

Serve accepted by
Komayori Jere on behalf
of Office of Ombudsman
on 4th August 2021 at
8.05 am



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
JUDICIAL REVIEW CAUSE NO. 62 OF 2020**

BETWEEN:

**THE STATE (On the application ofAPPLICANT
NATIONAL LIBRARY SERVICE BOARD)**

-AND-

THE OMBUDSMAN.....RESPONDENT

CORUM: R. M CHIANNGWA JUDGE

Debwe Counsel for the Claimant

Mangulama Counsel for the Respondent

Chitao Court Clerk

JUDGEMENT

Introduction

1. This matter is before this court on review. It is the applicants contention that the respondent had no jurisdiction in making the determinations made.
2. The claimant seeks the following:
 - 2.1 A declaration that the respondent's inquiry into complaints of (i) unfair dismissal; (ii) unfair labour practices; (iii) unfair redundancy, and (iv) misallocation of gratuity funds was

ultra vires the powers of the respondent and unconstitutional as the Industrial Relations Court has statutory jurisdiction over such matters.

- 2.2 A declaration that the respondent's inquiry into the complaint of abuse of power by the National Librarian and the Deputy National Librarian regarding how the two acquired institutional houses was ultra vires the powers of the Ombudsman and unconstitutional as Courts of Magistrate and the High Court of Malawi have original criminal jurisdiction over such complaints.
- 2.3 A declaration that hearing witnesses of the complainants in the absence of the respondents (the Claimants herein as well as Mr. Gray Nyali and Mr. Vote Somba) with (i) no opportunity to hear what they said to the Ombudsman in full, (ii) no opportunity to cross examine the complainants and (iii) no opportunity to comment fully on what the complainants said was grave breach of the rules of natural justice and consequently a failure of justice at the most and a miscarriage of justice in the least.
- 2.4 An order setting aside the findings of the respondent on her inquiry into the (i) alleged unfair dismissals of Mr. Ronald Mphweya, Walusungu Simbeye, Mathews Bunaya Banda and Nita Kasanga; (ii) alleged unfair redundancy of Laula Malala; (iii) alleged unfair labour practices against Bunaya Banda, Nita Kasanga, Andrew Kandulu, G Nkhoma, Chisimba, A Namaliya, G. Mwanderela, Binalison, and Buwani; (iii) misallocation of gratuity funds; and (iv) acquisition of institutional houses by the National Librarian and Deputy National Librarian
- 2.5 An order setting aside all the directions of the respondent set out at pages 33 to 36 of her determination of 26 August 2020.
- 2.6 An order directing the respondent to pay costs of these review proceedings.
3. The applicant filed a sworn statement in support of the application. In response the application was equally opposed through a sworn statement. Below is a summary of the submissions made.

Applicants Case

4. The applicant states that:
- 4.1. the claimant employed Mr. Gray Nyali as Executive Secretary (popularly referred to as 'National Librarian') and Mr. Vote Somba as Deputy Chief Executive (Popularly referred to as 'Deputy National Librarian') and several other officers, clerks and servants.

- 4.2. Some of the claimant's employees joined membership of a trade union known as Communication Workers Union of Malawi ("COWUMA").
- 4.3. At the beginning of the 2018/2019 Financial Year COWUMA members demanded a salary increment of 20%. Having consulted the Secretary to the Treasury and the Comptroller of Statutory Corporations regarding expected levels of funding the Applicant reviewed salaries upwards by 10% across all grades. COWUMA members were not satisfied and declared a dispute on 31 October 2018 ("Dispute").
- 4.4. The dispute was resolved on 18 January 2019 and an agreement was executed by COWUMA, the Claimant's Management and the Conciliator.
- 4.5. On 6 May 2019 COWUMA members issued a Notice of Intention to Strike and they embarked on it. The Strike was illegal and an injunction was issued against COWUMA and by the Industrial Relations Court on 20 June 2019 restraining COUMA from engaging in the strike. The matter was registered as "Matter Number IRC 303 of 2019: National Library Service Board – vs- Communication Workers Union of Malawi (COWUMA)". COWUMA has not filed any appeal against the decision of the Industrial Relations Court.
- 4.6. During the illegal strike some members of staff misconducted themselves and disciplinary measures were taken against them after they were respectively given opportunity to be heard.
- 4.7. COWUMA lodged a complaint against the Applicant with the Office of the Ombudsman (the Respondent herein) on or before 27 November 2019. The Respondent determined that based on the complaint it was going to inquire into the various allegations.
5. In the determination the Respondent made numerous findings namely:
 - 5.1. That the issue of the sale and purchase of the institutional houses by the National Librarian Mr. Nyali and the Deputy Librarian Mr. Somba would be subjected to separate investigations and she would pronounce herself on the same afterwards.
 - 5.2. That Management of the National Library Services should write a comprehensive report to the employees explaining and detailing how the K39 million (Proceeds of a discharged gratuity fund) was used and with a copy of the report being sent to her by 15th September, 2020.
 - 5.3. That the National Library Services should reinstate Mr. Walusungu Simbeye, Mr. Bunaya Banda, Mrs. Nita Kasanga, Mr. Ronald Mpweya and Mr. Peter Kandulu immediately.

