IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Civil Appeal No. 22 of 2018

(Being High Court, Civil Appeal No. 16 of 2016, Lilongwe District Registry)

BETWEEN

AON MALAWI LIMITED .....APPELLANT

AND

GARRY TAMANI MAKOLO ..... RESPONDENT

CORAM: The Chief Justice A.K.C. Nyirenda SC
Justice E.B Twea SC, JA
Justice R.R. Mzikamanda SC, JA
Justice A.C. Chipeta SC, JA
Justice L.P. Chikopa SC, JA
Justice F.E. Kapanda SC, JA
Justice A.D. Kamanga SC, JA

Sauti Phiri....., for the Appellant
Chiume....., for the Respondent
Msowoya/Kumbani/ Mankhwazi.....Judicial Research officers
Minikwa/Masiyano.....Recording Officers
Msimuko/Mombera.....Court Reporters

JUDGMENT

Mzikamanda SC, JA

The matter on this appeal commenced in the Industrial Relations Court following the terminating of the employment of the respondent by the appellant. On 15th November, 2011 the respondent obtained a default judgment against the appellant directing that he be compensated for unfair labour practices, unfair dismissal, loss of legitimate income expectations, severance pay and pension benefits, all to be assessed.

As the time of assessment of damages the Deputy Chairperson of the Industrial Relations Court heard witnesses but ruled thus:

> *"It is the ruling of this court that on assessment based on the claim for constructive dismissal is not possible at this time. However, in the interest of justice for both parties the court orders the case be scheduled for a full hearing before member panelists as soon as possible."*

Remarkably, the Deputy Chairperson had previously rejected an application to set aside the default judgment and had opted to proceed with the assessment. The refusal to set aside the default judgment was not appealed against. It was the ruling for a full hearing that was appealed against the High Court. On appeal, Justice Mbendera SC, as he then was, held that the Deputy Chairperson erred in law in failing to complete the assessment directed by the default judgment as that judgment put issues of liability beyond contention. His Lordship allowed the appeal and remitted the file back to the Deputy Chairperson to complete the assessment and make an award.

Curiously, the Deputy Chairperson declined to do the assessment as ordered by Justice Mbendera SC, now on the grounds that no suspension letter, no dismissal letter and no report from police that the claimant had been cleared of fraud had been brought to the attention of the court. Neither was there proof of mitigation. The claimant appealed against to the High Court against this fresh order. The appeal was heard by Justice Fiona Mwale. Her Ladyship held that the Deputy Chairperson was bound by the order of Justice Mbendera SC and that she had to comply to complete the assessment of damages, and advising the parties to seek to compel the Industrial Relations Court to comply through writ of mandamus, if need be.

When the matter went back to the Industrial Relations Court, it was a different Deputy Chairperson who assessed damages and made an award if it was. The claimant was dissatisfied with the award. He appealed to the High Court

against the award. On appeal, Justice Muhara set aside the award by the Deputy Chairperson and made the following award on 22nd October 2015,

> *"For the period between September, 2011 to January 2015 the appellant should be paid all salary and all benefits including 13th cheque but excluding performance bonus. We order that increment multipliers should not be 20% as claimed by the appellant. Rather it should be inflation rate for the years concerned (2011-2015) plus 3.3%. This is based on exhibit 'GTM9' which is the last letter of increment which the appellant received before his constructive dismissal. According to 'GTM9' the appellant was awarded an increment of 10% and that increment was composed of official inflation rate of 6.7% which is resulted in real increase of 3.3%. To make matters clear once again the effective rate of increase will be the official inflation rate for years concerned plus 3.3%.*
>
> *For future loss compensation that is to say, for the period after January 2015, it is ordered that the appellant be paid his remuneration as calculated per the preceding paragraph for a period of 8 years being one third of the 24 years which is the period to his retirement."*

The present appeal is against this award, as finally assessed by an Assistant Registrar to whom His Lordship left the task of calculating the precise amounts. The grounds of appeal as amended are that:

