



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 1910 OF 2002**

BETWEEN:

GEORGE WILFRED LIBVUWO PLAINTIFF

-VS-

BLANTYRE CITY ASSEMBLY DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Makwinja, of Counsel, for the Plaintiff

Ms. Mndolo, of Counsel, for the Respondent

Ms. E. Chimang'anga, Court Clerk

ORDER

Kenyatta Nyirenda, J.

Introduction

The Plaintiff commenced the present action by Originating Summons on 11th June 2002. The action was later consolidated with Civil Cause No. 3075 of 2002 (The City Assembly of Blantyre v. G.W. Livuwo) and the Court ordered that the consolidated action should proceed as if it had been commenced by writ of summons.

Pleadings

The Plaintiff has pleaded in his statement of claim as follows:

- “1. The Plaintiff was employed by the Defendant on 8th July 1978.
2. The Plaintiff was retired from employment on 18th day of September 2001.
3. In spite of retiring the plaintiff from employment on the 18th day of September, 2001, the Defendant has to date not paid any retirement benefits to the Plaintiff.

4. *Further the Plaintiff was unfairly dismissed from employment on the 18th day of September, 2001 as the said retirement violated section 43 of the Republican Constitution the same having been effected without according the Plaintiff a hearing.*
5. *The Plaintiff at the time of the purported retirement was in receipt of \$235.84 salary per month payable in Malawi Kwacha.*
6. *The withdrawn pension benefits of the Plaintiff were wrongly calculated by the Defendant as if the Plaintiff was dismissed from employment and not retired from employment.*
7. *The Defendant has not repatriated the Plaintiff to his home of origin to date on termination of his services.*
8. *And the Plaintiff claims:*
 - (i) *Payment of repatriation benefits to his home village;*
 - (ii) *Payment of severance allowance for 23 years continuous service with the Defendant;*
 - (iii) *Payment of compensation for unfair dismissal;*
 - (iv) *Payment of full pension benefits; and*
 - (v) *costs of the action.”*

The Defendant admits that it employed the Plaintiff but avers that the Plaintiff misconducted himself when he misappropriated the Defendant's funds amounting to K159,000.00 which was the value of 318 food licences during the period between April, 1997 and October, 1999. The Defendant further avers that instead of dismissing the Plaintiff for misconduct, the Defendant resolved to retire the Plaintiff prematurely effective 18th September, 2001. It is also the case of the Defendant that the Plaintiff was paid terminal benefits that were indicated in the retirement letter. The Defendant further states that the Plaintiff, having been retired, cannot claim to have been unfairly dismissed. Regarding the Plaintiff's pension benefits, the Defendant avers that the same were calculated per the rules of pension that were applicable at the material time. Finally, the Defendant avers that the Plaintiff never informed the Defendant that he was ready to be repatriated. To the contrary, the Defendant states that Plaintiff cringed in the Defendant's house despite requests that the Plaintiff should vacate it.

In addition to the defence, the Defendant has counterclaimed against the Plaintiff. The counter-claim is worded in part as follows:

- “11. *The defendant also avers that ... the Plaintiff failed to account for 318 food licences valued at K159,000.00 during the period between April 1997 and October, 1999 and he has never refunded the value of the said licences.*
12. *The defendant further avers that upon premature retirement, the plaintiff had 3 months within which to vacate the defendant’s institutional house. But that the plaintiff has failed to vacate the house and has always cringed to it to date.*
13. *The defendant repeats paragraph 12 above and avers that the value of the rentals in 2002 were K20,000.00 and the same have been increasing over the years.*
14. *The defendant also avers that the conduct of the plaintiff in cringing to the institutional house has occasioned it loss.*
15. *The defendant therefore claims the equivalent rentals for the house the plaintiff has been living since 18th December, 2001 to the date when he shall vacate it.*
16. *The defendant also claims interest on the sum of K159,000.00 and the rentals at 3% above the National Bank of Malawi prevailing bank lending rate from 18th December, 2001*
17. *The defendant further claims collection charges on the K159,000.00 and rentals by way of indemnity from the plaintiff...”*

The Plaintiff filed a defence to the counter-claim, wherein he:

- (a) denies failing to account for 318 food licences or any licence at all in that the custody and issuance of food licences were the responsibility of the Administration Department of the Defendant;
- (b) states that not having failed to account for any food licences, the Plaintiff could not refund or pay any amount to the Defendant for the food licences;
- (c) admits that he was a tenant in one of the Defendant’s institutional houses at a rental of K25,000.00 a month but states that he vacated the said house upon receipt of the sum of K67,619.30 withdrawn benefits although the Defendant did not repatriate the Plaintiff to his home of origin
- (d) states that the increase in rental over the years is of no consequence to the Plaintiff, the Plaintiff having already vacated the Defendant’s institutional house; and
- (e) states that the Defendant is not entitled to claim interest and collection costs or any amount at all from the Plaintiff whether by way of indemnity or otherwise in that collection charges are the responsibility

of the Defendant in terms of the Legal Practitioners (Scale and Minimum Charges ((Amendment) Rules, 2002.