- 5.4. On compliance with 3.3 above the National Library Services to immediately initiate fresh and proper disciplinary proceedings against Ronald Mpweya with the corrected and verified figure of money admittedly misappropriated. Any disciplinary action to be taken after that process should be in accordance with the law and be fair and reasonable.
- 5.5. That the demotion of Mrs. S. Buwani demotion was nullified. That the National Library Services should reinstate her back to her original position and pay back the difference in salary between her original post and the post she was demoted to for the months that she was receiving salary based on the lower grade.
- 5.6. That Mr. Andrew Kandulu should be compensated for the loss of the scholarship which loss was clearly as a result of Management deliberate delay to sign the scholarship forms. Considering all circumstances of the case the compensation should be K800,000.00. In addition to this the Respondents should ensure that subject to Government processes, Mr. Andrew Kandulu is put on prioritized training plan of the National Library Services Limited so that he may be considered for another scholarship. The K800,000.00 should be paid to him by 30 November 2020.
- 5.7. That the Administrative Officer, Ms. Mchanzime, who failed to be diligent and ensure that whatever communication they were waiting for from DHRMD is obtained in time to avoid the loss of the scholarship as it happened herein should undergo disciplinary process for failure of duty. This should be done by 30 September 2020.
- 5.8. That considering that time has passed since the transfers were effected and that the unfairly transferred employees may have settled into their new positions, Management of the National Library Services should reopen discussions with the employees on the transfers and if the employees indicate that they want to revert to their respective original duty stations management should be able to process that. A report of these discussions together with resolutions should be furnished to the Ombudsman's Office by 30 September 2020. Any transfer after that should be properly done.
- 5.9. That National Library Services should comprehensively review its Terms and Conditions of Service with particular focus on the issues of disciplinary processes taking into account the Ombudsman observations in her determination to ensure that they are in line with principles of fairness as provided in the Constitution and the Employment Act. The specific issues requiring reviewing and or introduction are:- Provision of fair process for

appointing members of the Disciplinary Committee members; A provision that prohibits the Disciplinary Committee chair to be both the prosecutor and Judge in own case; A provision that provides for different composition of Disciplinary Committee for different category of grades of members of staff; A provision for Disciplinary Committee members should give room to incorporation of outside and independent members depending on expertise and grade in question; A provision that makes any dismissal of member of staff subject to the endorsement of the Board regardless of the Grade. This review should be completed by 30 December 2020.

5.10. For the reason that all the related correspondence in as far as the disciplinary process inquired into by the Ombudsman were embarrassing, emotional and chaotic and there was obvious lack of knowledge on how to conduct disciplinary processes. National Library Services should engage a consultant to train the relevant staff on proper disciplinary processes. The Training to be completed by 30 December 2020. The report on the training to be furnished to the Ombudsman's Office.

5.11. That it was clear that the National Librarian and his Deputy abused their powers in the purchase of the Institutional houses. They showed poor leadership throughout the strike period and ended up committing different kinds of illegalities in the process and in particularly retaliated against the staff instead of managing them. They perpetuated the toxic, chaotic and disorderly environment at the time of the strike. These are serious misconduct that calls into question their suitability for the positions they now hold. To this end the Board or Controller of Statutory Corporations should institute Disciplinary proceedings against them within the next 90 days from the date of this determination.

