a hearing to assess compensation was conducted in the wake of a consent judgment by which respondents conceded liability in an out of court settlement. By the terms of the settlement, it appears the parties failed to reach agreement on compensation, which necessitated the hearing to assess compensation. First, however, a narration of the facts giving rise to applicants' suit. As will be clearly evident, the facts themselves are not at all in dispute.

Mr. Emmanuel Matapa, first applicant, was employed by respondents in 2001 as Project Engineer responsible for urban and district roads. He was initially employed on a three-year contract. At the expiry of that contract, his employment was converted from a fixed term contract to a permanent and pensionable contract of employment for an unspecified period of time.

Under the ensuing contract, Mr. Matapa served respondents for some 16 odd years in various positions, including as Maintenance Engineer, Chief Engineer and Director of Maintenance. Ultimately, he was appointed Chief Executive Officer in 2017. Like his

initial contract as Projects Engineer in 2001, his contract as Chief Executive Officer was a fixed term contract of three-years. Specifically, that contract commenced on August 5, 2017 to run until August 4, 2020. Upon expiry, respondents renewed his contract for another three years from August 5, 2020 through to August 4, 2023.

On the other hand, second applicant, Ms. Auda Msiska, was first employed by respondents as an accountant in October of 1999. She gradually rose through various positions through promotions until her appointment as Director of Corporate Services.

Unlike first applicant, second applicant's employment comprised entirely a series of fixed term contracts, spanning at least three years apiece. As will presently become clear, this distinction in the type and duration between first and second applicants' contracts of employment implicates different outcomes from the assessment and the measure of compensation each is entitled to and consequently awarded. Similar to first applicant's contracts as Chief Executive Officer, however, her contract as Director of Corporate Services was also a three-year contract, running from January 18, 2020 to January 17, 2023.

As earlier noted, and prior to her appointment and service as Director of Corporate Services, second applicant was promoted and served sequentially as Chief Accountant and Director of Finance. It was during her service as Director of Finance that her position was retitled Director of Corporate Services when respondents restructured and formally became the Roads Authority.

In October 2020, Government appointed a new Board of Directors for the Roads Authority. The newly appointed Board comprised a Mr. Joel (or Joe, if you will) Ching'ani as Chairman and Mr. Byson Mpando as Vice Chairman. The other members of the Board included Dr. Boniface Dulani and Messrs. Evans Kafandiyani, Lameck Msamange, Francis Gondwe, Caesar Fatchi, Abdul Khan, and Inkosi ya Makosi M'Mbelwa V.; with the Secretary for Transport and Public Works and the Secretary for Local Government as ex-officio members. Finally, the Comptroller of Statutory Corporations sat on respondents' Board as a co-opted member.

In their Statement of Claim, applicants allege that beginning in February, 2021, barely four months into his appointment as Chairman, Mr. Ching'ani embarked on an unconcealed campaign to convince respondents' Board to terminate applicants' contracts of employment. This, through several undisguised attempts at different times during Board meetings. In spite of his concerted efforts, the other members on respondents' Board consistently declined to approve Chairman Ching'ani's propositions to terminate applicants' contracts. Finally, after visiting several project sites in a number of districts around the central Region, Chairman Ching'ani purportedly summoned some of the permanent members of the Board to what he, Chairman Ching'ani, referred to as an 'extra-ordinary (dinner) meeting' in the evening of October 26, 2021 at Capital Hotel.

Again, according to applicants' Statement of Claim, during the purported dinner, cum extra-ordinary meeting, Chairman Ching'ani informed the Board members then present that he had found a means by which to terminate applicants' contracts of employment. That he would invoke Clause 4 (b) of applicants' contracts of employment to terminate the contracts. Clause 4 (b) of applicants' contracts of employment provided for termination on notice or payment in lieu.

On October 29, 2021, three days after the purported dinner, cum extra-ordinary meeting, both applicants were summoned by Chairman Ching'ani and were handed letters terminating their contracts, which letters he, Chairman Chning'ani, personally authored.

Needless to say, the letters did not specify any reason or reasons for the termination. Both letters merely stated that applicants' contracts of employment were terminated with immediate effect pursuant to Clause 4 (b) of their contracts.

Now, having carefully perused the case record, I have not come across any Statement of Reply respondents may have filed challenging applicants' Statement of Claim. Indeed, from my close examination and consideration of the suit's historical posture, I do not believe respondents actually filed any statement of reply at all. That observation notwithstanding, and rather surprisingly, respondents, or more specifically, Chairman Ching'ani, himself, unwittingly corroborates applicants' allegations and assertions in the Statement of Claim. This, through an affidavit he swore and filed opposing applicants' motion for an order of urgent interim relief. That affidavit, both under Caps. 4:07 and 54:01 of the Laws of Malawi, the Oaths, Affirmations and Declarations Act and the Labor Relations Act respectively, forms and is part of the evidence on record in this matter.

Tellingly, in said affidavit, Chairman Ching'ani expressly admitted and stated that on the evening of October 26, 2021, he "summoned an extra ordinary (dinner) meeting of the Board to discuss what the Board had seen during the day." Chairman Ching'ani deponed that during the purported dinner, cum extra ordinary meeting, the Board agreed that respondents' management was "not serious with their work." That conclusion, so it would seem, was supposedly grounded on managements' failure to respond to Chairman Ching'ani's inquiries on an incident involving first, the leakage of confidential financial information on social media; insinuations of insubordination towards the Board on applicants' part; allowing the commencement of construction works on a six lane road project in Lilongwe before an Environmental and Social Impact Assessment (ESIA) approval was obtained and finally, allegations of management's *laissez faire* attitude towards the Board in general.

Chairman Ching'ani deponed that on these grounds, the Board resolved to terminate applicants' contracts of employment with immediate effect. According to Chairman Ching'ani's affidavit, the Board resolved to invoke Clause 4 (b) of applicants' contracts of employment to terminate the contracts. Again, in his affidavit, Chairman Ching'ani intimated that invoking Clause 4 (b) was somehow an act of benevolence towards applicants because the Board's resolution and ensuing decision would at least entitle them to some benefits upon termination. Chairman Ching'ani deponed that such benefit principally comprised three months' pay applicants would receive in lieu of notice.

Chairman Ching'ani went on to depone that the dinner, cum extraordinary meeting, was appropriately quorate and could not be faulted in its convening and constitution. That the resolution to terminate applicants' contracts of employment was supported by all Board members who attended the dinner. That he, Chairman Ching'ani, personally contacted those Board members absent at the dinner for their input, who, at least according to Chairman Ching'ani, all agreed with the resolution to terminate applicants' employment contracts.

Responding to applicants' motion for urgent interim relief, among which was a prayer to stay the terminations and order reinstatement pending final disposition of the matter, Chairman Ching'ani prayed in his affidavit that applicants should not be reinstated because the terminations had already been effected. That an acting Chief Executive Officer had already been identified and appointed. That if anything, were the Court to find

applicants were unfairly dismissed, respondents have the capacity to pay any compensation the Court may order applicants be paid. Finally, chairman Ching'ani deponed that the dinner, cum extra ordinary meeting, was a properly convened Extra Ordinary Board meeting since he, as Chairman, had called for it. That on that basis, and because of it, all resolutions made at that dinner, cum extra ordinary board meeting, were valid and legal.

Perhaps it is apt at this point to make mention that both first and second applicants were not in attendance at the dinner, cum extra ordinary meeting on that evening of October 26 at Capital Hotel. Indeed, the evidence strongly suggests they were not invited to attend the dinner in the first place, whether as 'management' or to make representations in their defense against the allegations levelled against them. Second, in his affidavit, Chairman Ching'ani deponed that at the 'extra ordinary (dinner) meeting', the Board agreed that respondents' management was "not serious with their work" on grounds of failure to respond to his inquiries, insinuation of insubordination and their *laissez faire attitude* towards the Board.

From that deposition, however, it is noteworthy that in spite of the intimations that it was respondent's management that was not serious with their work and were insubordinate and displayed a *laissez fair* attitude towards the Board, only applicants' contracts were terminated. The rest of management was not cited nor affected by the dismissals.