Evidence

The Plaintiff was the only witness for the Plaintiff's case. He adopted his Witness Statement as his evidence in chief.

The Plaintiff was employed by the Defendant on 8th July 1978 as an Assistant Environmental Health Officer and he was promoted to the position of Senior Environmental Health Officer in 1990. On 31st August 2000, he was suspended from duty on no pay on the allegation that he had misappropriated the Defendant's money worthy K159,000, being the value of 318 food licences during the period from April 1997 to October 1999. The suspension was meant "*to provide room for further investigations*". The Local Government Service Commission (LASCOM) upon examination of the Plaintiff's case directed that his suspension be uplifted and that he be reinstated with immediate effect. He was informed of the directive of LASCOM by the Defendant's Chief Executive Officer in her letter dated 18th September 2001 (Exhibit P2).

Shortly thereafter, the Defendant's Chief Executive Officer wrote the Plaintiff a letter dated 18th September 2001 (Exhibit P3) informing him that LASCOM had directed that he be prematurely retired from service with immediate effect on public interest and that on retirement the Defendant would pay him full retirement benefits, three months' salary in lieu of notice and commutation of leave days still outstanding to his credit. He would also be provided with transport to ferry his belongings to his home of origin.

Paragraphs 7 to 22 capture the essence of the Plaintiff's case against the Defendant and they read as follows:

- “7. *That the said pre-mature retirement amounted to unfair dismissal as my constitutional expectation to work for BCA to retirement age was violated.*
8. *That BCA Inter-Departmental Memorandum from the Manager of Financial Service to all members of staff dated 30th October 1991 introduced the Pension Scheme for BCA Staff (Exhibited “GWL4”).*
9. *That the BCA has neglected or has willfully refused to pay me full retirement benefits and provide transport to ferry my belongings to my home of origin namely Mulola Village, T/A Mabuka, Mulanje.*

10. *That by letter dated 1st February 2002 BCA changed tune on the pension benefits payable to me from “full retirement benefits” to “my withdrawn pension benefits” (Exhibited “GWL5”).*
11. *That the reason for the change of tune was that I had not yet attained the prescribed retirement age.*
12. *That the letters of 18th September 2001 and 1st February 2002 were all written on authority of LASCOM minute number LGSC/50/4/29 and BCA categorically stated that LASCOM had directed that I be retired in the public interest.*
13. *That the letter of 1st February 2002 was for my withdrawn pension benefits i.e. my contributions to the BCA pension scheme as if my services had been terminated on dismissal and not on retirement. According to Exhibit “GWL4” my withdrawal benefits should have been calculated based on 100% my contributions plus a refund of my contributions with 4% compound interest. The contribution was at 5% and 9% of the monthly salary by me and the BCA respectively.*
14. *That at the material time the terms and conditions of service of LASCOM which were binding on BCA provided, that an officer who has not attained the age of 55 years may be required to retire, inter alia, in the public interest (Exhibited “GWL6”).*
15. *That I was 45 years of age at the time I was informed by BCA that LASCOM had directed that I be retired in the public interest and I was therefore entitled to full retirement benefits and not merely my withdrawn pension benefits of K67,619.30 (Exhibited :GWL7)”. I was also entitled to severance allowance my employment having been unilaterally terminated at the instance of BCA after working for over 23 years for BCA.*
16. *That I was not responsible for safety and custody of food licenses. My duties involved inspecting premises and recommending to the Administration section to issue food licenses. In any case when LASCOM investigated and examined my case, I was not found guilty of nay misappropriation of BCA’s money in the sum of K159, 000.00 representing 138 unaccounted for food licenses.*
17. *That I was allocated a house by BCA in 1981 and the rental for the house was K25, 00 per month. There was no agreement between me and BCA to adjust the rental to K20, 000.00 per month after my retirement.*
18. *That I was paid the sum of K67, 619.30 being my withdrawn pension benefits on the 17th day of April 2002.*

19. *That BCA has not provided transport to ferry my belonging to my home. I could not move out of the house allocated to me by BCA as I had no money to transport my belongings to my home. Further the BCA removed me from its payroll in the month of September 2001. I was supposed to have moved out of the BCA house by the 18th day of December 2002 but could not do so because BCA had to provide me with transport to ferry my belongings home.*
20. *That in the premises the claim by BCA for the sum of K259, 000.00 be dismissed as being frivolous and vexations. The claim for collection costs is also not tenable the same being the responsibility of BCA.*
21. *That I claim that BCA pay me my full retirement benefits and severance allowance with interest at such rates as the Court will determine from the date the amounts fell due to the date of payment. Further the conduct of BCA in prematurely retiring me amounted to an unfair labour practice hence unfair dismissal. I should be paid compensation for unfair dismissal with interest from 2001.*
22. *That BCA invited all retired employees to a get together on the 17th day of January 2003. The party was in recognition of the invitees' dedication, commitment and long service to BCA. The BCA could not have recognized me as such if I were someone that had stolen from BCA (Exhibited "GWL8").*

