REPUBLIC OF MALAWI

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

PRINCIPAL REGISTRY

MATTER NO. IRC 414 OF 2014

BETWEEN

FRANCIS MALUMBE……..……..……. APPLICANT

-AND-

MALAWI TELECOMMUNICATIONS LIMITED……..……. RESPONDENT

CORUM: PETER M.E KANDULU, DEPUTY CHAIRPERSON

Applicant, Present/ Unrepresented

Mr. Macute Banda, Counsel for the Respondent

Mr. Kelvin Kakhobwe, Court Clerk

JUDGEMENT ON ASSESSMENT OF COMPENSATION

The Respondent employed the Applicant on 31st March 2006 following privatisation. He was dismissed on 30th June 2014. The Applicant launched this claim against the Respondent claiming unfair retrenchment and salary to his retirement age. The court delivered judgement in favour of the Applicant on 16th February 2024.

The import of the Judgement is quoted as follows: "*To us, this matter is a straightforward matter's issue; it had to do with the capacity of the applicant. Whether he qualified for the newly created positions, to which he applied. The applicant was not heard on that contrary to the dictated of section 57 of the Employment Act. According to section 58 of the Employment Act, if a dismissal is not in conformity with section 57 then it is unfair dismissal. We so hold that the respondent unfairly dismissed the applicant. The applicant's story is more probable than that of the respondent. We order that he be compensated. The file is remitted to his Honour Kandulu, the DCP to handle the assessment proceedings on a date to be fixed.*"

The matter came for a hearing on the assessment of compensation on 14th March 2024. Here is the determination of the court having heard both parties.

The Burden of Proof

The burden of proof in civil matters rests upon the party who asserts the affirmative. This is based on the maxim that he who asserts must prove which is coined in the Latin phrase*: "ei incumbit probation qui dicit non qui negat".*

The Standard of Proof

The standard of proof is that on a balance of probabilities. In ***Miller v Minister of Pensions*** (1947) 2 All Er 372 Denning J said, "*that degree is well settled. It must carry a reasonable degree of probability, not as high as is required in a criminal case. If the evidence is such that the tribunal can say; 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."* See also the cases of ***Mr Lipenga (Administrator of the Estate of Janet George) v Prime Insurance Company Ltd*** *Civil Cause No. 1386 of 2005* and **Catherine James Kachale v Alisa Ashani & Annie Ashani** Civil Cause No. 2306 of 2004.

The Applicant's case

The applicant filed his written witness statement. In his written statement, he told the court that the Respondent on a permanent contract employed him on the 6th day of January 2003 as Records Officer Grade 2. At the time of dismissal, his salary was MK213,725,000; he produced and exhibited a pay slip as proof.

In cross-examination

The applicant confirmed that the company changed from a public to a private company in 2006. There was a new contract of employment in 2006. He confirmed that he received the terminal benefits in the form of leave pay, transport, severance pay, and notice pay.

The Applicant had nothing to rebut in re-examination.

Respondent's case

Lydia Malemia represented the respondent and filed a written witness statement. There are no disputes that the Respondent employed the applicant on the 6th of January 2003 as a Records Officer. The Respondent underwent privatisation from a public entity to a private entity such that by 31st January 2006, it became a legal entity limited by shares. Consequently, all contracts of employment were mutually terminated and all employees were retrenched and were paid all their dues including severance allowance and pension.

The applicant was offered a fresh contract from 31st January 2006 as the old contract ended. On 29th August 2006, the applicant was confirmed in the position of Records Officer. The respondent retrenched the applicant on 30th June 2014 such that he received his terminal benefits including severance pay for 8 years, leave days, notice pay, and transport.

During cross-examination, the applicant did not ask any questions hence the court would regard the evidence of the respondent as uncontroverted.

Issue for Determination

What is the just and equitable compensation that the Applicant is entitled to for unfair dismissal?

The Law on just and equitable Compensation

Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation.

In determining the sum payable as compensation, the starting point is the sum the Applicant was getting as wages. Section 3 of the Employment Act defines 'wages' to mean all earnings, however, designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law, which is payable by a written or unwritten contract of employment by an employer to an employee for work done or to be done or for service rendered or to be rendered.

An award of compensation for unfair dismissal is made under Section 63(4) of the Employment Act, ("the Act") which states:

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

It follows that in assessing compensation the court has to consider the following:

(I) Award amount that is just and equitable.

(ii) Amount shall be determined by loss sustained by the employee.

(iii) Cause or contribution to the dismissal by the employee.

Section 63 (5) of the Employment Act prescribes minimum awards that the court may award. It must be noted that this provision does not take away prescription in Section 63 (4) of the Act.

