REPUBLIC OF MALAWI

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

MATTER NO. IRC 1001 OF 2022

BETWEEN:

BRIAN BANDA……APPLICANT

-AND-

ATTORNEY GENERAL (STATE RESIDENCES)……...RESPONDENT

CORAM: PETER M.E KANDULU, DEPUTY CHAIRPERSON

Mauya Msuku, Counsel for the Applicant,

Absent, The Respondent,

R. Kakhobwe, Court Clerk

JUDGEMENT ON ASSESSMENT OF COMPENSATION

Brief Facts

The Applicant commenced the present proceedings seeking (a) compensation for constructive dismissal, (b) severance allowance pay, and (c) compensation for unfair labour practices. The IRC Form 1 was filed on the 28th day of September 2022 and was served to the respondent on the 26th of October 2022 at 2.45 pm, service was duly received and the respondent stamped an official stamp acknowledging service

The Respondent failed to file a reply within the prescribed period by law hence the applicant obtained a default judgement on the 7th day of November 2022. A notice of assessment of compensation was duly issued and served on the respondent on the 7th day of November 2022.

The Respondent filed a motion to set aside the default judgement. The motion was scheduled to be heard on the 20th day of June 2023. On the date scheduled for hearing the motion, the respondent or his legal representative did not appear in court and no reason was given to the court on their absence. The motion was dismissed.

The court issued a notice for the hearing of the assessment of compensation trial. The said notice of hearing was served on the respondent on the 11th day of August 2023 at 1.50 pm and service was acknowledged by C. Chitsonga on behalf of the Attorney General.

The Attorney General's Chambers filed an exparte motion for a stay of proceedings pending hearing of an application to set aside the default judgement. The motion was issued to be heard on the 25th day of August 2023 the day the court had scheduled to hear the assessment of damages. When the motion was called, the Respondent or Attorney General Representative was not present in court.

However, Counsel for the Applicant was present and addressed the court that this was the third time that the Representative or his representative was served or they initiated court proceedings but on the date scheduled, they never appeared or communicated with the court or the applicant on the reasons for their failure to attend court's proceedings.

Counsel implored the court to dismiss the motion and proceed with the hearing of the assessment of damages which was the first to be issued before the motion. A return service of the said notice

of hearing was handed over to the court for inspection. The court having been satisfied that the respondent was served and he acknowledged receipt of service, ordered the assessment of damages proceedings to proceed. He called the applicant to the witness stand to give his evidence in chief.

Evidence of the Applicant

The applicant was his own witness. He adopted his written witness statement and highlighted few areas in the said written statement. He tendered the contract with the respondent which was marked. He told the court that he was employed on the 7th day of August 2020 on a three-year fixed contract. Following his dismissal, his last salary was in February 2022. He told the court that he was entitled to MK10, 599, 924.00 annually which as per article viii (1) of the contract was subject to increment at the end of every year. He was also entitled to a motor vehicle Toyota Fortuner, he exhibited evidence which was marked which shows a daily rate of MK25,000.00 for such a vehicle.

He further informed the court that he used to have an average of 10 to 15 days out-of-duty assignments for the month for which he was entitled to MK50,000.00 for local assignments and USD 450 per day for external trips. He told the court that these allowances were exclusive of expenses which were borne by the Respondent. He further stated that on average, he would put these off-duty station assignments as half internal and half external. He also demonstrated through a contract agreement that as per close XI (2) of the said contract, he would at the end of his contract, be entitled to 15% of his total salary as gratuity.

He was not cross-examined since the Respondent had exercised their right not to attend the court proceedings despite receipt and acknowledgement of the court service. In another way the court would regard that the respondent had decided not to comply with the order of the court to attend the court proceedings initiated by themselves. Because of their absences the court have only heard evidence of the applicant which is uncontroverted.

The applicant evidence is the only available to the court. The court shall regard the evidence of the applicant as the true version of the fixed contract agreement between the Applicant and the Respondent since the evidence of the applicant remains uncontroverted.

The court is so grateful to counsel Mauya Msuku for his well-written final submission on how the assessment compensation ought to be done in this matter. The court would like to state that it shall

not restate all that is written in the final submission, suffice to mention that the court shall use the content of the submission to resolve this matter.