1. The learned judge erred in law, at appeal, to re-open a finding of fact by the IRC that the respondent failed to mitigate his loss.
2. The learned judge failed to have due or any regard to the principle that labour law is concerned with the attainment of fairness to both the employee and the employer.
3. The learned judge's finding that the respondent did not cause or contribute to the dismissal was wholly inconsistent with the evidence.
4. The learned judge's failure to take into account the extent to which the respondent caused or contributed to his dismissal was an error of law.
5. The learned judge's basis for award of compensation in contrary to the rule that no one is employed forever or that as employment contract cannot be terminated before its expiry or that an employee can only be employed in one sector.

The appellant seeks a reversal of the decision of the Court below, the setting aside of the compensation award by the IRC dated 19th January 2015.

The appellant filed two bundles for the appeal, one for appeal on liability and another for appeal on assessment of compensation. The appellant's skeleton arguments seek to show that the learned judge erred his law in placing the burden of proving mitigation of loss on the employee. Reference was made the part of judgment that says:

> *"... having made the allegation that the appellant failed to mitigate his loss the burden of proof remained on the respondent throughout the trial to prove that fact. The appellant was under no obligation to produce letter of rejection as contended by the respondent."*

In arguing that the rule is that it is the responsibility of the employee to take all reasonable steps to mitigate his or her loss consequent upon employer's termination of his or her employment, the appellant cited a decision of the IRC in **Mwafulirwa V Manica Malawi Limited** IRC Matter No 34 of 2004 (unreported). The High Court decision of **Malawi Enviromental Endowment Trust V Kalowekamo** (2008) MLLR 237 was cited for the proportion that the employee should demonstrate through the production of employment application letters and negative responses as proof that he had tried to mitigate his loss. Exhibits GM4 of 10thSeptember 2014, Exhibit GM5 of 10th February 2013 and Exhibit GM6 of 10th December 2011 are application letters without corresponding letter as of rejection. The IRC ruled that he had not mitigated his loss as a finding of fact and the High Court whose appellate jurisdiction was confined to matters of law was not entitled to disturb that funding.

In arguing that the judge failed to have due or any regard to the principle that labour law is concerned with the attainment of the fairness to both the employee and the employer, the appellant stated that the purpose of the labour laws in Malawi is to create a conducive labour environment for both the employer and the employee. It quoted the following statement from **Terrastone Construction V Solomon Chituntha** MSCA Civil Appeal NO 60 of 2011 that

> *"In determining what is reasonable not only the interests of the employee but also the interests of the employer must be taken into account."*

Failure by the learned judge to take into account the interests of the appellant was error of law.

In arguing that the learned judge's finding that the respondent did not cause or contribute to his dismissal was wholly inconsistent with the evidence, the appellant observed that the learned judge correctly observed and found that in this case liability was settled by default judgment. Further the appellant pointed out that both the case of **Terrastone** and the present case concern compensation of a fair and equitable

compensation in terms of section 63 (5) of the Employment Act and the judge is duty-bound to consider what, if any, contribution an employee made to his dismissal. Thus, the appellant argues that considerations of whether or not the dismissal is substantially or procedurally unfair are relevant when determining an issue of liability, not of compensation. It cited three IRC matters to demonstrate how courts considers an employee's contribution to the dismissal. It urges the court to find that at the assessment, both the appellant and the respondent produced evidence to prove that the respondent caused or contributed to his dismissal. It is an error of law that the learned judge found that the IRC erred by receiving evidence at assessment and that is terms of section 65 of the Labour Relations Act, the learned Judge had no jurisdiction to overrule an IRC finding of fact.