5.12. The Claimant states that the findings of the Ombudsman and the directions given were made in the course of a breach of the Constitution and a usurpation of the jurisdiction of the Industrial Relations Court, Magistrate Court and the High Court of Malawi and are null and void.

Respondents Response

4 In response the respondent stated that:

4.1 On 16th September, 2019 the respondent received a complaint from the Human Rights Consultative Committee (HRCC) on behalf of some members of staff of the National

Library alleging abuse of power and public funds by the National Librarian Mr. Gray Nyali and his deputy Mr. Somba.

- 4.2 The abuse of office and abuse of power was in relation to three institutional houses situated in Lilongwe, Blantyre and Mzuzu which it was alleged that the Claimant's senior Management had sold to itself despite the existence of a ban on the sale of institutional houses by the Government and that when members of staff questioned this and questioned the manner in which the proceeds were utilized, the Claimant's management embarked on a revenge exercise against the members of staff which revenge was in form of unfair dismissals, demotions, transfers and loss of opportunities.
- 4.3 As the respondent had jurisdiction to inquire into matters that were raised by the employees of the respondent as the complaint that was before the respondent was that of abuse of office and abuse of public funds by the National Librarian and the Deputy National Librarian and the labour related issues were ancillary to the main complaint.
- 4.4 The employment aspects were unveiled under the issue of abuse of office as such dealing with these issues could not be separated.
- 4.5 Some employment issues that were not connected to the abuse of office and were already in court were not handled.
- 4.6 The respondent assumed jurisdiction herein after noting that the case may need production of documents which the respondent could easily have access to than the complainants due to the powers conferred on the Ombudsman.
- 4.7 The respondent received an additional complaint from the National Library Service Trade Union through the Malawi Human Rights Resource Centre on (MHRRC) dated 25th November, 2019 claiming unfair and dehumanizing treatment in that the National Librarian assaulted Ms. Kasanga when he was in a scuffle with the members of staff and despite reporting the matter to the police she was not being assisted.
- 4.8 On 25th November, 2019 the respondent heard the complaints and later on 2nd December, 2019 the respondent took the evidence of the Claimants herein. The first basis for this decision is that the Ombudsman is empowered to determine the nature and extent of an inquiry or investigation. How the respondent therefore conducts an investigation is the respondents discretion depending on the circumstances and peculiarities of each case.

4.9 In this matter there was a lot of tension, emotions and confrontational atmosphere and due to this volatile relationship, I decided hear the parties separately.

4.10 Despite taking this approach in my investigation, the respondent did put across to the Claimants herein all the issues that were raised by the Complainants and what the respondent had obtained in evidence from the Complainants.

4.11 After the respondent engaged the Claimants herein and they submitted their supporting documentation, the documents in support of their submissions spoke for themselves and they were the basis for my final findings as such there was no need to call for a third inquiry to have both sides present and confront one another.

4.12 On 26th day of August, 2020 the respondent released a determination on the matter which gave various directives and remedies

4.13 The said determination did touch on aspects that are labour related in nature however the rest of the directives are concerned with improving the systems at the National Library and to bringing a culture of accountability within the institution which also forms part of my mandate.

4.14 Some of the directives given directly affect the National Librarian Mr. Gray Nyali however, the majority were directed to the Board as such the respondent feel it is imperative that it must be shown that the Board which was directed to adhere to these directives in a Board resolution consented and directed that this Judicial Review be instituted.

4.15 The respondent denies having exceeded the mandate in and or having breached section 123 of the Constitution and usurped the powers of the Industrial Relations Court or any other Court and also deny that my directive in awarding compensation to Mr. Andrew Kandulu was unreasonable in the Wednesday's sense.

4.16 Even if the Court finds that some matters could be handled by the Industrial Relations court, it is not all the matters which were investigated and determined on that touched on matters that could be handled by the Industrial Relations Court as such the Court cannot quash the whole determination

Issues for determination

5. This court has to determine

5.1 whether the applicant has locus standi?

5.2 whether the respondent had jurisdiction to handle the complaints before it and make the determinations so pronounced?