Section 63 (5) of the Act provides:

The amount to be awarded under sub-section (4) shall not be less than:

A) One week's pay for each year of service for an employee who has served for not more than five years.

b) Two weeks' pay for each year of service for an employee who has served for more than five years but not more than ten years.

c) Three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years and.

d) One month's pay for each year of service for an employee who has served for more than Fifteen years.

The Malawi Supreme Court of Appeal and High Court of Malawi have expounded these two provisions:

In ***Willy Kamoto v Limbe Leaf Tobacco Malawi Ltd*** MSCA Civil Appeal Cause no. 24 of 2010, the Supreme Court of Appeal held that:

"*Compensation could never be aimed at completely protecting the employee into the future.*"

In ***Terrastone Construction Ltd v Solomon Chatantha*** MSCA Civil Appeal Cause no. 60 of 2011, the court held that:

"Our labour law is concerned with the attainment of fairness for both employer and employee. In weighing up the interest of the respective parties is of paramount importance to ensure that a balance is achieved to give credence not only to commercial reality but also to a respect of human dignity". (Emphasis supplied).

Furthermore, in the same case of ***Terrastone Construction Ltd vs Solomon Chathuntha***, (Supra), the Supreme Court of Appeal determined the question of what amounts to a just and equitable compensation and how the Court would apply its discretion to arrive at a just and equitable compensation concerning Section 63 (4) of the Employment Act.

The Court held that a court has to take into account the loss sustained by an employee because of the unfair dismissal but that the assessment does not have to end on the inquiry of loss. The court has to determine the matter on reasonable terms and that reasonableness will be achieved, if the interests of both the employee and the employer are taken into account.

The court in that case (Supra) then guided and advised that Section 63(4) of the Employment Act should be read together with Section 63(5) of the same Act and added that

"It is important that reasons should always be given for coming up with the assessment of damages which are more than what is set down in the law."

In the case of ***Sothern Bottlers (SOBO) vs Graciam Kalengo***, [2013] MLR 345 the Supreme Court of Appeal also stated the following on Page 348:

"Let us reiterate what was said in Standard Bank Vs R. B Mtukula, Misc Appeal No. 24/2007 (High Court) that where the court wishes to exceed the minimum compensation in Section 63 (5) of the Employment Act, it must give clear reasons so that the employer, employee and also the appeal or review court can appreciate why the award was enhanced."

Section 63 (4) is not a blank cheque for the court to decide any amount to be paid. It needs to be read with Section 63 (5) whenever compensation is awarded. In our view, it is a guideline on how a court may give an award under subsection (5) and should not be read in isolation". (Emphasis supplied).

"It is important that courts must not be seen to award damages, with elements of punishment to the employer".

In ***Stanbic Bank Ltd v Mtukula*** [2008] MLLR 54, the Malawi Supreme Court of Appeal said on p. 62:

"We, therefore, think that for the 19 years of service, the respondent would receive three months' pay for each year which would translate to 57 months' pay".

In *First Merchant Bank Ltd v Eisenhower Mkaka and Others* Civil Appeal no. 1 of 2016, Mkandawire J (as he was then) stated the following:

"In assessing compensation, the Industrial Relations Court had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of compensation that falls due, not the loss of salary increments and sundry amenities from the date of dismissal to the date of judgement or the assessment of damages compensation." In the same manner, future loss does not matter. Therefore, one cannot

talk of loss of earnings up to the time the former employee would have retired, certainly, which is not in the spirit of the Employment Act. (Emphasis supplied).

"There are 17 respondents and each one of them had worked for the appellant for a different number of years. Each one of them gave evidence during the assessment. Each respondent should therefore have been treated separately in assessing compensation.

In all, the above-cited decisions do (inter alia) hold that the period of service by the employee is the most important factor when computing compensation under Section 63 (4) as read with Section 63(5) of the Employment Act. Other factors can be considered when computing compensation above the minimum as prescribed under section 63 (4) and (5).

It follows for example, that someone who has served for 16 years may not get the same compensation as someone who has served say 5 years. This approach had been applied in this court. This point is the order of assessment in Eisenhower Mkaka and Others V First Merchant Bank Ltd IRC Matter no. 137 of 2012 (LL).