The Plaintiff was cross-examined by Counsel Mndolo. The initial questions were in respect of housing. The Plaintiff said his remuneration included being provided with a house. He vacated the house in April 2002 and he went to stay at Nansengo Village, which is within Soche Township, Blantyre. He hired a van to transport his goods from the Defendant's house to Nansengo Village. He said that he failed to go to his home of origin in Mulanje because he had not been given transport by the Defendant. He concluded on the issue of transport by stating that he is ready to go to his home village anytime the Defendant provides transport to him.

Counsel Mndolo next turned to rentals that the Plaintiff was paying in respect of the house. The Plaintiff stated that members of staff were being deducted K25,000 from their salary in respect of rentals. He said that there was neither a written document nor communication from the Defendant regarding the deductions.

With respect to the termination of the Plaintiff's employment, the Plaintiff admitted being served with a Notice of Intention to Institute Disciplinary Proceedings, responding to it and being found guilty of the two charges that were

levelled against him. The Plaintiff also confirmed that the letter from LASCOM was to the effect

that he was being retired in public interest as a way of saving him from dismissal. Finally, the Plaintiff conceded that none of the documents that he sought to rely on exonerated him from responsibility in so far as the disciplinary charges against him were concerned.

As regards his pension dues, the Plaintiff confirmed that the same was based on NICO's Group Pension and Life Assurance Scheme for City of Blantyre as set out in its Trust Rules and Deed (Exhibit D11). According to rule 6.2 of the Trust Rules, early retirement was to be within 5 years of normal retirement. The Plaintiff conceded that being 45 years at the time of termination of his services, he did not qualify for early retirement under the Trust Rules. The Plaintiff stated that he received K67,619.30 whereupon Counsel Mndolo asked him questions that led to the following Q & A:

Q: Why do you dispute the sum of K67,619.30? Do you have another figure?

A: No, I do not have another figure

Q: Would you then know whether you were paid more or less?

A: I am not sure

Q: Would the Court know?

A: No!

Q: In other words, you do not have any basis for the claim?

A: I have it in my statement of claim

Q: Did you indicate the amount?

A: No but it is easy to calculate the amount.

In re-examination, the Plaintiff reiterated that he has yet to be given transport to take him to his home of origin. He also confirmed that during his employment with the Defendant he was being deducted K25,000 per month in respect of the house. With respect to the termination of his employment, he referred to the Minutes of

LASCOM's 528th Meeting (Exhibit D7) which stated that he was to be retired with full benefits effective 31st August 2000.

He concluded by stating that he does know how the sum of K67,619.30 was arrived at as the Defendant just gave him a cheque and a payment voucher which did not explain how the calculations had been done

PW2 was Mr. Nanariwa Nanguwo. He adopted his witness statement as his evidence-in-chief. He testified that he is the owner of house No. LW11 situated on Plot No. LW 15/4, being Title No. Limbe West KJ28/3, and that the Plaintiff, who previously occupied the house, vacated the house in April 2002.

The Defendant called one witness, namely, Mr. Alfred Nyengo. He is employed by the Defendant as a Human Resources Manager. After being sworn in, DW adopted his witness statement whose material part reads as follows:

- “5. *Between 1st September 1999 and 17th November 1999, Blantyre City Assembly was audited by Government Auditors.*
6. *The Government auditor's report revealed that Mr. Livuwo, the Plaintiff had abused the Defendant's 318 food licenses worth K159,000.00 during the period between April, 19997 to October 1999.*
7. *Mr. Livuwo submitted a report on the matter in March 2000. A copy of his report is exhibited hereto and marked as “AN”.*
8. *Mr. Livuwo was subsequently suspended pending further investigations on the matter. A copy of his suspension letter is exhibited hereto and marked as “AN 1”.*
9. *An investigation into the matter was lodged and was carried out by Mr. Stoko and me.*
10. *Our investigations established that Mr. Livuwo was responsible for the missing licenses. A copy of the report of the investigations is exhibited hereto and marked as “AN 2”.*
11. *On or around 6TH November 2000, Mr. Livuwo was formally charged with two charges in respect of the missing food licenses and asked to respond in writing why his case should not be referred to the Local Government Services Commission (LASCOM).*
12. *Mr. Livuwo submitted his written response. A copy of his response is exhibited hereto and marked as “AN 3”.*