Analysis of Law and Evidence

Locus Standi

5. In **Civil Liberties Committee v Minister of Justice and another** [2004] MLR 55 (SCA) the court held that courts must consider, inter alia, the absence of another responsible person that can bring an action to challenge the decision in question and the role of the applicant in relation to the subject matter of the action. In addition, the court held that in the field of public law a private citizen can establish standing to bring an action if he can show that the conduct or decision of the defendant adversely affects his legal right or interest. In this matter, the respondents argue the claimants do not have sufficient interest, as it must be shown that a Board resolution consented and directed that this Judicial Review be instituted. On the other hand, the claimants argue that the claimants do have sufficient interest as the claimant is directly affected by the respondent's determination having been directed to take disciplinary action against the National Librarian and his deputy as well as to effect reinstatement. This court has two observations. First, this court notes that at the stage of considering whether to grant leave or not the issue as to whether the claimant has sufficient interest or not should have been raised as it is one of the considerations the court determines at a preliminary stage. This preliminary point in law was not raised by the respondent as the court determined whether to grant leave for judicial review or not.
6. Be that as it may this court is of the view in agreement with the claimants that the claimant does have sufficient interest as they are affected by the determination made by the respondent as they play a role in the implementation of the determinations made. In addition, this court observes that the respondents have not shown the court that the claimants do not have sufficient interest by producing the relevant evidence. The respondents have merely argued that the claimant, which is the Board itself, should produce evidence that the Board sanctioned the judicial review process. The argument in itself sounds confusing in the absence of contrary evidence to show that the Board didn't

sanction the commencement of the review process. The objection fails as it hasn't been substantiated.

On jurisdiction

7. Decisions of the Ombudsman are reviewable by the High Court under *section 123 (2) of the Constitution* and see also *Air Malawi Ltd v Ombudsman [1999] MLR 8 (HC)*. In the process of review the High Court only 'reviews or revisits exercise of the Ombudsman's functions and powers' see *The Trustees of Malawi Against Physical Disabilities v The State and The Office of the Ombudsman [2000–2001] MLR 391 (HC)*.
8. The issue raised by the applicants is that the respondent did not have jurisdiction to make the determinations made.
9. The functions and powers of the Ombudsman are spelt in section 123 of the Constitution and section 5 of the Ombudsman Act.
10. Section 123 states the functions and powers of the Ombudsman as follows:
 - (1) *The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.*
 - (2) *Notwithstanding subsection (1), the powers of the office of the Ombudsman under this section shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined.*
11. Section 5 of the Ombudsman Act spells out the duties and functions of the Ombudsman as follows:
 - (1) *Subject to the Constitution, the Ombudsman shall inquire into and investigate in accordance with the provisions of this Act, and take such action or steps as may be prescribed by this Act on any request or complaint in any instance or matter laid before the Ombudsman in accordance with section 7 (1) or (2), and concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society.*

(2) Without derogating from the provisions of subsection (1), any request or complaint in respect of any instance or matter referred to in that subsection may include any instance or matter in respect of which it is alleged—

(a) that any decision or recommendation taken or made by or under the authority of any organ of Government or any act or omission of such organ is unreasonable, unjust or unfair, or is based on any practice which may be deemed as such;

(b) that the powers, duties or functions which vest in any organ of Government are exercised or performed in a manner which is unreasonable, unjust or unfair.

(3) This section shall not apply in respect of any decision taken in or in connexion with any civil or criminal case by a court of law.

12. Now, the question is what matter did the Ombudsman assume jurisdiction over? Did the law allow the Ombudsman to do so?
13. Page 3 of the Ombudsman determination lists the issues that the Ombudsman assumed jurisdiction over namely:
- 13.1 abuse of power by the National Librarian and his deputy in that they acquired institutional houses without lawful authority;
 - 13.2 misallocation of gratuity funds owed to members of staff from 2016 to date;
 - 13.3 unfair dismissal and unfair redundancy
 - 13.4 unfair labour practices which include physical and verbal assault, harassment (groping of the breast), refusal to sign scholarship, unjustifiable transfers, withholding of October 2019 salaries, unjustifiable demotion, unjustifiable changes in the composition of disciplinary committee removing union members and replacing them with cronies, favouratism in offering assistance in training in that different criteria is used in determining whether an officer goes for paid or unpaid study leave
 - 13.5 unfair practice of introducing library services fees for library users when it is supposed to be a free service for example paying to read a book or newspaper as well as paying to use the toilet among other things.
14. Section 123 of the Constitution allows the Ombudsman to investigate a case where a person has suffered injustice and there is no available remedy before the court. On the other hand, section 5 of the Ombudsman Act, subject to the Constitution, allows the Ombudsman to investigate a matter concerning abuse of power or unfair treatment of a person by a