However, the court would like to bemoan the tendency by counsel representing the Respondent for the laissez faire attitude when executing their work at the expense of tax payers resources. The service of the court's documents were served on the representative of the State and evidence of receipt or acknowledgement was tendered in court. However, despite receipt they did not appear in court for several times. I would urge officers responsible in the office of the Attorney General to ensure that this tendency is checked and put to rest. Court services and orders must always be respected by the State. This would set a good example to all lawyers in this country since the Attorney General is head of the bar.

Burden of proof

On having so pleaded, the onus is on the applicants to prove his 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. The burden is fixed at the beginning of the 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

The standard required in civil cases is generally expressed as proof on a balance of probabilities 1947] All ER 372. It follows in this matter that the Applicants have a burden to prove on the balance of probabilities the claim against the Respondent.

Issues for Determination

What is the appropriate quantum to award the applicant?

The Law

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.

In employment matters, when computing the applicant's loss, the court must not only look at salary but all other benefits in their monetary terms. ***Escom Limited vs. George Matola***, Civil Cause No. 418 of 2004. In ***Tourism Development & Tourism Company et al vs. Ken Williams Mhango***, (2008) MLLR, 314, Mkandawire, J stated:

"The respondent was not just entitled to notice pay as it is clear that as a result of the appellant's action in unfairly dismissing him, he lost all the salary and any benefits he would have earned." *The respondent's loss should include salary and benefits which he would have been paid and which he may reasonably be expected to have received but for dismissal."*

In ***FW Kalinda vs. Limbe Leaf Tobacco Co. Ltd,*** Civil Cause No. 1542 of 1995 on an order for assessment of damages, Dorothy nyaKaundakamanga stated:

"The case of Dr Chawani v Attorney General, MSCA No. 18 of 2000 (unreported) is authority for the awarding of fringe benefits like telephone allowance, housing allowance, if those benefits were not mere expectations but legal obligations based on the contract of employment between the applicant and the respondent or any other law. In quantifying these benefits in kind like medical aid the court should value what they were worth to the employee."

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) Loss sustained by the employee shall determine the amount.

(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) as amended 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 ***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).

"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".

The court is aware that the case at hand does not involve unfair dismissal but rather is is a constructive dismissal under section 60 of the Employment Act. Constructive dismissal claims are notoriously difficult for employees to prove, and there is no clear test as to whether a repudiatory breach has occurred. In each case, it will be a matter of evaluating the evidence and facts in the context and all the circumstances of the case. However, in order to be successful with a constructive dismissal claim an employee must be able to demonstrate that there has been: A repudiatory breach of contract (a fundamental breach which goes right to the root of the employment contract or which shows the employer no longer wishes to be bound by at least one of the key terms of the employee's contract) by the employer, which can be evidenced. This may be an actual or anticipatory breach and can be a single act or a series of acts, but must be sufficiently serious to justify the employee resigning. An acceptance of the breach by the employee and the employee treats the contract as at an end, resigning promptly in response to the breach.

In this case the applicant had informed the court that the respondent had deployed him to a non existing posts, a position which was contrary to his professional. He stated that he felt that the Respondent had created an environment which made it impossible for the two to continue with the work relationship. It was his argument that it was the conduct of the Repondent which had made him lose his work.

The Applicant was entitled to K10,599, 924.00 annual salary which translates to K883, 327.00 per month. He was also entitled to a motor vehicle whose daily rate is K25, 000.00 translating to K750,000.00 on an average of 30 days per month. The motor vehicle also came with 500 litres of fuel.

Counsel for the Applicant has asked the court to take judicial notice of the fact that fuel was currently at K1,739.02 per litre (the same being in the public domain) translating to K869,510.00 per month. The Applicant could also have 10 to 15 days off-station assignments for which he was entitled to K50,000.00 local and 450USD external of which he would put and half external and half local. For purposes of assessment, counsel suggest he would put at the minimum being 5 days for local and 5 days external. This translates to K250,000.00 per month for local and

K2,443,500.00 (using an official exchange rate of K1,086 to a dollar). The total of the above is K5,196,337.00 as a monthly entitlement.