13. *The Assembly found Mr. Livuwo culpable of the charges that were leveled against him which warranted a dismissal and meant he would lose all his benefits. However, consideration was given on the number of years he had worked for the Assembly and the Assembly recommended to LASCOM to retire him in the public interest with full retirement benefits than to dismiss him. A copy of the letter to LASCOM is exhibited hereto and marked as “AN 4”.*
14. *That LASCOM after considering the matter and the recommendation by the Assembly directed three things: lifting of the suspension; reinstatement of Mr. Livuwo and retirement of Mr. Livuwo in public interest with full benefits. A copy of the minutes of LASCOM is exhibited hereto and marked as “AN 5”.*
15. *Mr. Livuwo was communicated to on or about 18th September 2001 about the decisions by LASCOM. Copies of the letters are exhibited hereto and marked as “AN 6” and “AN6b”.*
16. *When the issue was brought to AON who were the Assembly’s brokers, they calculated the benefits payable to Mr. Livuwo in line with the rules and issued a cheque in the sum of K67, 619.30 that was eventually paid to Mr. Livuwo.*
17. *That when the Defendant learnt that according to the rules of the suspension, Mr. Livuwo did not qualify to receive pension as benefits as he was only 44 years old then, he was communicated to. The letter was clear that it was replacing the other earlier letters. A copy of the letter is exhibited hereto and marked “AN7”.*
18. *The Assembly had a pension scheme that was managed by National Insurance Company Limited Malawi. A copy of the Trust Deed and Rule is exhibited hereto and marked as “AN8”.*
19. *There was also a member’s explanatory booklet that was for employees exhibited hereto and marked as “AN9”.*
20. *Rule 6.2 of the Trust Deed and Rules provided for pension benefits where an employee retired early. However, according to the rules, the retirement had to be within five (50 years of the employee’s normal retirement age but not earlier than the 55th birthday in the case of male employees. The only exception was where the retirement was on account of any infirmity of body or mind. But even in the case of early retirement, the employee was not entitled to full retirement benefits.*
21. *In terms of the pension rules, Mr. Livuwo did not qualify for early retirement hence the reason the pension brokers could not calculate pension benefits for him.*
22. *That in terms of Rule 9.1 of the Trust Deed and Rules, an employee leaving service before normal retirement other than early retirement was entitled to be*

paid his contributions plus 4% interest plus an additional amount paid from the employee's contributions determined by the number of years of service of the employee in the Assembly.

23. *Mr. Livuwo was paid according to Rule 9.1 referred in paragraph 21 above.*
24. *The Assembly followed the requirements of the law under the Act by according to Mr. Livuwo an opportunity to be heard prior to deciding on his matter.*
25. *The Plaintiff was prematurely retired and not dismissed. He has never disputed the fact that he was retired. Therefore, his claim for compensation for unfair dismissal is without merit as he would not have been retired at the same time dismissed.*
26. *That Mr. Livuwo was invited to the get together because he was retired despite the issues surrounding his retirement.*
27. *Mr. Livuwo had three (3) months to stay in the house after he was notified of his retirement. His stay was not dependent on the payment of his benefits. In any event, the same was paid within a reasonable time since he was retired. As no point did the Plaintiff inform the Assembly of the date he wanted to be repatriated to his home village. He cannot therefore say that he was never provided with transport.*
28. *The Defendant did request the Plaintiff to vacate the house but he did not. The Defendant is therefore entitled to claim the rentals for the period the Plaintiff continued to stay in the house without its consent.*
29. *The K25.00 that the Plaintiff contributed monthly towards the house was not the equivalent of the rentals of the house. Therefore, the same cannot be treated as the value of the rentals for the Defendant's house.*
30. *The Defendant is therefore entitled to rentals at a reasonable price comparable to the rentals that were payable at the material time for a similar house as well as interest thereon."*

In cross-examination by Counsel Makwinja, DW admitted that the Plaintiff was not paid gratuity although he was entitled to it. DW also stated that between Malawi Local Authorities Service Staff Regulations (Exhibit D13) and Blantyre City Assembly – Conditions of Service System (Exhibit D. 14), the latter had precedence. Counsel Makwinja also asked DW whether the directive by LASCOM as set out in Exhibit D7 (Minutes of LASCOM's 528th Meeting) covered the issue of house rentals and he said that it did not.

Counsel Makwinja next turned to termination of the Plaintiff's services. DW stated that it is the Defendant that recommended to LASCOM that the Plaintiff be retired in public interest. He explained that the Defendant did not recommend that the Plaintiff be dismissed and that this meant that the Plaintiff would be paid full benefits but in line with the Defendant's prevailing conditions of service.

With regard to housing, DW stated that he could not remember if the Defendant ever wrote a letter to the Plaintiff to inform him that he had to vacate the house. DW insisted that it was up to the Plaintiff to initiate the process of vacation of the house by writing the Defendant. DW also stated that the non-deduction of rentals from the Plaintiff's dues was a result of oversight by the Defendant

In re-examination, Counsel Mndolo asked DW to explain the role of LASCOM and DW stated that LASCOM is charged with recruitment and disciplinary matters relating to senior officers in Assemblies. He confirmed that the Plaintiff was in a category of senior officers and that LASCOM agreed with the recommendation of the Defendant.