government employee. This therefore clearly marks the difference in jurisdiction between the courts and the office of the Ombudsman. In essence the jurisdiction of the Ombudsman is to investigate or inquire matters where a person has suffered injustice or where a person has suffered injustice at the instance of a government employee abusing power or unfairly treating the person. In both cases there ought to be no available remedy before the courts.

15. It is this court's view having in mind section 123 of the Constitution that the complaints before the Ombudsman relating to unfair dismissal; unfair redundancy and unfair labour practices are claims which could have been addressed in the Industrial Relations Court as it has jurisdiction to deal with the same under section 57 of the Employment Act on dismissals. It is noted that the Industrial Relations Court has determined matters on transfers as in **Jana v Attorney-General** MLLR 391; unfair dismissals leading to reinstatements for unions and individuals as in **128 Trade Union Members v NSCM Milling Division** MLLR 321; demotion as in **Chinkondenji v Malawi Stock Exchange Ltd** MLLR 379 just to mention a few. It is argued by the Ombudsman that these matters arose during the hearing as such they were dealt with in the manner in which they were dealt with. This court is of the view that the mere fact that a legal matter (which falls outside the jurisdiction of a tribunal or a court) arises during the course of proceedings before the court or tribunal does not confer jurisdiction on such court or tribunal nor does it justify the tribunal or court to assume jurisdiction on such a matter and make decisions. Therefore, in this matter the Ombudsman could not assume jurisdiction over these matters for which the Ombudsman did not have jurisdiction simply because they arose during the course of the exercise of its powers.
16. An analogy can be drawn in cases of divorce. Generally, a Third a grade magistrate, would have jurisdiction over a claim for dissolution of a customary marriage. However, the same Third Grade Magistrate handling the claim for dissolution of marriage cannot proceed to handle a claim for custody of children though arising out of the same matter specific jurisdiction having been given to First Grade Magistrate and or designated Second Grade Magistrates. Therefore, the court finds that the Ombudsman has no jurisdiction over employment matters which arose during the proceeding which included unfair dismissal; unfair redundancy and unfair labour practices. The assumption of jurisdiction in this case was ultravires and therefore nullified.

17. Now regarding the remainder of the issues before the Ombudsman as summarized in clauses 12.1; 12.2 and 12.5 it is this courts view that the Ombudsman had jurisdiction under section 5 of the Ombudsman Act which allows the Ombudsman to handle matters pertaining to abuse of power by a government official. Much as it can be argued that the criminal court was an available court remedy, section 5 of the Ombudsman Act is made complete with section 126 of the Constitution. In essence in a case of abuse of power by a government official, the Ombudsman investigates the matter and recommends prosecution where a case has been established. In no way does this oust the jurisdiction of the court.
18. The applicants have argued that the rules of natural justice where not adhered to as there was no confrontation of witnesses and the claimants. Section 43 of the Constitution captures the law on rules of natural justice. In essence the gist of this law is that a party should not be condemned without being heard. The respondents acknowledge that they could not hear the parties because the volatility of the subject matter and persons involved in the subject matter. It is argued that documents were the basis of the decision of the Ombudsman. It is the courts view that though the Ombudsman is mandated to carry out investigations and or an inquiry, the remedies it mets out under section 126 (b) of the Constitution and section 8 of the Ombudsman's Act necessitate that any party affected by the decision made should have been given an opportunity to be heard which should at a minimum include the right to challenge the evidence which has been proffered against a party especially where its legitimate interests or rights may be impacted by the decision. In other words, it is this courts view that where the Ombudsman plays an investigatory role and does not make a final decision on a matter and refers the matter to an appropriate body to make a decision on the grievance the Ombudsman need not adhere to rules of natural justice as it plays the role of fact finding. However, where the Ombudsman sits as a tribunal or quasi-judicial body making a final decision addressing a grievance, a failure to provide such an opportunity to be heard cannot be mitigated by arguing that the decision was based on documentary evidence. It is this court's finding that the failure to adhere to rules of natural justice, where the Ombudsman sat to make address a grievance, compromised the hearing process and outcome of the determination made by the respondent.