The Applicant's contract was to run from August 2020 to July 2023. It was terminated in February 2022 by the Respondent. He therefore, lost 17 months. If the monthly entitlement of K5, 196, 337.00 was to be taken, the total comes to K88, 337, 729.00.

The contract provided for annual increment of the salary. Lost salary alone is K15, 016, 559.00. Counsel for the applicant had submitted that the court must awards an additional 20% of this to reflect the lost increments. 20% would be K3, 003, 311.80.

Counsel has further stated that the contract provided for 15% gratuity upon completion of the contract. Taking the rate of K10, 599, 924.00 annual salary, the Applicant would have received the total sum of K31, 799, 772.00. 15% of this would be K4, 769, 965.80. However, as submitted above, the salary was subject to increment. Counssel had therefore, also submitted that to this sum, be added 20% which is **K953, 993.16**. The total would therefore be **K5, 723, 958.96.**

The court therefore award the applicant the above three sums a total of **K97, 064, 999.80.**

Counsel had also remined the court that Courts have awarded damages under a separate head for unfair labour practices in cases of constructive dismissal. This is mostly so because in cases of constructive dismissal, the employee is exposed to serious unwanted conduct.

In ***STN Nkhumbalume vs. Blantyre City Assembly***, Civil Cause No. 88 of 2010, the Plaintiff was put on suspension with half pay for two years after which he moved the court to declare constructive dismissal. The Plaintiff awarded him K800, 000.00 for unfair labour practices on 14th March 2013.

In ***Jack Chiwalika vs. Southern Region Water Board***, Civil Cause Number 171 of 2014, the Plaintiff was put on suspension on half pay for 20 months. The court awarded him the sum of K1,300,000.00 as damages for unfair labour practices. This award was made on 5th July 2017.

Counsel have argued that in the present case, the Applicant is a professional and a well-known one both within his circles and to the public. To treat him the way the Respondent treated him, therefore, exposed him to serious ridicule which is against unfair labour practices. Counsel for the Applicant, therefore, submitted that the sum of **K5,000,000.00** would be fair compensation under

this head. The court award the Applicant the total sum of **MK5, 000, 000. 00** under this head as prayed.

The court would like to state that the issue at hand is unque. It is an issue to deal with a fixed term of contract or specified employment contract which had its own contractual agreements. The Applicant was appointed by the State President as Communication Officer responsible for the State Residences. He decided to resign from his own former job because he was given a 3 years contract. The contract had its own terms of engagement which had legal intention biding between the two. The State decided to breach those legal intetntion and unilaterally dismissed the applicant constructively. I should emphasise that this is according to the evidence of the applicant alone.

I am alive and aware that employment is not a life time engagement as guided by the Malawi Supreme Court of Appeal. But in this case, the applicant was given a specified fixed 3 years contract of employment which is different from an open ended and permanent employment where one can decide to work up to the retirement age.

This specified 3 years contract of employment would come to an end own its own unless the two agreed to renew for another term of engagement. While, the contract was subsisting according to the evidence of the Applicant, he was deployed to None Existing Posts. This redeployment was done unilaitary, which, the applicant considered a breach to their intiatial 3 years specified contract of employment. It is based on this reason that Counsel for the applicant had argued that his client needs to be paid up to the end of the remaining period of the contract. He further argued that based on the conduct of the respondent by redeploying the applicant to the non existing post, it meant he was constructively dismissed.

The court does not interfere with the intention of the parties when it comes to contractual engagement. What the court does is to interprent the intention of the parties based on the known facts known to each of the parties to the engagement. Is this case the default judgement held the respondent liable and ordered the respondent to compensate the applicant. The Applicant had presented evidence and the figures which he ought to be paid. Having analysed the evidence, facts and law cited by counsel for the Applicant. My court has no any reason to doubt and reduce the figures as presented since the evidence is uncontroverted.

Sseverance Allowance

Computation of severance allowance is provided in the First Scheduled of the Employment Act. The computation of severance allowance is by reference to the length of one's service. As per the evidence on record and the court's judgement, the Applicant was employed in 2006. At the time of her dismissal, therefore, she had completed 13 years.