Hearing of the case was concluded on 23rd July 2015 and, following consultations and agreement by Counsel, the Plaintiff was given 21 days from 23rd July 2015 within which he was to file with the Court his final written submissions and the Defendant was to file its final written submissions within 21 days thereafter. The Plaintiff filed his submissions on 14th August 2015. The Defendant never filed submissions within the time period fixed by the Court or at all.

Issues for Determination

There are essentially three issues for the Court's determination and these are whether or not:

- (a) the Plaintiff is entitled to full retirement benefits?
- (b) the Plaintiff is entitled to severance allowance under the Employment Act [hereinafter referred to as the "Act"]?
- (c) the Defendant is entitled to the sum of K259,000.00, that is, K159,000.00 (being value of 318 food licences) and K100,000.00 (rentals)?

Burden and Standard of Proof

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit on a balance of probabilities. In **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, the Court observed as follows:

“Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui

negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see Bond Air Services Ltd v Hill [1955] 2 QB 417.”

The party on whom lies a burden must adduce evidence of the disputed facts or fail in his or her contention. In the present case, the burden of proof lies on the Plaintiff with respect to his claim and on the Defendant in so far as its counter-claim is concerned.

Analysis and Determination

Both parties agree that the services of the Plaintiff were terminated following a directive by LASCOM at its 528th meeting. For reasons which appear presently, it is necessary to reproduce the relevant minutes of that meeting (Exhibit D7) *in extensio*:

**“MINUTES OF THE 528th MEETING OF THE LOCAL GOVERNMENT SERVICE COMMISSION HELD ON THE 18th JUNE, 2001
LOCAL GOVERNMENT SERVICE COMMISSION MINUTE NUMBER 36/2001, 37/2001 AND 38/2001
FILE REFERENCE NUMBER ... ~~VAC/20/29/2001~~ ...50/4/29**

**BLANTYRE CITY ASSEMBLY
GSC. MINUTE NO. 38/2001 – Disciplinary Case**

The Commission considered the Blantyre Assembly Chief Executive’s letter Ref. No. AHS/sa/Pers. File dated 18th December, 2000 in which she recommended that MR. G.W. LIBVUWO, Environmental Health Officer (Grade 6) be retired from service in public interest on grounds that management had lost trust and confidence in him.

After studying the submission, the Commission accepted the recommendation and

- (i) the suspension order imposed on Mr. Libvuwo be lifted with effect from 31st August, 2000
- (ii) he be reinstated in the service with effect from 31st August, 2000
- (iii) he be retired from the service in public interest with full benefits effective from 31st August, 2000.

50/4/29” - Emphasis by underlining supplied

That LASCOM directed that the Plaintiff be retired with full benefits effective from 31st August 2000 is clear from Exhibit D7 but the all-important question is what does the term “full benefits” in this context entail. The Court was referred to section 9.4 of Exhibit D. 14 (Blantyre City Assembly – Conditions of Service System) for an answer. The section deals with the issue of terminal benefits and it reads:

“Where the City Assembly has terminated the services of a staff member (across the board) on grounds other than those of gross misconduct, he shall be entitled to the following benefits:

- i) The relevant notice pay.*
- ii) Payment of all outstanding leave days.*
- iii) A severance benefit or gratuity as determined by the City Assembly.*
- iv) A refund of the contribution made towards pension in accordance with the pension scheme rules.*
- v) Payment for (that particular financial year) outstanding overtime or off-duty.*
- vi) Transport to carry his household effects and family from his work station to a place of his choice.*
- vii) The employee shall be permitted to stay in a City Assembly/rented house up to a maximum of 90 calendar days from the date of leaving service without paying rent.”*

Having received Exhibit D7 (Minutes of LASCOM’s 528th meeting), the Defendant wrote the Plaintiff a letter dated 18th September, 2001 (Exhibit P2) advising the Plaintiff that his suspension had been lifted and that he was reinstated to service with immediate effect and that all dues withheld during his suspension

Within hours of issuance of Exhibit P2, it would seem the Defendant took the view that Exhibit P2 did not exactly convey the directive by LASCOM. For example, Exhibit P2 does not mention the directive by LASCOM to the effect that the Plaintiff be retired in public interest with full benefits. The Defendant, accordingly, issued a fresh letter which is also dated 18th September 2001 (Exhibit P3). It might not be out of place to set out Exhibit P3 in full:

“I write further to my letter of 31st August, 2000 in which you were suspended from duty following the audit report which reveals that you had misappropriated the Assembly money worth K159,000-00 being the value of 318 food licenses during the period of April 1997 to October, 1999.

The Local Government Services Commission (LASCOM) in minute no LGSC 50/4/29 has directed that you are being prematurely retired from service with immediate effect on public interest.