Now, as I earlier pointed out, respondents do not seem to have filed a Statement of Reply. To that end, there is no indication whether respondents contend that applicants were properly dismissed. They also do not contend whether applicants were accorded their rights to substantive justice or due process. Instead, on the day appointed for argument of applicants' motion for the order of urgent interim relief, the parties informed the Court that they were contemplating an out of court settlement. In due course, specifically on December 10, 2021, they executed a Consent Judgment they then filed with, and which was duly endorsed by the Court by which respondents admitted liability on the suit for unfair dismissal. In its pertinent parts, the Consent Judgment stated that by consent of the parties, the termination of applicants' employment contracts on October 29, 2021 amounted to unfair dismissal.

This development conclusively determined the question of liability in applicants' favor, thereby disposing the matter and negating the need for a full trial to determine whether the terminations were merited or not. It was on the basis of that admission of liability by concession that the assessment for compensation, the subject of this order, was conducted.

In light of these developments, it is needless to discourse the principles applicable when determining whether a claimant's dismissal was unfair or not. In the case at the Bar, that would clearly be moot, an exercise in academic flippancy. Following respondents' own admission of liability in dismissing applicants unfairly, what remains at this juncture is only to consider what compensation applicants may be entitled to.

At the assessment hearing, both applicants led evidence by giving oral testimony to support their claims for compensation. As will become clear in due course, much of that testimony would not, but for the peculiar nature of this matter, be directly relevant to the measure of compensation they would otherwise be entitled to. This is because, in cases of unfair dismissal, what evidence is significant and relevant, is evidence on which the determination of unfair dismissal itself can be founded. Once such determination has been

made, the award of compensation is primarily and exclusively governed by s. 63 of Cap. 55:01 of the Laws of Malawi, the Employment Act (in places in this opinion, the Employment Act). This means that the measure of compensation a claimant gets upon a finding of unfair dismissal is specifically determined by statute and not the idiosyncrasies of a particular judicial officer. Thus, the measure of compensation is neither haphazard nor arbitrary. Compensation for unfair dismissal under the Employment Act automatically follows the event, that is, the finding of unfair dismissal and is guided by a specific framework outlined in s. 63 of said Act.

On account of the peculiar circumstances obtaining in this matter, the evidence applicants led is tellingly compelling to justify a departure from strictly adhering to the primary compensatory framework outlined in s. 63 of the Act. Such departure, as will be demonstrated, is fully allowed by law. Again, the peculiar circumstances I determine compel such departure will comprehensively be articulated and analyzed in the course of this opinion as required by law.

First off, in *Chifundo Chioko and 59 Others –v- First Capital Bank*, Matter No. IRC 10 of 2020 (Mz) (Unrep.), I paid particular attention to the principles applicable in assessment of compensation for unfair dismissal under the Employment Act. For context, and to ground my reasons for awarding the compensation I make in this order of assessment, which, as intimated, is a departure from the framework in s. 63, it is only proper that I revisit and restate these principles.

To begin with, and as earlier suggested, when assessing compensation for unfair dismissal, the governing legal framework is primarily s. 63 of the Employment Act. On its part, s. 63 (1) first outlines in a hierarchical order what remedies a court is empowered to consider granting. Regarding these remedies, s. 63 provides as follows:

> 63 (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—
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> (*a*) an order for reinstatement whereby the employee is to be treated in all respects as if he had not been dismissed;
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> (*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
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> (c) an award of compensation as specified in subsection (4).
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> (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.
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> (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.
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> (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.
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> (5) The amount to be awarded under subsection (4) shall not be less, than—
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> (*a*) one week's pay for each year of service for an employee who has served for not more than five years;
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> (*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).

(6) Where the Court has made an award of reinstatement or re-engagement and the award is not complied with by the employer, the employee shall be entitled to a special award of an amount equivalent to twelve weeks' wages, in addition to a compensatory award under subsections (4) and (5).

On a finding of unfair dismissal, s. 63 (1) outlines three available remedies a court may grant, laid out in a deferential hierarchy: Reinstatement, reengagement and compensation. Following that hierarchy, s. 63 (2) on its part guides the court specifically to consider reinstatement first before reengagement and compensation, and in that order of precedence. Only where a court determines, for one reason or another, that reinstatement or reengagement are not possible as remedies or are impractical, is it given allowance to consider compensation, what I classify a remedy of last resort under the compensatory framework established under s. 63.

In considering compensation, s. 63(4) requires that such compensation be one the court, in its discretion, considers just and equitable. In considering whether an award is just and equitable, s. 63(4) enjoins the court to take into account three factors. First is the loss sustained by the employee as a consequence of the dismissal. Second is the extent such loss is attributable to an employer's conduct in the manner dismissal was effected. And third is the employee's own conduct as might have caused or contributed to the dismissal. From this extrapolation, and before I justify my determination to depart from the framework of compensation in s. 63(5), a general discussion of the conceptual backdrop of the compensatory framework under the Employment Act is fitting.

First, it is important to comprehend that the conceptual backdrop for assessing compensation in cases of unfair dismissal under the Employment Act differs markedly from assessing damages generally in civil proceedings. This is because when assessing compensation for unfair dismissal, the Court is primarily guided by the provisions of s. 63 of the Employment Act and not the principles applicable in assessing damages generally in civil proceedings in the High Court or magistrates' courts.

When assessing damages in civil proceedings in the High Court or the magistrates' courts, the principle is to put the person claiming damages in the position they would have been in had it not been for the wrong for which damages are claimed. So, for example, when arriving at a sum of money for reparation in personal injury cases, authority is replete and settled that where any injury is to be compensated by damages, as nearly as possible, the court should award a sum of money that will put the injured party in the same position they would have been in had they not suffered the injuries for which damages are sought (see *Ulemu Simoko –v- The Attorney General,* Civil Cause No. 755 of 2011 (Unrep.)*; Livingstone –v- Rawvards Coal Co* (1880) 5 A.C. 25, per Lord Blackburn). As Msosa J. (as she then was) said in *Namwivo –v- Semu et al* (1993) 16 (1) MLR 369, "[S]imply put, this means putting the plaintiff [back] into a position he would have been in had the tort not been committed."

On the other hand, when assessing compensation in cases of unfair dismissal, it is difficult to put a dismissed employee in the same position they would have been in had the dismissal not occurred. This is because putting a dismissed employee in the same position they would have been in before dismissal would essentially implicate reinstatement, along with the restoration to such employee, all salaries, benefits and entitlements they enjoyed

before the dismissal; in reality, something that is not always possible or practical. This, the Act itself acknowledges through expressly recognizing that reinstatement or reengagement might not always be possible. In such cases, s. 63 (4) expressly provides that the overarching principle when awarding compensation in cases of unfair dismissal is that such award be just and equitable. Bearing this overriding principle in mind, when calculating compensation for unfair dismissal, a court should, as a starting point, always follow the framework and formula set and outlined in s. 63 (5).

In *First Merchant Bank Limited –v- Eisenhower Mkaka and Others*, Civil Appeal No. 1 of 2016 (Unrep.), Mkandawire J. (as he then was), expressed this very same principle at p. 4, where he stated:

> In assessing the compensation, the Industrial Relations Court had to stick to the spirit of sections 63 of the Employment Act (sic). Under this provision it is the duration of service before terminations that matters a lot in the calculation of the compensation that must fall due, not the loss of salary, increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation. In the same manner future losses do not matter therefore one cannot talk of loss of earnings up to the time the former employee should have retired. Certainly that is not the spirit of our Employment Act.

This reasoning reflects the very philosophy that underpins s. 63 of the Employment Act. On its part, s. 63 (5) sets out a graduated scheme on which compensation for unfair dismissal should be determined. That scheme is principally dependent on two factors. An employee's remuneration and the length of their actual service, limiting that length of service up to the date of dismissal, and no further. This framework would seem to suggest then that other factors that have routinely been considered by the Industrial Relations Court in the past two decades are irrelevant and inapplicable. So, for example, the asserted marketability of a dismissed employee, their qualifications, experience, including any notions of mitigation of loss and challenges in securing alternative employment, are all otherwise irrelevant. One may argue, but that argument is yet to be settled, that those factors might be relevant where a court determines a departure from the framework outlined in s. 63 (5) is justified. This is because s. 63 itself does not expressly state those factors to be relevant. Instead, s. 63 (4) outlines the factors a court ought to consider when making awards for compensation on a finding of unfair dismissal.