The First Schedule of the Employment Act provides that a person who has worked for a period exceeding ten years shall be entitled as severance allowance to "Two weeks' wages for each completed year of service for the first five years, plus three weeks' wages for each completed year of service from the sixth year up to and including the tenth year, plus four weeks' wages for each completed year of service from the eleventh year onwards."

In terms of payments forming the basis of severance allowance, Section 35(2) as amended, provides as follows:

"(2) The calculation of severance allowance under subsection (1) shall be based on the following-

(a) basic salary;

(b) housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;

(b) car allowance of provision of a car, except to the extent that the car is provided to enable the employee to work;

(c) any cash payments made to an employee, except those listed as exclusions in terms of this schedule;

(d) any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule;

(2) The following items do not form part of remuneration to calculate severance allowance unless an employment contract or collective agreement expressly provides otherwise -

(a) any cash payment or payment in kind provided to enable the employee to work (for example, a piece of equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);

(b) a relocation allowance;

(c) gratuities (for example, tips received from customers) and gifts from the employer;

(d) Share incentive schemes;

(e) discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);

(f) employer's contributions to medical aid, pension, provident fund or similar schemes;

(g) employer's contributions to funeral or death benefit schemes.

(h) an entertainment allowance;

(i) an education or schooling allowance.

Counsel for the Applicant has submitted that in the present case, from the list provided by the schedule, the following would be part of entitlements for purposes of computing severance allowance (i) salary, (ii) car use, and (iii) fuel. All these heads have been used when computing severance allowance and he cited the cases of ***Catarina Franzel vs. CFAO Malawi Limited*** (supra) and Willen ***Chamkuwa vs. Macsteel Malawi Limited*** (supra).

The Applicant worked for one complete year. He would, therefore, be entitled to two week's pay.

The above three entitlements, give a monthly entitlement of MK2, 502, 837.00. Two week's pay would, therefore, be MK1, 251, 418.50.

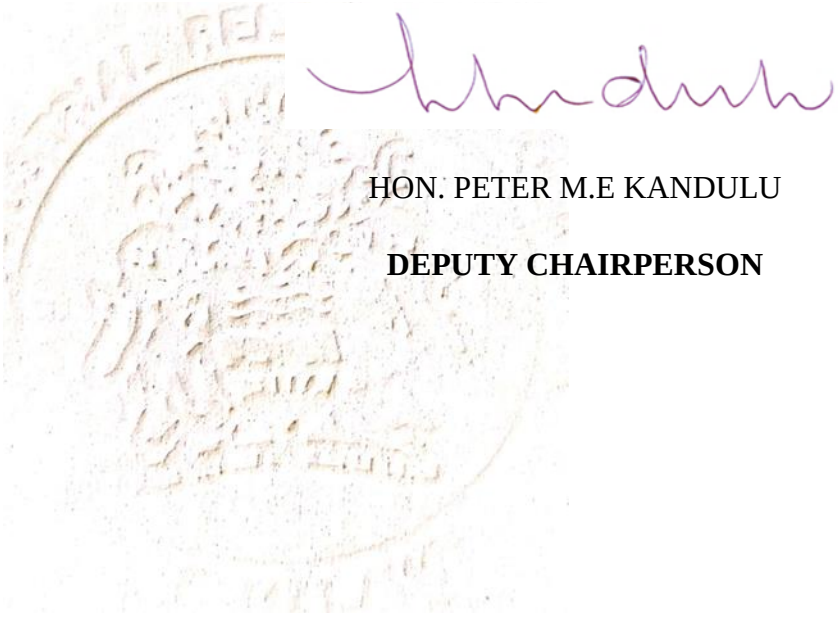
From the submission, the formula for calculating severance pay for 2 weeks' wages would be MK2, 502, 837. 00 / 2 = **MK1, 251, 418. 50**

The court, therefore, awards the total sum of **K1,251,418.50** as a severance allowance for the applicant.

Counsel for the applicant had moved the court to award the applicant the total sum award of **MK103, 316, 418.00** being the total sum of all the proposed awards under the above heads.

The Applicant is awarded **MK 103, 316, 418. 00** being compensation for unfair dismissal and severance allowance and the same must be paid within 30 days.

Delivered in chambers this 22nd day of December 2023 at Blantyre.



HON. PETER M.E KANDULU

DEPUTY CHAIRPERSON