The records show that you joined the service on 8th July, 1978 and to date you have been in the service for 23 years.

Upon retirement the Assembly shall pay the following:

- Full retirement benefits*
- Three months salary in lieu of notice*
- Commutation of leave days still standing to your credit if any*
- Transport shall be provided to ferry your belongings.*

The Director of Financial Services is by copy of this letter advised to effect the above dues.

Please complete the attached departure clearance forms.”

It is significant to note that although the directive by LASCOM was very clear that the Plaintiff was retired from service with effect from 31st August 2000, the Defendant surprisingly chose to introduce the vague phrase *“retired from service with immediate effect”*.

Four months and two weeks after writing Exhibit P3, the Defendant was minded to write another letter on the same subject-matter of retirement of the Plaintiff. The letter is dated 1st February 2002 (Exhibit P5) and as its wording is at the centre stage of the dispute in this case, it is only fair that it be set out in full:

“I write further to my letter of 31st August, 2000 in which you were suspended and another one of 18th September, 2001 in which you were retired from services following an

audit report which reveals that you had misappropriated the Assembly money worth K159,000-00 being the value of 318 food licenses during the period of April 1997 to October, 1999.

The Local Government Services Commission (LASCOMJ) in minute no LGSC 50/4/29 has directed that you be retired prematurely from service with effect from 18th September, 2001 in the public interest.

The records show that you joined the service on 8th July, 1978 and to date you have been in the service for 23 years.

Upon retirement the Assembly shall pay you the following;

- *Your withdrawn pension benefits as you have not attained the prescribed retirement age as per our pension scheme*
- *Three months salary in lieu of notice*
- *Commutation of leave days still standing to your credit if any*
- *Transport shall be provided to ferry your belongings.*

The Director of Financial Services is by copy of this letter advised to effect the above dues.

The contents of this letter supercedes the contents of my previous correspondences (suspension letter dated 31st August, 2000 and retirement letter dated 18th September, 2001) on the same.”

Just as was the case with Exhibit P3, it is not uninteresting to note that although the directive by LASCOM was very clear that the Plaintiff was retired from service with effect from 31st August 2000, the Defendant changed the retirement date in Exhibit P5 to 18th September 2001.

Counsel Makwinja submitted that the Plaintiff was entitled to full benefits as directed by LASCOM and that the Defendant had no authority to act outside LASCOM's directive as set out in Exhibit D7 (Minutes of LASCOM's 528th meeting). I cannot agree more with Counsel Makwinja. The Defendant was enjoined to implement the directive of LASCOM. If at all the Defendant faced difficulties in executing the directive, the proper thing that the Defendant ought to have done was seek further guidance from LASCOM. There is no evidence that the Defendant ever reverted back to LASCOM. On the evidence before the Court, LASCOM only meet once to discuss the disciplinary matter pertaining to the Plaintiff, that is, on 18th June, 2001 during the 528th Meeting thereof as evidenced by Exhibit D7 (Minutes of LASCOM's 528th meeting).

On the basis of the directive by LASCOM as read with section 9.4 of Exhibit D14

(Blantyre City Assembly – Conditions of Service System), it is my finding that the Plaintiff was entitled to (a) three months salary in lieu of notice, (b) payment of all his outstanding leave days, if any, (c) severance benefit or gratuity, as determined by the Defendant, (d) a refund of the contribution made towards pension in accordance with the pension scheme rules, (e) payment for (that particular financial year) outstanding overtime or off-duty, (f) transport to carry his household effects and family from his work station to a place of his choice and (g) be permitted to stay in the Defendant/rented house up to a maximum of 90 calendar days from the date of leaving service without paying rent.

I now turn to consider the specific claims made by the parties in their respective pleadings.

Repatriation benefits

It is the case of the Plaintiff that the Defendant has not provided the Plaintiff with transport to ferry his belongings to his home of origin, namely, Mulola Village, T/A Mabuka, Mulanje.

Generally speaking, repatriation refers to taking employees and their family and personal belongings from their duty station to their home or place of recruitment, depending on the terms of the contract. Entitlement to repatriation must be expressly or impliedly provided for in the contract of employment or in a statute: see **Kankhwangwa and Other v. Liquidator, Import and Export [2008] MLLR 26 (SCA)**.

The Act does not make any express provision in respect of repatriation of employees. The question then becomes whether the Plaintiff's contract of employment provides for the same. As we have already seen, section 9.4 of Exhibit D. 14 (Blantyre City Assembly–Conditions of Service System) entitles an employee to be provided with transport to carry his household effects and family from his work station to a place of his choice.

The Defendant does not deny that the Plaintiff is entitled to be repatriated but blames the Plaintiff for its failure to provide him with transport. According to the testimony of DW, the Plaintiff did not inform the Defendant of the date he wanted to be repatriated to his home village and as such he cannot claim that he was never provided with transport. It appears to me that DW was economical with the truth on this issue. In terms of Exhibit P3, the Plaintiff was provided with departure clearance forms. There was no evidence adduced by the Defendant that the Plaintiff did not complete these forms. In the premises, I am inclined to agree with

the Plaintiff that he provided the necessary information to the Defendant regarding repatriation.