In light of this observation, and in furtherance of the same principle, s. 63 (4) empowers a court, in appropriate cases, to award more than the awards prescribed as the minimum in s. 63 (5). In doing so, s. 63 (4) portends instances where circumstances justify a court's going beyond the minimums set out in s. 63 (5). Those circumstances include the conduct of the employer towards the employee when effecting the dismissal juxtaposed against the employee's own conduct that may have caused or contributed to their dismissal. The combined effect of s. 63 (5) and (4) encapsulates the just and equitable principle embedded within s. 63 of the Employment Act generally, and more specifically stated in s. 63 (4).

These principles were similarly, and authoritatively, echoed by the Supreme Court in *Terrastone Construction Limited –v- Solomon Chatuntha,* M.S.C.A Civ. App. No. 60 of 2011 (Unrep.). On appeal from the High Court, respondent, who was appellant in the High Court and applicant in the Industrial Relations Court, was summarily dismissed on allegations he had attempted to steal nails from his employer, having been caught *flagrante delicto*, with the nails strapped to his leg as he attempted to leave his employers' premises.

In spite of his own admission, the trial court found for applicant only on grounds he had not been afforded an opportunity to be heard. It awarded him MK2, 900.00 as compensation for unfair dismissal. On appeal, the High Court affirmed but substituted the award and increased it to MK754, 000.00 in compensation, which was the equivalent of all salaries he had otherwise earned during the five years he had been in appellants' employment.

The Supreme Court, Chief Justice Msosa SC., (rtd), presiding and Nyirenda SC and Mzikamanda SC, JJAs (as they then were), sitting, reiterated that s. 63 (1) (c) prescribes a compensation that requires an employer to pay an employee an amount of money as *recompense* for unfair dismissal or unfair labor practices. The Supreme Court went on to state that such compensation is not one for measured damages or quantified losses suffered by an employee. That the provision does not even require proof from an employee of specific financial losses consequent on the unfair dismissal. Rather, that s. 63 (5) grants options to judges to consider when awarding damages for unfair dismissal, stipulating minimum sums dependent on the employee's remuneration and length of service.

The Court went on to say that judges have a wide latitude under s. 63 (4) to award more than the minimums provided in s. 63 (5) if such is deemed just and equitable. The Court expressly pointed out that in assessing what compensation is just and equitable, a judge need not only consider circumstances and interests of an employee dismissed unfairly but those of an employer too and that these should always have a bearing on any award beyond the minimums in s. 63 (5). To that end, the Supreme Court held that s. 63 (4) is not a blank check for awarding an employee dismissed unfairly any amount. More importantly, the Court emphasized that a court should always give clear reasons for awarding compensation in excess of what is set down as the minimum in s. 63 (5).

So, setting aside the High Court's award of MK754, 000.00 and substituting it with MK40, 600.00, the Supreme Court held that respondent had caused or contributed to his dismissal by his own conduct; the attempted theft from his employer who, under s. 59 of the Employment Act, had the right to dismiss him summarily. Still, given that the Industrial Relations Court had already found as fact that the dismissal was unfair only on account of failure to afford respondent the opportunity to be heard, he was only entitled to the minimum in s. 63 (5). To that end, since he had worked for just a little over five years, he was only entitled to two weeks' pay for every year of service, in addition to a month's pay in lieu of notice.

The last decision which solidifies the philosophy underpinning s. 63 (4) of the Employment Act that is worth highlighting is perhaps Chipeta J.'s (as he then was) decision in *National Bank of Malawi –v- Benjamin Khoswe*, Civil Cause No. 718 of 2002 (Unrep.), a case first filed in 2002, but whose decision was only handed down almost 15 years later, on January 24, 2017. Again, the facts leading to Mr. Khoswe filing suit are not relevant for our purposes. What is relevant, however, is the coterie of heads of compensation he claimed entitlement to, and most comically listed by Chipeta J. at p. 4 in the following manner:

> [F]ollowing his unfair dismissal, Mr Khoswe expected to be compensated for every amenity or convenience he could recall as having enjoyed or as having been entitled to during his tour of employment in the Bank that had employed him. Thus he expected damages for loss of the right to earn a living, loss of pension, loss of dignity and reputation, embarrassment, loss of medical aid scheme, loss of remuneration, loss of annual bonuses, loss of leave grants, loss of concessionary interest rate on house loan, loss of National Bank staff shares scheme, loss of annual salary increments, loss of access to the defendant's various recreational facilities, and loss of in-house and external

training opportunities. As can be further seen, not only did he want all these damages in respect of the time he had spent at National Bank up to the time of his dismissal, but he also wanted them as from that time up to the time he should have normally retired from service.

In addition, applicant also argued for loss of salary, annual leave days, future loss, loss of pension contributions as well as loss of future pension contributions. Finally, he cited his efforts at mitigating loss as entitling him to a bequeathing of a generous and probably fat compensation from the court.

In disposing of the appeal in the context of these claims, Chipeta J. started by pointing out that in assessing compensation in cases of unfair dismissal, the only relevant aspects of s. 63 of the Employment Act are subsections (1) (c), (4) and (5). He noted that s. 63 (4) is a crucial provision to take into account when assessing compensation. He went on to point out that s. 63 (5) immediately steps in to set out a framework for calculating the minimum awardable amounts of compensation. Crucially, Chipeta J. noted that the minimum amounts stipulated in s. 63 (5) should always be subject to the court's discretion settling for a higher award, depending on its evaluation of the case's peculiar circumstances under s. 63 (4).

Continuing with his analysis, Chipeta J. observed that these three subsections of s. 63 actually form a chain-link and operate "hand in hand" whenever the Court orders compensation in cases of unfair dismissal. Of note, Chipeta J., pointed out that save for setting the minimum levels of compensation dependent on the length of service, subsection (5) nevertheless leaves the Court a wide berth of discretion on how close the compensation it awards should remain to the minimum prescribed, or how far beyond the minimum thresholds it should go, a position the Supreme Court also took in *G.M. Wawanya –v- Malawi Housing Corporation*, MSCA Civ. App. No. No. 40 of 2007 (Unrep.) where it stated at p. 8:

> [S]ection 63 (5) then sets out the minimum the court shall award. Our reading of section 63 (4) is that a court has considerable latitude in awarding compensation under the Employment Act. In the end it really should not make any difference whether one wants to call the award an award under section 63 of the Employment Act or a common law award or any other description as one may please.
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> The provision allows for what the Court would consider just and equitable in the circumstances of the case. If the court was minded, and the circumstances were compelling, there is nothing to stop it from awarding compensation for the unexpired term of a fixed term contract or indeed a shorter period. Where the contract of employment provides for a period of notice for termination and also payment in lieu of such notice, the compensation under section 63 (4) may be in addition to the payment in lieu of notice.

Proceeding, in *Khoswe*, Chipeta J. noted that in requiring that the amount of compensation should be just and equitable, s. 63 (4) subjects such compensation to a reflection of the loss sustained by the employee in consequence of the dismissal in so far as such loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal. Echoing what the Supreme Court said in *Chatuntha*, Chipeta J., said at p. 14:

> It is therefore clear from this provision that the justice and equity of the compensation to be awarded is not to be measured from a vacuum. It instead ought to be measured first from a fountain of the level of blameworthiness of the employer in occasioning the [. . .] dismissal and then, if it exists, also from a fountain of blame the employee also bears for inviting the dismissal on himself.

On this point, Chipeta J. aptly concluded that while Section 63 (5) is ever available for the Court to check what the minimum measure of compensation set for a particular case is, it needs to specifically contend with the balancing of s. 63 (4) considerations of "just and equitable" before it settles for what it feels to be the appropriate measure of compensation it ought to award:

> If, therefore, there were any lesson for me to draw from this case authority, it would be that there is no fixed compensation rate or standard measure of fixing the compensation payable in respect of each and every case of unfair dismissal. Rather, bearing in mind the minimum payable compensation as prescribed by Section 63 (5) of the Employment Act 2000, the Court should feel free to settle for whatever amount it considers to be just and equitable compensation. It all depends on how the Court's assessment of Section 63 (4) considerations goes in the case that happens to be before it at the time of consideration (sic).

In *Chioko*, having considered the totality of existing authorities on the point, I extracted the following principles on assessment of compensation in cases of unfair dismissal generally, and specifically, under the Employment Act.

