



**REPUBLIC OF MALAWI**  
**IN THE INDUSTRIAL RELATIONS COURT OF MALAWI**  
**SITTING AT THYOLO**  
**IRC MATTER NO. 02 OF 2022**

**BETWEEN:**

**LINDA CHIKWENGA.....APPLICANT**

**-and-**

**NATIONAL BUS COMPANY LIMITED .....RESPONDENT**

**CORAM:** H/H PETER M.E KANDULU, AR  
Applicant, Present / Unrepresented  
Respondent, Absent / Unrepresented  
Ms Rose Msimuko, Court Clerk.

## **ORDER ON ASSESSMENT OF COMPENSATION**

### **Background**

1. This is an assessment of compensation that is payable to the applicant pursuant to the default judgement entered in favour of the applicant dated the 23<sup>rd</sup> day of September 2022.
2. The said default Judgment awarded the applicant to be paid pension contribution and terminal benefits to be assessed by the court.
3. Notice of assessment and a default judgement was duly served and acknowledged by the respondent, especially, Mr Kafuliza on the 12<sup>th</sup> day of October 2022.
4. However, during court proceedings, the respondent did not show up and no explanation was furnished to the court and to the applicant for their absence.
5. The court ordered the matter to proceed and assessed the awards as per the default judgement dated the 23<sup>rd</sup> day of September 2022.

### **Issues**

2. What is the applicable quantum to be awarded to the applicant?

### **Burden of proof**

3. On having so pleaded, the onus is on the applicants to prove their claims as the burden of proof rests upon the party, who substantially asserts the affirmative of the issue *Joseph Constantine Steamship Line –vs.- Imperial Smelting Corporation Ltd* (1942) AC 154.
4. The burden is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it. *B. Sacranie v. ESCOM*, HC/PR Civil Cause Number 717 of 1991.

### **Standard of Proof**

5. The standard required in civil cases is generally expressed as proof on a balance of probabilities *Miller v. Minister of Pensions* 1947] All ER 372. It follows in this matter that the Applicants have a burden to prove the claims against the respondent in their pleadings on the balance of probabilities.

### **The Law on failure to show up to tell their version of Evidence**

6. Regarding failure to show up to tell their version of the evidence, the court held in the case of *Edwin Govati t/a Nzeru Zathu Investments v Carnival Furnishers Limited*, High Court Principal Registry Civil Appeal No. 59 of 2012 (being Civil Cause No. 124 of 2011, Blantyre Magistrate Court before Her Worship Tizifa) the High Court dismissed the appeal and upheld the lower court's findings after noting that the lower court had only one version of facts as the Appellant, then the defendant in the lower court had chosen not to testify.
7. In the case of *Maonga & Others v Blantyre Print & Publishing Company Limited*, 14 MLR, 240, Unyolo, J upheld a decision of Leyland Motors Corporation Malawi Limited v Mohamed, Civil Cause No 240 of 1983:  
*"Failure to call a material witness to testify on a material point may damage the case of the party who fails to do so as that failure may be construed that the story is fictitious."*
8. The Learned Judge also quoted with approval the case of *Attorney General v Chirambo*, Civil cause No 444 of 1955 in the following words:  
*"Such failure (that is to call a material witness) may raise suspicion and although suspicion is not enough proof of guilt, but it has the effect of reducing the weight of the evidence of a party."*
9. In this case there is only evidence of the applicant, the said evidence remains uncontroverted and I shall not reproduce every piece of the same.

### **The applicable law**

10. The law governing these matters can be summarized as follows:
11. Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.
12. In the case of *Tourism Development and Tourism Company and another v Mhango* [2008] MLLR 319 it was stated that unfair dismissal is a statutory wrong and in assessing compensation a court has wide discretion. That discretion must be exercised judicially and by principles.

13. The basis of an award of damages is to give a claimant compensation for the damage or any loss or injury that he has suffered. This is a position taken by Lord Blackburn in *Livingstone vs Rawyards Coal Company* (1880) 5 AC 25.
14. According to lord Scarman in *Lim vs Camden & Islington Area Health Authority* (1980) AC 174, compensation should be as nearly as possible to put the party who has suffered in the same position, he/ she would have been in as if he/ she had not suffered the wrong.
15. As outlined by Section 63 (1) (c), in awards for compensation for unfair dismissal, the guiding principles are as specified in Section 63 (4) read together with subsection (5) of the Employment Act. Section 63 (4) provides as follows:  
*“An award of compensation shall be such an 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”*
16. Now, to ensure that the compensation is fair, just and equitable to both parties, Section 63 (5) then provides for the starting point. Thus, the discretion of how much maximum compensation to award to an employee who has been unfairly dismissed is given to the court.
17. In exercising these discretionary powers, however, Section 63(4) essentially states that the court must consider a proven loss sustained by the Applicant due to the dismissal in the first place and that the dismissal must be attributable to the actions of the employer.
18. And finally, the loss suffered must be examined in light of the actions of the employee himself/herself, as to whether he or she has contributed in one way or the other.

### **Pension**

19. Section 9 of the Pensions Act 2011 provides for a mandatory pension for each employer. The Pension Act became operative on 1<sup>st</sup> June 2011. Section 12 (1) prescribes the minimum employer’s contribution at 10% per month. I shall use 10% of the applicant’s distinct salary when calculating pension contributions:

**Evidence**

20. For the applicant, testified in person and stated as follows: she was employed in November 2010 as a HR Officer. At the time of her resignation in November 2013, her salary was MK45, 000 kwacha. Her claim is for pension contributions and leave pay for 72 days. She also claims MK50, 000.00 as costs for the proceedings. She was not cross-examined as the respondent were not in court.
21. Employer pension contributions calculations are  $10/100 \times 45,000 \times 36$  months equals **MK162,000.00**  
2 years accrued leave pay 72 days X rate/day 72 X 1, 730.76 equals **MK124, 615.39**  
Total Benefits to be awarded **MK286, 615. 39**
22. Since, the date of resignation, the kwacha has lost value from 2013 to date. I boost the award by 50% to take into consideration the aspect of loss of value of the Kwacha.
23.  $286, 615.39 \times 50\% = \text{MK}143, 307.70$
24. I, therefore, award the applicant the following
- |                           |                      |
|---------------------------|----------------------|
| Pension Contribution      | 162, 000.00          |
| Accrued Leave Days        | 124, 615.39          |
| 50% devaluation value     | 143, 307.70          |
| Costs for the Proceedings | 50,000.00            |
| Total awarded             | <b>MK479, 923.09</b> |
25. Payment to the applicant must be effected within 14 days from the date of service of this order.
26. Delivered in chambers this 18<sup>th</sup> day of October, 2022 at Blantyre

PETER M.E KANDULU  
ASSISTANT REGISTRAR