The Plaintiff repeatedly told the Court during the trial that he is ready and willing to be provided with transport to ferry his belongings to his home of origin. I, accordingly, enter judgment for the Plaintiff on this item.

Unfair dismissal

The claim for unfair dismissal is premised on the contention by Counsel Makwinja that the Plaintiff was retired pre-maturely without according him a hearing as regards the retirement. The claim appears to me to be misconceived.

In terms of section 58 of the Act, a dismissal is unfair if it is not in conformity with section 57 of the Act and subsections (1) and 92) thereof are relevant:

- “(1) *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.*
- (2) *The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.”*

It is clear on the evidence adduced in this case that the Plaintiff admitted being served with a Notice of Intention to Institute Disciplinary Proceedings, responding to it and being found guilty of the two charges of misconduct. The first charge was to the effect that the Plaintiff had misappropriated the Defendant’s money worthy K159,000.00, being the value of 318 food licences. The Court finds that the Defendant had a valid reason to dismiss the Plaintiff. It is also my finding that the Defendant accorded the Plaintiff a fair hearing.

It is important to bear in mind that in addition to the requirements of section 57 of the Act, section 61(2) of the Act enjoins an employer to “*show that in all circumstances of the case, he acted with justice and equity*”. To my mind, the Defendant went out of its way to meet the requirements of section 61(2) of the Act by opting to retire the Plaintiff in public interest as opposed to outright dismissal

which would have meant the Plaintiff getting insignificant terminal benefits, if any at all. It will be recalled that the Plaintiff confirmed during his cross-examination that he understood the letter from LASCOM being to the effect that he was being retired in public interest as a way of saving him from dismissal.

In the final analysis of the evidence before me and in light of the law as set out in sections 57 and 61 of the Act, I find that the Plaintiff was not unfairly dismissed. To the contrary, the Defendant acted with justice and equity. In the premises, I am not persuaded at all by the submission of Counsel Makwinja that having found the Plaintiff guilty of misconduct pursuant to the requirements of section 57 of the Act, the Defendant could not legally impose a penalty, that is, retiring the Plaintiff in public interest, without giving him an opportunity to be heard on the proposed

penalty. In my view, neither section 43 of the Constitution nor section 57 of the Act supports the contention of Counsel. The fact of the matter is that the Plaintiff was given a fair hearing and it is on the basis of that hearing that the Defendant retired the Plaintiff in public interest.

Severance allowance under the Act

The Act in section 35 makes provision for payment of severance pay. At the time of termination of the Plaintiff's contract, the text of section 35 of the Act read in part as follows:

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

- (3) *The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.*

- (6) *Subsection (1) shall not apply where the employee--*
 - (a) *is serving a probationary period as provided for in section 26;*
 - (b) *is fairly dismissed for a reason related to his conduct; ...*

Having found that the Plaintiff was fairly dismissed, it follows that section 35(1) of the Act does not apply to the Plaintiff by reason of section 35(6)(b) of the Act. Briefly put, the Plaintiff is not entitled to be paid severance pay under the Act because he was fairly dismissed for a reason related to his conduct.

Before moving on, it is important to bear in mind that the severance allowance payable under section 35 of the Act is separate and distinct from *severance benefit or gratuity, as determined by the City Assembly*” provided in section 9.4 of Exhibit D14 (Blantyre City Assembly – Conditions of Service System)

Full pension benefits

As already discussed hereinbefore, the Plaintiff is entitled to a refund of the contribution made towards pension in accordance with the pension scheme rules. The applicable pension scheme rules in this case are NICO’s Group Pension and Life Assurance Scheme for City of Blantyre as set out in its Trust Rules and Deeds (Exhibit D11).

Refund by the Plaintiff of the sum of K159,000.00

In its counterclaim, the Defendant avers that the Plaintiff failed to account for 318 food licences valued at K159,000.00 during the period between April 1997 and October, 1999 and he has never refunded the value of the said licences. The Plaintiff strenuously objects to this claim. It might be useful to reproduce the relevant part of the Plaintiff’s Final Written submissions:

“4.6 *The Defendant stated that because of the grade the Plaintiff had at the Defendant, only LASCOM was mandated to deal with him. The Defendant referred the Plaintiff’s case of misconduct to LASCOM and LASCOM came back to the Defendant with its decision. It is clear from Exhibit D7 that LASCOM never directed that the Defendant should recover the sum of K159,000.00 for the food licences that the Plaintiff allegedly misappropriated. Even in its own recommendation to LASCOM, the Defendant never raised the issue of the sum of K159,000.00. Moreover the Defendant during the time of the Plaintiff’s suspension withheld his dues; if the Defendant was minded to claim the sum of K159,000.00 from the Plaintiff and knew that it had a credible claim against the Plaintiff, why did the Defendant pay all dues of the Plaintiff withheld by the Defendant during his suspension to the Plaintiff ? (See Exhibit D8) Again the Defendant paid the withdrawn benefits after deducting what the Plaintiff owed the Defendant which did not include the sum of K159,000.00 ...*”

I cannot agree more with Counsel Makwinja. The Defendant’s claim for a refund of the K159,000.00 is without merit and the claim is, accordingly, summarily dismissed.