In fact, in the case of *First Merchant Bank Ltd vs Eisenhower Mkaka and Others* (supra), which is relatively the recent Supreme Court of Appeal decision, it was well articulated that employment is not a lifetime commitment and that it would not be in the spirit of Section 63(4) and (5) of the Employment Act to award the Applicant up to retirement age. The Court stated as follows which we also find quite illuminating, instructive, and illustrative:

"In assessing compensation, the IRC had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of the compensation that must fall due, not the loss of salary, increments, and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages/compensation. In the same manner, future losses do not matter at all. Therefore, one cannot talk of loss of earnings up to the time the former employee should have retired. Certainly, that is not the spirit of the Employment Act. As already observed, Section 63(5) sets down the minimum compensation. The court may go up depending on its evaluation of the matter. The court enjoys the wide discretion to settle for either the minimum prescribed or for any higher amounts of compensation as would fit the description of "just and equitable" after weighing the considerations in Section 63(4) of the Act".

It is also trite that in considering what is just and equitable compensation, the court takes into account the age of the applicant, education qualification, marketability and contribution to the dismissal see ***Chiumia vs SS Rent a Car Ltd*** Matter No 149 of 2000.

On the issue of compensation, the case of ***Eisenhower Mkaka and Others V First Merchant Bank Ltd*** (supra) in my view should be the guiding and leading case on how compensation ought to be computed in this case. The reason was that the trial Court did not find that the applicant contributed to his unfair dismissal. The trial court held that the Respondent unfairly dismissed the applicant unheard contrary to the dictates of sections 57 and 58 of the Employment Act.

In matters of employment, the court is concerned with the assessment of compensation as opposed to damages. This is the reason that the law under the Employment Act in Section 63 (5) provides a framework for assessing just and equitable compensation. The idea is to be fair to both be fair to both employers and employees. The employee should be made neither richer overnight nor poor. At the same time, the award should not aim at punishing the employer. It is on this principle that the law provides a minimum award payable and is only allowed to go beyond by giving reasons for departing from the scheme.

The reasons or factors the court would consider when it departs for the payment of the minimum and pay the applicant the above minimum are whether the applicant contributed to his or her dismissal. Whether at the age of the applicant, qualifications of the applicant, and marketability of the job, he can manage to secure another alternative employment. If the answer to the questions above is in favour of the applicant, the court can invoke its discretion to pay the applicant the above minimum.

In the case before us, the applicant did not contribute to his unfair dismissal. The Respondent dismissed the applicant based on the operation requirement according to their assertion. According to the judgement of the court imported in paragraph 2 of this judgement. The dismissal of the applicant was based on his capacity for the newly established position to whether he qualified for them, to which he applied. The applicant was not heard on that contrary to the dictated of section 57 of the Employment Act. According to section 58 of the Employment Act, if a dismissal is not in conformity with section 57 then it is unfair dismissal. This simply means the applicant never contributed to his unfair dismissal. He qualifies to be paid above the minimum.

The applicant indicated he worked for 12 years with the Respondent. He submitted that 7 months' wages per each completed year of service would be just, fair, and reasonable compensation for the loss he has suffered. He calculated his compensation at MK 213,725.00 multiplied by 7 months per year for 12 years. Accordingly, he submitted that he be compensated with the total sum of MK17,952,900.00.

However, during cross-examination, he admitted that he received his terminal benefits when he was taken into a private entity by the newly established private entity. This confirms that he worked for the Respondent in this newly established private entity for 8 years having received the terminal benefits from 2003 to 2006.

The respondent submitted that 5 months' wages for each completed year of service would be equitable to both the employee and the employer

In my view, I support the submission by the Respondent that the applicant ought to be compensated by 5 months for each completed year of service. His last monthly salary was K213,725.00. There are no any other benefits that the Applicant claimed from this court.

Accordingly, just and equitable compensation would be (5) five months' salary for each year completed year of service. This is because, under the scheme of Section 63 of the Employment Act, the focus is on the years already worked for as opposed to future earnings. The Applicant is, therefore, entitled to K213, 725 x 5x 8= **K8, 549,000.00.**

As a matter of law, the Applicant was entitled to a pension contribution from the employer, which as a matter of policy was at 10% of the salary, which is K21,372.50 per month. Calculated from 2006 to 2014, for eight (8) years, the Applicant is entitled to the sum of **K2, 051,760.00** unless the court thinks otherwise.

On severance allowance under Section 35 of the Employment Act, the Applicant admitted during cross-examinations that he already received them. This is the most probable reason that the Applicant did not plead severance pay.

The Respondent submits that the Applicant is entitled to a total sum of **K10, 600,760.00** as compensation for unfair retrenchment.

The applicant has moved the court to boost the award since the amount was due in 2014 considering the cumulative inflation since 2014.