First, the Employment Act 2000 introduced a distinct legal framework for assessing compensation in cases of unfair dismissal than was applicable under common law generally, and as was especially applicable and followed in cases before 2000. This is because under the Employment Act 2000, the framework for calculating compensation for unfair dismissal had been revolutionized. And so, under the Employment Act, the beginning point in assessing compensation in cases of unfair dismissal should always be s. 63 (4), which states:

> An award of compensation shall be such amount as the Court considers just and equitable in the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.

This position then sets down the underpinning principle in assessing compensation in cases of unfair dismissal. The compensation awarded must be an award that is just and equitable. On the other hand, s. 63 (5) sets out the basic and minimum awards below which a court should not go when making the award. In doing so, s. 63 (5) provides a graduated scheme for calculating the level of compensation. In making the award, two factors must always be borne in mind, the remuneration a claimant was getting during their employment and the duration of their service in employment. In that regard, s. 63 (5) prescribes a week's pay for each year of service for a claimant who served not exceeding five years; two week's pay for each year of service for a claimant serving more than five years but not exceeding ten years; three week's pay for each year of service for a claimant serving more than ten years but not exceeding fifteen years; and a month's pay for each year of service for a claimant serving in excess of fifteen years.

Once such computation is complete, the Court is obliged to consider whether the award is just and equitable under s. 63 (4). If a court finds the award just and equitable, then it will not interfere with the award and such award will stand. If, on the other hand, it finds the award inadequate to pass the just and equitable test in s. 63 (4), it can award a

sum higher than the minimum in s. 63 (5) (see *Malawi Environmental Endowment Trust –v- Felix Kalowekamo* (2008) MLLR 237).

In taking such considerations, the Court has to have regard to the loss sustained by the employee as a consequence of the dismissal in so far as the loss is attributable to first, the actions and conduct of the employer when dismissing a claimant and second, the actions and conduct of the claimant that may have caused or contributed to their dismissal. Invariably, where a Court decides that the award computed under s. 63 (5) is not just and equitable under s. 63 (4), and elects to go beyond the minimum thresholds in s. 63 (5) and awards a higher sum, it needs, and must set out its reasoning justifying its increase of the award or indeed its complete departure from the minimum thresholds in s. 63 (5). Ultimately, the authorities conclusively converge in principle that the Court has wide discretion to award compensation in cases of unfair dismissal, but that any such compensation must always be grounded on s. 63 (4) and (5) with justification where need be.

What the authorities also clearly point out is that there is no legal basis whatsoever in basing compensation on heads of damages such as immediate loss, past loss, future loss or indeed awarding compensation for the entire length of a claimant's employment up to retirement. On this point, perhaps Twea J. articulates the position even better in *DHL International Limited –v- Aubrey Nkhata*, Civ. App. No. 50 of 2004 (Unrep.) where he stated:

> I have considered the approach of the lower court to the award of compensation. I noted that the approach was not properly articulated.
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> The proper approach is as espoused by this Court in Mpaso's case. Section 63 (4) requires the court to make an award of compensation that is just and equitable in the circumstances. When making such a decision, it must take into account three factors: Loss sustained by the employee consequent upon dismissal; whether the loss can be attributed to the action of employer (sic); and the extent of the employee's contribution to the dismissal.
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> Subsection (5) therefore gives the mandatory minimum that the court may award. Depending on the findings of the court in respect of the three above factors, it may adjust the scale upwards in respect of subsection (4).

Twea J. observes that where the court determines that it will award more than the minimum in s. 63 (5), it must give reasons. That the decision of the court must not be arbitrary. He continues:

> It is not open to the court [to award whatever] it wants. The Court must award such sums as would, by law, be allowed. It should be clear, on the record, to the employee, employers and all why the Court decided to enhance the award from the minimum stipulated in Section 63 (5).

I find that the case before me compellingly deserves awarding compensation over and above the minimum thresholds outlined in s. 63 (5). First, however, I bear closely in mind that the compensation applicants are entitled to must be just and equitable. As a starting point, I would of course be expected to award applicants such compensation as appropriately apply to each under s. 63 (5). In my considered opinion, however, I do not believe that awarding applicants compensation under the framework in s. 63 (5) would satisfy the just and equitable test in s. 63 (4). On account of the special circumstances obtaining in this matter and respondents' peculiar, if not deplorable conduct and indefensible impunity in their treatment of both applicants, awarding compensation under

the framework in s. 63 (5) would not be just and equitable. This, especially given that applicants did not conduct themselves in a manner that caused or contributed in any fashion whatsoever, to their dismissal.

I have carefully reflected on what award would be just and equitable given the peculiar facts in this matter. I resolve to exercise my discretion to go beyond the minimum thresholds in s. 63 (5) and completely disregard the minimum awards. I am convinced such minimum thresholds would not be just and equitable.

In considering what would be just and equitable compensation beyond, and entirely disregarding the framework in s. 63 (5) in this matter, I have to consider the three factors under s. 63 (4), indeed as clearly articulated by Chipeta J. in *Khoswe*, Twea J. in *Nkhata* and the Supreme Court in *Chatuntha*. In that regard, I have to bear in mind the loss applicants sustained as a consequence of their dismissal in the context of respondents' actions leading to the dismissal. That is, specifically whether the loss occasioned by the dismissal can directly be attributed to respondents' acts and, of course, the extent applicants' may have caused or contributed to their own dismissal.

To effectively demonstrate this, I have to determine and conclude, with complete conviction, whether applicants' termination or dismissal from employment was completely instigated by respondents. Juxtaposed to such consideration, I rightly have to balance whether applicants somehow caused the dismissals themselves, or indeed contributed to them.

First, my determination on whether applicants' actions caused or contributed to their dismissals is a resounding NO...! Neither applicants' actions caused or contributed to their dismissals. On the contrary, it was exclusively respondents' actions that led entirely to both applicants' dismissals. It is clear on the facts before me that both applicants' dismissals were expressly championed and orchestrated by respondents, and can exclusively be attributed to Chairman Ching'ani's concerted efforts and actions. His active involvement in the entire series of events that eventually led to applicants' dismissals raises no scintilla of doubt on this determination and conclusion. One could even be tempted to wonder and question whether he, Chairman Ching'ani, harbored personal grudges against and had scores to settle with both applicants, whatever origin of those grudges and scores may have been.

Recall that earlier, I pointed out that the evidence applicants led before is uncontroverted. Recall also that I observed that Chairman Ching'ani himself principally, personally championed and single handedly orchestrated the entire scheme to have applicants dismissed. From a totality of the evidence before me, it is clear that his intimation that the other members of the Board were in agreement with the resolution to dismiss applicants only reflected his attempts to manipulate the other Board members to rubber stamp and cloak his schemes with a veneer of collective responsibility while veiling his acts with a semblance of legality. Otherwise, the evidence before me crystallizes all responsibility for both applicants' dismissals on Chairman Ching'ani himself. It is to an analysis of the evidence grounding that conclusion and determination that I now turn.

A dispassionate examination and analysis of Chairman Ching'ani's acts leading to both applicants' dismissals and his conduct towards both in this matter, especially in the context of the just and equitable principle in s. 63 (4) of the Employment Act unavoidably turns me to an objective interpretation of s. 57, particularly sub sections (1) and (2), the first part of which provides:

> The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee. . .

Whether respondents' conduct under s. 63 (4) warrants applicants a higher compensation than the minimums provided in s. 63 (5) turns on whether respondents, through Chairman Ching'ani's actions, acted with justice, fairness and equity in the manner they effected both applicants' dismissals. Ultimately, the question I pose to make this determination is, "Did respondents act with justice, fairness and equity?" Again, the only answer to that question, given the evidence before me, is a resounding no..!

Answering that question implicates a careful consideration of the law on termination of employment grounded on capacity and conduct. In the present instance, Chairman Ching'ani asserts that applicants' employment contracts were terminated because they were not serious with their work. Specifically, he asserted that applicants were insubordinate towards him and the Board for supposedly failing to respond to his inquiries on the leakage of confidential financial information on social media; allowing the commencement of construction works on a six lane road project in Lilongwe before approval on the Environmental and Social Impact Assessment (ESIA) was obtained and his allegations of management's *laissez faire* attitude towards him and the Board generally.

First, as noted above, under the Employment Act, the termination of a claimant's employment contract can only be effected on three grounds: Capacity, conduct and operational requirements. To begin with, the entirety of s. 57 (1) of the Employment Act provides:

> The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.