Should all the remedies made by the respondent be quashed?

19. Now regarding the remedies made by the respondents on pages 33 to 36, this court does not agree with the claimants that all remedies ought to be quashed. Section 126 of the Constitution and section 8 of the Ombudsman Act allows the Ombudsman to make specific remedies. Section 126 of the Constitution provides that the Ombudsman can a) *direct that appropriate administrative action be taken to redress the grievance; (b) cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance; and (c) refer a case to the Director of Public Prosecutions with a recommendation for prosecution, and, in the event of a refusal by the Director of Public Prosecutions to proceed with the case, the Ombudsman shall have the power to require reasons for the refusal.* Section 8 of the Ombudsman Act provides that *The Ombudsman shall after holding any inquiry or investigation in accordance with this Act-7 (a) notify the person who laid the matter before him under Section 7(1) or (2) of the outcome of such inquiry or investigation in such manner and form as the Ombudsman may determine and to such extent as the Ombudsman may deem necessary or appropriate in the public interest, or that the matter will not be inquired into or investigated in accordance with Section 7 (3); (b) take appropriate action or steps to call for or require the remedying or reversal of matters or instances specified in Section 5 through such means as are fair, proper and effective, including by- (i) negotiation and compromise between the parties concerned; (ii) causing the complaint and the Ombudsman's finding thereon to be reported to the superior of an offending person; (iii) referring the matter to the Attorney General or the Director of Public Prosecutions or both, as the case may be. (2) The Ombudsman may, but without derogating from any organ of the provisions of Sub-section 1(b) if he is of the opinion that any instance or matter inquired into or investigated by him under Section 5 can be rectified or remedied in any lawful manner, notify the organ of government his findings and the manner in which the matter can be rectified or remedied.*

20. Having in mind the above remedies which are in essence geared to addressing systems on one hand and on the other hand referring matters to other institutions for further action, this court finds that the directions, as listed below in summary, made by the respondent shall stand:

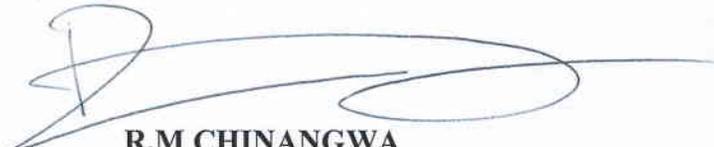
a) *On sale and purchase of institutional house as this was to be further investigated*

- b) *Management to write a report on how Mk39 million kwacha was used as it shows that the investigations are ongoing.*
 - c) *Management and the Board to institute disciplinary hearing on Ronald Mpweya; Ms. C Mchanzime and National Librarian and his management team for misappropriation of funds; failure of duty and failure to manage the strike respectively as this directs the appropriate administrative action to be taken.*
 - d) *Management to review conditions of service so that they are aligned to the Constitution and Employment Act as this directs the appropriate administrative action to be taken.*
 - e) *Management to train relevant staff on how to administer a disciplinary process as this directs the appropriate administrative action to be taken.*
21. On the other hand, the directions relating to reinstatement of Messer's Simbeye, Banda, Kasanga, Mpweya and Kandulu; nullification of Buwanis demotion and payment of salary arrears and compensation of Mk800,000 for loss of scholarship for Mr Kandulu and all ancillary orders relating to his training are set aside as these relate to Ombudsman's lack of jurisdiction on employment matters there being an available remedy in the Industrial Relations Court.

Finding

- 22. The claimants succeed in part as the respondent did not have jurisdiction on complaints which were tenable in the Industrial Relations Court.
- 23. Each party is to bear its own costs.

Pronounced this 3rd day of August 2021 at LILONGWE



R.M CHINANGWA

JUDGE