He has cited the case of ***Museum and Chillida v Reserve Bank of Malawi*** matter No. 30 of 201, the Court boosted the awards by 50% owing to inflation. In ***Kandoje v Malawi Housing Corporation*** (2008) MLR 433 the Court held as follows;

"The cause of action arose in 2003 but the events cover a period from 1998. The Applicant was lowly paid as noticed from the pay slip. The local currency has since devalued and the court has the discretion to award interest to cater for devaluation and inflation... in this case, the court has awarded 40% of the total awards to cater for devaluation since 1998".

In the ***Frackson Chitheka v Attorney General*** (Ministry of Finance) Civil Appeal No. 67 of 2008 boosted the award by 100%. The Court held as follows;

"As will be seen the issue of compensation for unfair dismissal is a matter governed by the law with the discretion of the court built in... in assessing compensation for unfair dismissal the court considers several factors. These include the applicant's effort to mitigate his loss, the employee's age, physical fitness, qualification, and the prevailing labour market, these factors inform the court in determining the multiplier, and the formula for calculating is set by the law. In matters that come to the Industrial Relations Court, it is the general formula that will apply unless some special formula is pleaded and proved... as regards the boost of 100% that was entirely at the discretion of the lower court considering the devaluation and the rate of living at the time. I confirm the 100% boost.

In ***Chibuku Products Limited v Harry Chilongo*** Civil Appeal no 10 of 2022 this Honourable Court boosted the award by 82.1%. The Court held as follows;

"Awards must be boosted to retain the value of the money that would have been made or paid out to the applicant in 2019. As stated in the previous paragraphs in this judgment the kwacha cumulatively has been devalued to date by slightly over 82.1% against USD.

Further, because between 2014 and 2024 (the year he was unfairly dismissed to date) inflation in Malawi has by over 100%, it is submitted that the sum payable for compensation in the

circumstances be boosted by 100%. He, therefore, proposed a total compensation of K72, 666,500.00 having factored in the issue of inflation.

The Respondent did not oppose their submission to the boosting of the awards despite that they were served with the skeleton arguments by the Applicant. Since the respondent has not opposed the submission, the court shall boost the awards.

Indeed the awarded sum was due in 2014. This is the year that the applicant was supposed to be paid his due. MTL is a profit-making company as it was listed as a private by-shares company. My strong assumption is that the amount, which was due to the applicant in 2014, has been used to maximise their profits. It will therefore be fair that the issue of boosting should be considered in favour of the applicant.

The reason for boosting the award is to align the amount awarded to its purchase value or power if it was given in 2014. Between 2014 to 2023, the kwacha has been devalued multiple times. The exchange rate of the Malawi Kwacha to USD in 2014 was 496.3086 MWK on 30 Nov 2014. Today 36th day of March 2024, the Malawi Kwacha to USD is MK1, 757. 00 and at the black market the rate is Malawi Kwacha to USD 2,150.00 MWK. The kwacha has been devalued by more than 300% since he was dismissed. For example, the price of petrol in 2014 was MK839.00. Today the same pump price for petrol is MK2, 530.00 a jump of over 200 %. Sugar at the market in 2014 was MK520.00 compared to MK3, 500.00 today a jump over 400%. If we factor all these factors to measure the purchase value of the amount awarded today to 2014, I would boost the award by 200%. This is only to ensure that the applicant gets what he was worth in terms of purchase power in 2014.

Therefore the total award is MK10, 600,760.00 X 200% = MK21, 201, 520.00 + MK10, 600,760.00 = MK31, 802,280.00

The total award to the applicant is **MK31,802,280.00** for unfair dismissal and pension. I therefore order the respondent to pay the applicant the amount as awarded within 14 days from the date this order is made.

This matter has taken a longer period to come to its conclusion. Delaying this matter further in my view shall be not in good interest to the parties. However, each party has the liberty under the laws of this country if they are not satisfied with the judgement to appeal to the High Court.

An appeal on its own is not a stay of the judgement and usually, an order of stay of execution of the judgement is granted at the discretion of the court. I have noted that the respondent had filed a notice for an appeal on the judgement on liability. A perusal of the grounds for the appeal in my view being an expert in labour/employment law seems to be weaker and I raise so much doubt whether an appeal for such ground would succeed.

However, the right to appeal is accorded to any litigant dissatisfied with a judgement of the lower court and to try their luck in the superior court. I order, in the event, that the respondent is desirous to proceed with the process of an appeal to give 50% of the awarded sum to the Applicant within 7 days and the remaining sum of 50% to be deposited to the court's bank earning account within 14 days before leave to appeal is granted.

I so order

Delivered in chambers this 26th day of March 2024 at Blantyre.

HON. PETER M.E KANDULU

DEPUTY CHAIRPERSON