While s. 58 provides that "a dismissal is unfair if it is not in conformity with section 57 or is a constructive dismissal pursuant to section 60," it is important to understand that a constructive dismissal, if affirmed, is an unfair dismissal outright but is not itself expressly included in the grounds of dismissal under s. 57 of the Act (Note that s. 58 inadvertently cites s. 40 instead of s. 60 when it references constructive dismissal). On the other hand, a dismissal under s. 57 can be lawful if the prerequisites for dismissal it outlines are met. Thus, a dismissal under s. 57 only becomes unfair if the prerequisites under which the dismissal is carried out are breached.

Termination on grounds of capacity relates to an employee's failure to perform and deliver on the responsibilities demanded of a position where an employee represents they possess the requisite qualifications, skillsets and experience required for the performance of such responsibilities. In light of the suit at the Bar, this ground of termination is directly relevant because Chairman Ching'ani specifically asserted that applicants were incompetent when he alleged that they were not serious with their work, insinuating a serious lack of capacity to effectively deliver on their responsibilities as management. In

other words, Chairman Ching'ani essentially accused applicants, as management, of incompetence and, therefore, under s. 57 (1), lacking capacity.

Termination on grounds of conduct relates to an employee's relationships with colleagues in the workplace, third parties dealing with the undertaking as well as society at large. Conduct also relates to the employee's dealings with the assets, resources and financial instruments owned by an employer. To that end, a dismissal based on conduct may involve an employee's insubordination towards superiors, inappropriate and unsanctioned or unlawful behavior towards colleagues, abuse of an employer's resources and assets or engaging in corrupt dealings utilizing one's position to advantage personal interests. The case at Bar directly implicates a dismissal on grounds of conduct because, again, Chairman Ching'ani expressly levelled misconduct against applicants. This, in his deposition that their attitude towards him and the Board generally was insubordinate and *laissez faire.*

To protect against unmerited dismissals from employment, the Constitution introduces 'due process' of administrative action that underpins the guarantee of administrative justice in its s. 43 prescriptions. This necessarily includes the right to lawful and procedurally fair administrative action, combined with the right to be furnished with reasons for any administrative decision affecting rights, freedoms, legitimate expectations or interests.

In the context of workers' and employment rights, courts have interpreted the rights guaranteed in s. 43 as extending principles of natural justice to contracts of employment before any decision, including a decision grounding disciplinary action, can be taken (*In re Constitution of the Republic of Malawi; In re Lunguzi* [1994] MLR 72 (HC); *Attorney General –v- Lunguzi & Another* [1996] MLR 8 (SCA); *Chawani –v- Attorney General* [2000-2001] MLR 77; For a seminal discussion of the impact of s. 43 on administrative law and employment post 1994 generally, see **DANWOOD M. CHIRWA, HUMAN RIGHTS UNDER THE MALAWIAN CONSTITUTION 457 (2011),** especially at 460-461.).

Rules of natural justice include the rule against bias, *nemo iudex in causa sua*; that one cannot be judge in their own case and *audi alteram partem*; no person shall be condemned unheard, that one must be afforded an opportunity to be heard before a decision averse to their rights or interests is taken (see **A. W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW (14TH ED.,) 725 (2007)).**

Although the general discourse on administrative action in practice and the academy traditionally focuses on public law, it is undeniable that s. 43 has recognized the application of administrative justice principles in the private law domain in certain circumstances, especially in relation to workers' and employment rights. Dr. Chirwa makes the same observation with slightly nuanced reasoning (**CHIRWA**, *supra*); Danwood Mzikenge Chirwa, *Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles,* **JOURNAL OF AFRICAN LAW, VOL. 55, NO. 1 105-127, 119 (2011)).**

The Employment Act encapsulates these rights and privileges by establishing a comprehensive legal framework for their realization. For example, the Act sets out the types of employment that can be contracted under law in Malawi in s. 25, conditionality and prerequisites for skilled employees in s. 26, regulates terms and conditions of service in s. 27, limits working hours in ss. 36 and 37 and outlines procedures for disciplinary action in s. 56.

In the context of securing tenure, s. 28 of the Act prescribes conditions under which employment may justifiably be terminated. On its part, s. 58 compliments s. 28 by prescribing that a dismissal from employment will be deemed unfair if it is not in conformity with s. 57 or is a constructive dismissal under s. 60. On the other hand, s. 57 restricts the lawful termination of employment to three grounds: (a) capacity, (b) conduct and (c) operational requirements (or unexpected eventualities) of an undertaking. Regarding the first two, the employment contract cannot be terminated before the employee is given an opportunity to be heard, hence the *audi alteram partem* rule noted above, expressly reflected in s. 57 (2).

Contrasted with previous practice, and what Chairman Ching'ani purported to do in applicants' case, it is not enough for an employer to only give a period of 'notice' under s. 28 to an employee before terminating the employment contract. Section 57 (2) expressly states that the employment of an employee shall not be terminated for reasons connected with capacity or conduct unless the employee has been provided an opportunity to defend themselves against the allegations made.

In essence, this means that when faced with an assertion of unfair dismissal, a court must conduct its inquiry at two levels: First, whether there was or were 'substantive' grounds for dismissing the employee (notably relating to capacity or competence, or the conduct of the employee) and second, whether the employer complied with rules of natural justice.

In practice, this means an employer needs to afford the employee an opportunity to be heard on allegations against them and allow such employee to challenge any evidence brought against them, including confronting witnesses. The law, therefore, exhorts the employer always to act lawfully and fairly, both substantively and procedurally, before dismissing an employee. Collectively, these reforms protect workers and employees from arbitrary and unilateral administrative action, which guarantees protection against unmerited dismissals.

In the case at the Bar, it is abundantly clear from Chairman Ching'ani's actions that both applicants were never afforded an opportunity to defend themselves against the allegations made against them. It would appear, in all respects, that Chairman Ching'ani unilaterally drove the process leading to applicants' dismissals. He only needed Board members to endorse his predetermined labors with what seemed to him a semblance of lawful justification and procedural propriety.

In *Cosmas Banda –v- Nkhatabay Development Trust*, Matter No. IRC 75 of 2010 (Mz) (Unrep.) the Court pointed out that the corpus of jurisprudence on labor and

employment law considers fair procedures sacrosanct and condition precedent to termination of employment. Finding for applicant, the Court noted that considering the facts and evidence in that case, it was clear that the termination of applicant's employment was exclusively related to his conduct. That the reasons for terminating applicant's employment were that he had authorized collection of fees without issuing receipts and did not abide by the Board's directives that meals for students should be served inside a dining hall, while always observing correct dining room etiquette.

In *Banda*, it was evident that all the reasons given spoke to the conduct of the applicant in the execution of his duties as Headmaster. And, as required by s. 57 (2), these are the very issues for which a hearing ought to be afforded an employee before their contract of employment can be terminated.

Now, in *Banda*, as in the case at the Bar, applicant's circumstances presented nothing different. He was entitled, as were applicants in the present matter, as matter of law, as a constitutional right, and as an edict of fairness, to be afforded an opportunity to tell their side of the story before condemnation with termination. *Audi alteram partem*. No one should be condemned unheard.

No such hearing was conducted in the case at the Bar. It is quite evident that Chairman Ching'ani unilaterally and personally authored the letters terminating applicants' contracts of employment, whether before or subsequent to the dinner, cum extra ordinary Board meeting, held on the evening of October 26, 2021 at Capital Hotel.

In *Banda -v- Lekha* (2008) M.L.L.R. 338, Chairperson Zibelu-Banda (as she then was) also reiterated this position when she held that the right to fair labor practices in s. 31 of the Constitution entails the right not only to know the reasons for dismissal but also to be afforded an opportunity to explain one's side and to defend oneself against allegations as provided under s. 57 (2) of the Employment Act.

At the assessment hearing in the suit at the Bar, first applicant, Mr. Emmanuel Matapa, testified that after a stellar career with respondents, he was appointed Chief Executive Officer on a three-year contract running from August 5, 2017 to August 4, 2020. He tendered a copy of the contract which I marked Exhibit AW1-6. He went on to testify that on August 5, 2020, his contract was renewed for a further three years to run until August 4, 2023. He tendered a second contract for the position that I marked Exhibit AW1-7.

First applicant testified that on October 29, 2021, which was a Friday, and while he had been in a meeting with the Minister of Transport and Public Works, he received a phone call from Chairman Ching'ani, informing him that his contract had been terminated. That he should collect his letter of termination from Chairman Ching'ani himself at the Roads Authority offices. During the call, Chairman Ching'ani instructed him to handover all his responsibilities and files by the following Monday, November 1, 2021.

This is repeated in first applicant's written deposition where he stated that barely a year into his second contract, Chairman Ching'ani unilaterally terminated his contract without fault or reason on his part. Indeed, he tendered a letter terminating his contract signed by Chairman Ching'ani himself. I had the letter of termination marked Exhibit AW1-8.

First applicant testified that his dismissal was widely reported and published in both the mainstream and social media over the course of that weekend. First applicant testified that as a matter of fact, these publications emanated mainly from interviews Chairman

Ching'ani himself gave to the media on Saturday October 30, 2021, a day after the phone call informing him of the termination of his contract. In support, first applicant tendered cuttings from the main Sunday papers headlined 'RA fires CEO' and 'Roads Authority Board fires CEO Matapa' on October 31, 2021. I had these cuttings marked Exhibit AW1-9.

First applicant testified that since the widespread publication of the termination of his contract, he has been unable to secure employment because of the negative impressions and stigma over his reputation in the public domain. He tendered a letter turning down his application for a major consultancy engagement with the World Bank to support this assertion. I had that letter marked Exhibit AW1-19. During redirect, first applicant reiterated that his dismissal was unilaterally made and orchestrated by Chairman Ching'ani and not the entire respondents' Board as claimed and sworn by Chairman Ching'ani.

In my careful observations and evaluation of the evidence before me, I am compelled to agree with first applicants' oral testimony and the deposition he made in his witness statement. Reinforcing this conclusion, I observe first, that applicant emphasized and I accept, that he had been in continuous employment with respondents for some 20 odd years before his dismissal. Over the two decades he was in employment, his performance or conduct was never in issue. At least no evidence has been led suggesting that his performance or conduct during the 20 odd years he was in respondent's service was ever questioned.

In 2017, he was appointed respondents' Chief Executive Officer on a three-year contract. In 2020, at the expiry of his first contract as Chief Executive Officer, his contract was renewed for a further three years. Observably, it does seem true that it was only after Chairman Ching'ani was appointed onto respondents' Board that efforts to terminate both applicants' contracts commenced and were pursued with unrestrained vigor. And, as noted in the evidence above, this started barely four months after Chairman Ching'ani was appointed. It is thus my conclusion that Chairman Ching'ani's conduct was questionable at best, and at worst, exemplified obvious and deliberate malcontent.

On this score, and to emphasize Chairman Ching'ani's overt intentions to manipulate the Board into terminating applicants' contracts, first applicant made reference to affidavits filed by two of respondents' Board members supporting applicants' motion for an order of urgent interim relief. Specifically, those affidavits were sworn by a Mr. Lameck Masangwe, who is Senior Chief Malemia and Mr. Byson Mpando, the Vice Chairman of respondents' Board. In their respective affidavits, these two members of the Board disowned the purported dinner, cum extra ordinary meeting Chairman Ching'ani alleges to have convened that ostensibly resolved to terminate applicants' contracts of employment.

In their respective affidavits, both these members depone that at the dinner, cum extra ordinary meeting, Chairman Ching'ani unilaterally and expressly informed the members present that he had found a provision in applicants' contracts of employment that could be relied on to terminate their contracts. They continue that Chairman Ching'ani specifically pointed out that this is Clause 4 (b) in applicants' contracts of employment. Finally, both members depone that it was only on October 29, 2021 when they learned from Inkosi ya Makosi Mbelwa V. that Chairman Ching'ani had personally informed him that he had written letters to applicants terminating their contracts of employment.

To emphasize that several members of respondents' Board disowned the October 26 dinner, cum extraordinary meeting, first applicant exhibited a memo to Chairman Ching'ani authored by Professor Boniface Dulani on November 1, 2021 with the subject line, 'Dismissal of CEO and Director of Corporate Services of the Roads Authority'. On account of the content of that memo, which strongly censures Chairman Ching'ani's unilateral conduct, and corroborates applicants' assertions of the Chairman's malcontent towards them, I find it imperative to reproduce the contents of that memo verbatim:

> I have read the recent media reports on the 'dismissal' of the Chief Executive Officer and the Director of Corporate Services of the Roads Authority. I wish to register my strong reservations in the manner these decisions have been handled and make a plea for their reversal, if at all that is possible.
>
> Chairman, in our call last week Thursday, you indicated that a gathering of all Board members, minus ex-official members, took place earlier last week over dinner where the matter of dismissing the two members of RA staff was discussed. It was not my understanding that this gathering was being treated as a duly convened Board meeting that could make resolutions as momentous as the ones made. My expectation was that whatever was discussed would subsequently be presented to a duly constituted Board meeting for formal deliberation.
>
> I am mindful that as I am currently out of the country, it cannot be expected that I would be attending all meetings such as the one where the decision to fire the two officers was made. However, I would have expected that at a minimum, all Board members, including myself, would have been furnished with an invitation and agenda in the prescribed period. I never received any such invitation.
>
> I am also aware, Chairman, that the decision to fire the two RA members was premised on clause 4 (b) of their contracts which provides for termination with notice. I am not a lawyer, obviously, but I do not think that this clause can be triggered without cause. Indeed, rules of natural justice entail that an employ (sic) must be given a chance to be heard before such decisions are made. I am not sure, however, if the two officers were given any chance to be heard.
>
> During our call last Thursday, Chairman, you also brought up the fact that in the recent site visits in the Central Region, a decision was made to reverse the recommendation of the joint ARC and CSC committee for the renewal of the contract for the Director of Maintenance. Upon further reflection, I wish to register my concerns once again in the irregular manner this decision was made. I believe the right procedure would have been to table this decision at a full Board meeting for all members to deliberate and make a decision. Otherwise, Chair, I feel the decision reflects a lack of confidence in the joint ARC and CSC committees to do their jobs properly.
>
> Chairman, I recall that during our first Board meeting in Salima, you emphasized that one of the pillars guiding your stewardship of the RA Board would be rule of law. I am failing to see how the decision to dismiss the CEO and Director of CSC as well as the impromptu decision to rescind the decision of the joint ARC and CSC committees recommending the renewal of the contract of the Director of Maintenance, can be considered to be in compliance with the rule of law, given the manner they have been executed.
>
> Given my concerns, I am of the view that the decision to fire the two members of staff would not stand legal scrutiny. If we do not raise these concerns, we would be failing as Board members in our fiduciary duty as these decisions have a high likelihood of exposing the Roads Authority to unnecessary litigation and penalties.
>
> It is against the foregoing that pursuant to article 10 (b) of the Roads Authority Act (sic) I would like to request your office, Sir, to call for an extra ordinary meeting of the Board in the next seven days where members can deliberate and make a formal decision on recent developments. Until that meeting, I would like to propose that the recent decision to dismiss the two officers and reversal of the recommendation for the renewal of the contract of the Director of Maintenance, be pended.

Now, recall that first applicant had testified that his dismissal was widely reported and published in both the mainstream and social media over the course of the weekend he was dismissed. In that regard, he testified that the publications emanated from interviews Chairman Ching'ani himself gave to the media on Saturday, October 30, 2021 the day after

receiving their termination letters. Recall again that first applicant tendered cuttings from the weekend Sunday papers headlined 'RA fires CEO' and 'Roads Authority Board fires CEO Matapa' on October 31, 2021. All these and Professor Dulani's memo attest to how much the other members of respondents' Board felt uncomfortable at the manner in which Chairman Ching'ani proceeded with the decision to terminate applicants' contracts. Second applicant's testimony at the assessment only confirms this spate of evidence.

On her part, Ms. Auda Msiska, testified that she too had made a deposition in a witness statement filed with the Court. During her oral testimony, she, as did first applicant, adopted it wholesale. In her consolidated testimony, she pointed out that she too has not been able to find alternative employment because of the negative connotations and stigma the publicity of her dismissal had on her reputation publicly.

Now, on a careful consideration of her testimony and witness statement, much of the evidence Ms. Msiska gave is reflected in first applicant's testimony, save her narrative on her career progression up to her appointment as Director of Corporate Services. On account of these similarities, I find it unnecessary to reproduce her deposition in full. Suffice to say that everything that surfaced on a combination of first applicant's testimony and Chairman Ching'ani's sworn affidavit is also reflected in second applicant's deposition.

Given the state of, and my analysis of respondents' conduct through Chairman Ching'ani's unilateral and concerted campaign to dismiss applicants, in determining the appropriate compensation applicants ought to be awarded, it is my conclusion and firm conviction that adhering to the framework in s. 63 (5) would not be just and equitable under s. 63 (4) considerations. In point of fact, considering the nature and amount of evidence before me, I find it quite baffling that Chairman Ching'ani's attitude during, and in the course of these proceedings, disclosed a measure of impunity and a lack of dignified respect towards his responsibility as Board Chairman for a public institution that operates on and utilizes public resources in its operations. Recall that in his affidavit, Chairman Ching'ani expressly deponed that this Court should not consider reinstating applicants as a remedy, challenging that if anything, should this Court find applicants' dismissals to have been unfair, respondents have the capacity to pay any compensation the Court may award applicants. According to his deposition, this, merely because the terminations had already been effected and that a replacement acting Chief Executive Officer had already been identified and appointed. In and of itself, this begs the question whether, as Professor Dulani's memo laments, Chairman Ching'ani had the presence of mind to reflect, at the time he was orchestrating applicants' dismissals, that he was in a position of stewardship as Chairman of respondents' Board.

One wonders whether, when making these statements to the Court, and as Professor Dulani echoes in his memo, Chairman Ching'ani understood that he indeed was potentially exposing respondents' assets and resources to liability and waste through needless litigation. One would even wonder whether, when Chairman Ching'ani made the declarations in his affidavit, he understood that the resources he was exposing to loss through compensation are actually resources drawn from the people of Malawi and not his own personal resources? Again, as observed by Professor Dulani, Chairman Ching'ani's conduct is completely antithetical to notions of public stewardship expected of him to champion as respondents' Chairman of the Board.

In point of fact, it is my opinion and determination that Chairman Ching'ani's conduct is antithetical the very notion of public trust enshrined in s. 12 of the Constitution. That all legal and political authority derives from the people of Malawi and is to be exercised solely to serve their interests; that all persons responsible for the exercise of powers of state do so on trust and should exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi. Exposing a public institution's resources to loss through needless litigation as Chairman Ching'ani did in his conduct towards applicants does not reflect dignified stewardship, nor does it advance the interests of Malawians under the Constitution.

On this basis, I determine that the only just and equitable compensation I should award applicants is to consider their contracts as never having been terminated at all. To that end, I award both applicants the value of their salary and entitlements they would otherwise have accrued and obtained for the remainder of their contracts from the date of their dismissal, to wit, October 29, 2021.

Further, recall that first applicant had also stated that he was not paid his terminal benefits for his service prior to and at the time he was first offered the contract for the position of Chief Executive Officer. Recall also that first applicant was offered the Chief Executive Officer contract having served respondents since 2001 in a contract for an unspecified period.

On my considered reflection, however, since first applicant was not dismissed during the subsistence of his employment before appointment as Chief Executive Officer, he cannot claim compensation for unfair dismissal with respect to that period. But, since that service was in law terminated at the commencement of the new contract, mutually or unilaterally by respondents, he is entitled to a severance allowance under s. 35 (1) of the Employment Act for the period of his service from 2001 to 2017.

Second, because no evidence has been led challenging first applicant's claims to payment of terminal benefits for his service prior to his engagement as Chief Executive Officer, I have no ground for treating his evidence or testimony as controverted. Respondents did not challenge first applicants' assertions that he was in fact not paid his terminal benefits when his permanent pensionable contract was terminated upon his engagement as Chief Executive Officer. It is on that basis that I determine that he be awarded severance pay for that period.

With respect to second applicant, her situation is slightly different. It would seem, unlike first applicant, her employment with respondents had been a series of contracts. On that score, it would appear she was paid, at the expiry of each contract, gratuity as prescribed by law and/or respondents' terms and conditions of service. For that reason, it is clear that she is not entitled to a severance allowance under s. 35 (1) of the Employment Act for the period before her appointment as Director of Corporate Services.

This means, in respect of both applicants, the only contracts on which they were unfairly dismissed are the contracts from 2020 to 2023. In that regard, the award I make under s. 63 (4) is compensation that turns on both applicants' respective entitlements under those contracts. The severance allowance I award is only in respect of first applicant, and that in the context of his service prior to 2017. This, as noted, on account he was not paid any gratuity or severance in respect of that service upon his appointment as Chief Executive Officer in 2017. Finally, it is worth noting that first applicant was paid his gratuity at the expiry of his first contract as Chief Executive Officer in 2020. For that reason, he is not

entitled to a severance allowance for the period between 2017 to 2020. I now turn to the computation of the compensation each applicant is entitled to.

In his testimony, first applicant testified that he had worked for respondents for 20 years and had not received any terminal benefits, including severance allowance for the duration of his service prior to his appointment as Chief Executive Officer. He conceded, however, that he did receive a gratuity at the expiry of his first contract as Chief Executive Officer. On that basis, he claimed severance pay for the period he had been in respondents' employment before his appointment as Chief Executive Officer. He further testified that at the time of dismissal, he had accumulated 9 leave days that he had not taken, which he now claims.

In his written witness deposition, first applicant stated that members of respondents' Board members expressed serious concerns and reservations with what he termed the unilateral decision of the Board Chairman to terminate his contract. In spite of these concerns and reservations, the Board Chairman showed no regard to his rights, concerns or feelings. Instead, applicant asserts that Chairman Ching'ani persisted with vigor and zeal in his efforts and attempts to have his contract terminated. He asserts that the termination was arbitrary, that Chairman Ching'ani was overbearing, arrogant and self-absorbed and asserting. That the manner in which Chairman Ching'ani pursued his agenda to terminate his contract had gross impunity written all over it.

First, for purposes of severance allowance in respect of the first applicant and in considering the evidence before me regarding his service prior to his appointment as Chief Executive Officer, his remuneration was MK3, 635, 708.17 which comprised his basic pay and allowances including household utilities, fuel and telephone allowances and finally, support towards children's school fees (see *DHL International Limited –v- Aubrey Nkhata*, Civ. App. No. 50 of 2004 (Unrep.)). Having served more than 10 years, and according to Part I of the First Schedule of the Employment Act, he is entitled to two weeks' wages for each completed year of service for the first five years, plus three weeks' wages for each completed year of service from the sixth year up to and including the tenth year, plus four weeks' wages for each completed year of service from the eleventh year onwards. In that regard, for the first five years, first applicant is entitled to MK3, 635, 708.17 ÷ 4 × 2 × 5, which equals MK9, 089, 270.45. From the sixth year up to and including the tenth year, he is entitled to MK3, 635, 708.17 ÷ 4 × 3 × 5, which translates to MK13, 633, 905.64 and finally, for the 6 years from the eleventh year to 2017 when he was appointed Chief Executive Officer, he is entitled to MK3, 635, 708.17 × 5, which translates to MK18, 178, 540.85, all summing up to MK40, 901, 716.94. I therefore award him **MK40, 901, 716.94** as severance pay for his service from 2001 to 2017 when he was appointed respondent's Chief Executive Officer.

Regarding his compensation for unfair dismissal in respect of his second and final contract as respondents' Chief Executive Officer, first applicant testified that respondents only paid him three month's salary in lieu of notice. Applicant also states in his deposition that at the time of dismissal, he was 49 years old. That considering his employment record, he had legitimate expectations that he would be in employment with respondents until retirement at age 60. First applicant asserts that on account of the nature of his position, circumstances surrounding his dismissal, political sensitivities and the totality of financial and material benefits attaching to his position as respondents' Chief Executive Officer, it is extremely difficult for him to secure alternative or permanent employment at his level.

First applicant also asserts that because of the direct actions of Chairman Ching'ani, news of his dismissal was widely published both on mainstream and social media. That by such publicity, which was in large measure negative and deprecating, his image was grossly tarnished, thereby creating stigma around his reputation premised on suspicion of gross misconduct, incompetence and serious insubordination towards and disregard of authority, all of which has led to a serious reduction of his chances on the labor market. First applicant stated in his deposition that given all these considerations, he prays for the payment of all salaries and benefits for the remainder of his contract, all totaling MK483,241,338.04.

This termination package, according to first applicant, comprises salary for the remainder of his contract, entitlements to home internet, salary increments, car usage, personal fuel, official fuel, severance pay, unclaimed leave days, phone allowances, medical insurance, life insurance premiums, school fees for his children, pension contributions, club membership, professional body subscriptions, personal accident insurance, external training allowances, gratuity, car purchase entitlements and entertainment allowances.

To justify his claim for this amount, first applicant presented what he deemed calculations of entitlements and benefits as he would have enjoyed up to the expiry of his contract. First, applicant claimed the value of payments towards a medical scheme which respondents were responsible for on his behalf. On this point, first applicant claimed that respondents were contributing towards a VIP scheme through the Medical Aid Society of Malawi (MASM) for his spouse and three children. That respondents were contributing MK36,000.00 per month for his spouse and MK32,000.00 per month each for his two children. In the same vein, applicant asserts that he was entitled to a Life Insurance Scheme as part of his benefits as a pensionable member of staff managed by Old Mutual Plc. He also claims school fees towards two children that respondents were responsible for at MK1, 500,000.00 per term per child. To support these claims, he tendered invoices from Kalibu Academy that I had marked Exhibit AW1-14.

First applicant also claims the value of benefits towards club membership that respondents were responsible for as part of his entertainment allowance. In this regard, first applicant asserts that respondents were responsible for payment of MK340,000.00 per year at the Lilongwe Golf Club. He tendered a copy of an invoice for membership fees from the Lilongwe Golf Club I marked Exhibit AW1-15. First applicant also claimed payment of value representing annual professional membership fees to the Malawi Institute of Engineering in the sum of MK168,000.00, for which he produced a copy of an invoice I marked AW1-16.

It is of course important to mention at this point that first applicant also claims compensation for lost training opportunities he supposedly had access to in the course of employment. That respondents had already budgeted for such training courses. He testified that at the time of termination, he had already been earmarked for training, and that as a direct consequence of the termination, he missed out on such training opportunity. Specifically, he testified that because of the termination, he lost out on that opportunity and was seeking compensation for it. It is also important at this point to make mention that both applicants also claimed compensation for lost medical insurance benefits under their respective contracts.

On External Training Allowances, which is item number 18 in the calculations, first applicant asserts that he used to attend at least one external training for about two weeks in

each year. In the year of his dismissal, first applicant asserts that his training trip was already budgeted for and approved. His dismissal meant he was unable to attend the training. To that end, he claims the allowances that he could have been given had he attended training both in the year of his dismissal and the years beyond until the expiry of his contract in August 2023.

In his testimony, first applicant alluded to the loss of use of a motor vehicle, which he described as Toyota Prado, 2.8, 4x4 SUV that respondents were in the course of procuring for him before he was dismissed. On this, first applicant states that he arrived at the value he was claiming on the motor vehicle after he obtained a quote from a reputable car dealer and rental service for a similar vehicle and compared what he would have paid for had he been allowed right of first refusal to purchase the vehicle.

In cross examination, first applicant testified that under respondents' Asset Management Policy, he was entitled to first refusal on the official motor vehicle he had been assigned. He testified that the price of the vehicle would be 40% of its purchase value. He pointed out that the purchase value of the vehicle which he was entitled to use was MK129,930,000.00. Forty per cent of the purchase value of the vehicle would come up to MK51,972,000.00. He thus claims the difference between the purchase value of the vehicle and the price at which he would have bought the vehicle in accordance with the terms of the Asset Management Policy. As such, he claims MK77, 958, OOO.00 as the value of his loss in not purchasing the vehicle.

I have carefully considered the claims and assertions made by first applicant. While I fully realize that the compensation I have determined to award represents all his entitlements for the remainder of his contract, I have been at pains to accept all the entitlements he has claimed. My misgivings on awarding these claims stems mainly from a consideration that some of these claims appear to me to be grounded on privileges respondents' accorded applicant not as of right, but rather on a gratuitous basis. They were not, strictly speaking, condition precedent for the advancement of respondents' objectives or conditional for his performance of responsibilities in his position as Chief Executive Officer.

In coming to this conclusion, I have also drawn from the allowances articulated in s. 35 on calculating wages and remuneration for purposes of calculating severance pay. Not to influence my reasoning as to whether they are payable, per se, but more as a guide on what allowances can and should be considered as forming part of contractual entitlements that make up wages or remuneration. On that basis, I determine to err on the side of caution and award applicant his salary for the remainder of his contract, including salary increments in the final year of his contract, his car usage, allowances for fuel, unclaimed leave days, telephone and telecommunication allowances, medical insurance allowances, life insurance premiums, school fees for children, employer contributions to pension, personal accident insurance, professional body subscriptions and motor vehicle entitlement on first refusal to purchase. On this account, I award applicant MK369, 500, 090.37. out of this, I take out three months' salary respondents already paid applicant MK18, 997, 221.84, leaving a total of **MK350, 502, 868.53.** Adding the **MK40, 901, 716.94** severance awarded in respect of his service prior to his appointment as chief Executive Officer, I award first applicant a total of **MK391, 404, 585.47** as compensation for unfair dismissal. I thus have excluded such claims as club membership and entertainment allowances as listed in his original calculations. I have also excluded any

claims for allowances lost due to his failure to attend training that he claimed. I do not believe he would justifiably be entitled to allowances for which the training never actually took place. I now turn to second applicant.

First, recall that I found as verified that second applicant had consistently been paid gratuity for the series of fixed term contracts from 1999 to her second contract as Director of Corporate Services in 2020. In that regard, and as pointed out earlier, I award second applicant all her entitlements for the remainder of her contract up to 2023.

In that regard, second applicant prays for an award of MK381, 205, 474.13 comprising her salaries for the remainder of the contract including entitlements and benefits up to the expiry of her contract. She also claims compensation for the loss of a motor vehicle that she had the right of first refusal which was withdrawn from her at the time of her dismissal. She also claims she was entitled to medical cover for herself, her spouse and two children. She also testified that she was entitled to membership of a recreational club and that respondents were responsible for her club membership in the sum of MK340, 000.00 per year. She also claims she was entitled to professional membership paid for by respondents to the Institute of Chartered Accountants in the sum of MK255,000.00.

Second applicant also stated that she was entitled to training and had been earmarked for training in November of 2021 and for which tickets had already been purchased. The dismissal in October meant she could not proceed on the training and had thereby lost that opportunity and claims the value of the allowances she would otherwise have been entitled to had the training taken place.

Finally, second applicant claims the difference between the purchase value of the vehicle she was entitled to and the value she would have paid had she not been dismissed. In that regard, second applicant claims MK80, 662,382.85 as the difference between the purchase price of the vehicle and the 25% she would have paid to exercise her right of first refusal.

In cross, second applicant conceded that her two children were 21 and 26 years old at the time this assessment hearing was conducted. She also admitted that she does not have a child in school. In rebuttal, she testified that she was entitled to purchase her official motor vehicle which had since clocked two years and whose mileage, at the time of her dismissal, was 61, 000 kms on the odometer.

On the same terms as first applicant, I am disinclined to award applicant the sums she claims wholesale. I exclude, as in first applicant's case, claims for recreational, entertainment and club membership allowances and fees. I further exclude any of her claims for lost training allowances. Now, given that the reasons I exclude these claims are the same as in first applicant's, I find it needless to repeat them. Suffice to say that the two claims are similar in all respects and are, therefore, entitled to the same parameters of compensation. From that perspective, I award second applicant MK255, 732, 329.88 comprising salary for the remainder of her contract, entitlements to home internet, salary increments, car usage, personal fuel, official fuel, unclaimed leave days, phone allowances, medical insurance, life insurance premiums, children, pension contributions, professional body subscriptions, personal accident insurance and car purchase entitlement. Just as in first applicant's case, I deduct from this amount MK11, 000, 000.00 respondents already paid second applicant as notice pay. This then means I award applicant **MK244, 732, 329.88** as compensation for unfair dismissal.

In the final analysis, this then means first applicant is awarded **MK391, 404, 585.47** and second applicant is awarded **MK244, 732, 329.88** as compensation for unfair dismissal. Respondents are ordered to pay these awards within 10 days from the date of this order.

Any party aggrieved by this order of assessment is at liberty to appeal to the High Court within 30 days from the date hereof. Such appeal, in accordance with the prescriptions of the Labor Relations Act and the applicable rules of procedure, can only be on questions of law and not determinations or findings of fact.

Dated this 24th day of July 2023

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Austin B. B. Msowoya

CHAIRMAN