Payment of rentals by the Plaintiff

The Defendant also counterclaimed rentals for the house the Plaintiff had been occupying for the period from 18th December, 2001 to the date the Plaintiff vacated it.

As we have already seen, section 9.4 of Exhibit D. 14 (Blantyre City Assembly –

Conditions of Service System) entitles an employee to stay in the Defendant/rented house up to a maximum of 90 calendar days from the date of leaving service without paying rent. The Plaintiff was first informed of the directive by LASCOM on 18th September 2001 (Exhibit P3). This meant that the Plaintiff had up to 17th December 2001 within which he had to vacate the house.

The undisputed evidence is that the Plaintiff vacated the house in April 2002. Two main reasons have been advanced by the Plaintiff to explain why he only vacated the house in April 2002. Firstly, it was submitted that the Defendant was being unreasonable in expecting the Plaintiff to vacate the house when the Defendant had not provided him with transport for his repatriation. Secondly, the Court was invited

to note that the Plaintiff was given two letter of retirement, that is, Exhibit P3 dated 18th September 2001 and Exhibit P5 dated 1st February 2002.

I have considered this issue and I am very much persuaded by the reasoning of the Plaintiff. It seems to me that the alleged “*delayed*” vacation of the house by the Plaintiff was of the Defendant’s own making. The last retirement letter served on the Plaintiff is Exhibit P5 and it is dated 1st February 2002. This means the Plaintiff was entitled to continue staying in the house up to end April 2002. In the premises, it is my finding that the Plaintiff vacated the house within the 90 calendar days time period stipulated in section 9.4 of Exhibit D. 14 (Blantyre City Assembly – Conditions of Service System). It also seems to me that it would be inequitable for an employer to expect an employee to move out of an institutional house before the employee is paid his terminal dues.

Conclusion and Disposition

The thrust of the Plaintiff’s case is that the Defendant should pay him “*full benefits*” as directed by LASCOM in Exhibit D7. As discussed hereinabove, section 9.4 of Exhibit D14 (Blantyre City Assembly – Conditions of Service System) spells out the full benefits that a staff member of the Defendant is entitled to get at the termination of his or her employment, namely, (a) three months salary in lieu of notice, (b) payment of all his outstanding leave days, if any, (c) severance benefit or gratuity, as determined by the Defendant, (d) a refund of the contribution made towards pension in accordance with the pension scheme rules, (e) payment for (that particular financial year) outstanding overtime or off-duty, (f) transport to carry his household effects and family from his work station to a place of his choice and (g) stay in the Defendant/rented house up to a maximum of 90 calendar days from the date of leaving service without paying rent.

It is commonplace that items (a), (b) and (e) were not in issue in the present case. The Plaintiff was not paid item (c) and no reason whatsoever has been given for not doing so. I, therefore, enter judgment for the Plaintiff on item (c). I believe that the Defendant has in place a formula/guidelines that it uses to determine the severance benefit/gratuity payable section 9.4 of Exhibit D14. The sum of money due to the Plaintiff under this item has to be paid by the Defendant within 14 days hereof. I so order.

As regards item (d), the Plaintiff failed to establish that the Defendant owes him any money with respect to refund of his contribution towards pension. It is my finding that the Defendant paid the Plaintiff the correct amount in accordance with the applicable pension scheme rules, namely, NICO's Group Pension and Life

Assurance Scheme for City of Blantyre as set out in its Trust Rules and Deeds (Exhibit D11). The Plaintiff's claim on this item has to fail and it is, accordingly, dismissed.

With respect to item (f), it is clear on the available evidence that the Defendant did not provide the Plaintiff with transport as required under section 9.4 of Exhibit D14 (Blantyre City Assembly - Conditions of Service System). I, accordingly, enter judgment for the Plaintiff on this item. The Defendant must, within 14 days of the date hereof, provide the Plaintiff with transport to carry his household effects and family household effects and family from Area 2 Machinjiri in the City of Blantyre where he is currently staying to his home of origin, namely, Mulola Village, T/A Mabuka, Mulanje.

I now turn to the counterclaim by the Defendant. As will be noted from the analysis above, the counterclaim was misconceived and it is, accordingly, dismissed.

I award the Plaintiff costs on the Plaintiff's action and the Defendant's counterclaim, to be taxed if not agreed. I so order.

Pronounced in Court this 4th day of January 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE