IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 269 OF 2003

BETWEEN

KUNGAUME…… APPLICANT

AND

STEEL SUPPLIES (MW) LTD……...……..…… RESPONDENT

CORAM: **Hon. R. Zibelu Banda (Ms) Chairperson**
Nkhoma of Counsel for the Applicant
Mambulasa of Counsel for the Respondent
Ngalauka – Court Clerk

JUDGMENT

Terminal benefits-Severance allowance-Pension benefits-Section 35(1) Employment Act 2000-Amendment to Section 35 Employment Act-Amendment declared unlawful ,unconstitutional and void ab initio-*Whether the invalidity has retrospective effect-Severance allowance-Claim-to comply with section 35(8)Employment Act.*

Facts

The respondent applied provisions of section 35 of the Employment Act 2000 as amended by the Minister before a court of law declared the amendment null and void on 5 November 2004. The effect of applying that amendment was that the applicant was paid pension benefits but not severance allowance. The applicant through his Counsel prayed that he be paid his severance allowance. The respondent averred on the other hand that the court's declaration did not have retrospective effect as such the law as amended applied to the applicant.

The Law

The issue is determinable by referring to the meaning of a declaration of the type made by the court in ***Khawela and ors V Commercial Bank of Malawi*** [Civil Cause Number 7 of 2004 (unreported)]. One of the successful orders sought by counsel in that case was a declaratory order that the amendment was unlawful, unconstitutional and *void ab initio.*
In pronouncing the order the court held that:

> In the face of the law, therefore, the minister acted in excess of the powers conferred by section 35 of the Employment Act and indeed section 58(1) of the Constitution and therefore the purported amendment is invalid and is hereby quashed on that account.

The issue is whether this declaration as it appears and read in its natural and ordinary meaning has the effect alluded to by counsel for the applicant that the amendment was never at any time valid and hence the applicant is entitled to severance allowance.

Counsel on both sides were agreed in their submissions that according to **Bennion on Statutory Interpretation,** 2nd Edition, p 160, " any provision of an item of delegated legislation is ineffective if it goes outside the powers which (expressly or by implication) are conferred on the delegatee by the enabling Act. The provision is then said to be *ultra vires* (beyond the powers). This applies even where the instrument has been sanctioned by a confirming authority. However, the instrument is not to be treated as ineffective until declared to be so by a court of competent jurisdiction.

However, from this court's reading of the *Khawela* decision, the determining factor is what the honourable judge ordered. It is the view of this court that the judge nullified the amendment by the Minister and the nullity was with effect from the date of inception.

Barron's Law Dictionary defines invalidity as:

> An act having no legal force. It is the highest degree of irregularity ..and is such a defect as renders the proceeding in which it occurs totally null and void, of no avail or effect whatsoever and incapable of being made so.

Various sites under **www.google.com** define an act that is declared *void ab initio* as that act which, is null and void from its inception; and entitled to no legal significance whatsoever.

Perhaps this is to prevent the executive arm of government from usurping the powers of Parliament in law making. In a democracy separation of powers is the air that the society breath without which total anarchy would reign.

Pension, gratuity, ex gratia and all other gratuitous terminal payments are matters of contract negotiated and agreed upon between the employer and employee, different from severance allowance, which is a matter of statute and non negotiable, see ***Japan International Co operation Agency V Jere*** [Civil Appeal No. 25 of 2002 (unreported)]. Unless the employer can show that the negotiation was done in bad faith, he can not turn around and say:
'Oh! But this is too much; I think I will deprive you of your statutory entitlement'. Certainly the court's role is to promote rule of law and in this case the written law prevails over any contractual agreements and arrangements.

It is for these reasons that the court finds that the benefit for which the legislature intended for the applicant be bestowed upon him as the so called amendment disentitling the applicant from severance allowance is null and void from inception and has no legal significance whatsoever.

However, in any claim for severance allowance, the applicant must show that he presented his claim to the District Labour Officer within three months of its being due pursuant to section 35 (8) of the Employment Act which provides that:

> A complaint that a severance allowance has not been paid may be presented to a District Labour Oficer within three months of its being due and if the District Labour Officer fails to settle the matter within one month of its presentation, it may be referred to the court, in accordance with section 64 (2) or 64 (3), which, if the complaint has been proved, shall order payment of the amount.

In the instant case it was not shown that the applicant in fact complied with the above provision. In the absence of such compliance, the court must dismiss the action, see ***Sokalankhwazi V The Sugar Corporation of Malawi*** [Civil Cause Number 3204 of 2003 (unreported)]. This action is accordingly dismissed on that ground.

Pronounced in Open Court this 30th day of March 2005 at **LIMBE**.

R. Zibelu Banda (Ms.)
CHAIRPERSON.