In arguing the fifth ground of appeal, the appellant noted that the learned Judge considered whether **Chawani v Attorney General** (2008) MLLRI was still good law on compensation in employment law, and appeared to have been heavily influenced by it. It was also observed that similar reliance placed on the cases of **GM Wawanya V Malawi Housing Corporation** MSCA Civil Appeal NO 40 of 2007 (unreported), **Simwaka V Attorney General** (2004) MLR 349 and **Manica Malawi V Morton Mwafulirwa** (2006) MLR 284. Yet **Wawanya V Malawi Housing Corporation** was distinguished. **Simwaka V Attorney General** considered amended damages on the basis of S27 (1) of the Public Service Act just as the **Chawani** but the case of **Manica Malawi V Norton Mwafulirwa** never cited **Chawani.** Sections 31(1) and 43 of the Constitution are reaffirmed in **Terrastone** as the bedrock of every person's right to fair administrative action but notfor compensation for any person unfairly dismissed in Section 63 (5) of the Employment Act. The appellant argues that **Chawani** is good authority as to a person's right to fair administrative action and section 63(5) of the Employment Act complements this right. It was argued that **Chawani** cannot be used for ascertaining compensation in respect of events or occurrences after the Employment Act. Awards in compensation under employment law must not be made in the form of punishment but must show fairness to both the employer and the employee.

The skeletal arguments for the respondent are that the appeal is irregular in that it does not comply with section 23(1) of the Supreme Court of Appeal Act. It is argued that the judgment appealed against was delivered on 22nd October 2015 but the appellant filed the notice of appeal out of time on 29th February 2016 without applying for enlargement of time. The respondent argues that this is an incurable irregularity, there having been in ordinate and is excusable delay in filing the notice of appeal.

As to the first ground of appeal the respondent argues that the words of section 63(4) of the Employment Act are clear and that the Court did not fall into error on what the respondent argued is a settled principle of law that he who alleges must bear the burden of proof. The respondent argues that it was not incumbent upon him to prove that he had not mitigated his loss. The respondent submitted that even if the burden were still to be imposed on the employee, he, in this particular case, discharged it when he tendered three letters he wrote applying for employment. He submitted further that the fact that he did not produce letters of rejection of the applications does not as a matter of law and fact lead to the conclusion that he has not mitigated loss. He cited the High Court case of **Blantyre Newspapers Limited v Charles Simango** Civil Appeal NO 6 of 2011 for the proposition that the requirement is that the employee has to demonstrate that he looked for employment. He argued that the judgment in **Malawi Environmental Endowment Trust v Kalowekamo** (2008))) MLR 237 was overruled by the Supreme Court of Appeal and, therefore, statement reguarding the production of employment application and negative responses when assessment compensation have not supported by the conclusions of the Supreme Court of Appeal.

As the second ground of appeal, the respondent submitted that the case of **Terrastone Construction** is distinguishable from the present matter and that section 63(4) of the Employment Act does not talk of conducive labour environment for both the employer and the employee when assessing compensation. He argued that the Court considered the interests of both the employer and the employee when it awarded futuristic compensation for only 8 years instead of 24 years. He submits that no error of law is made in the Court below.

As to the third ground of appeal, it was argued by the respondent that in terms of section 63(4) of the Employment Act causing or contributing to one's dismissal is a factual matter that is determined at the liability stage and only informs the court when assessing the appropriate compensation as was the case in **Mbale v National Bank of Malawi, Biyo v Haps Investiments, Majawa v Auction Holdings Ltd** and **Terrastone**. Once Mbendera SC ,J and Mwale J had emphatically stated that the issues of liability had been settled by the default judgment , it was no longer open for the Industrial Relations Court to admit evidence at assessment stage which would ordinarily be required at the stage of liability. It was argued that the default judgment never included a finding of contribution or causation on the part of the employee and the care of **Terrastone** was distinguished by the Court below.

As to the fourth ground of appeal, the respondent argued that there was no merit in it because the judgment of the Court below did not award compensation 'forever' or up to

the time of expected retirement, the Court having been alive to the requirements in section 63 (4) and (5) of the Employment Act and the **Terrastone** judgment in so far as awarding compensation beyond the minimum is concerned . it was argued that having analysed the **Chawani** and the **Terrastone** cases, the judge in the Court below concluded that he could not award compensation for the remaining 24 years to retirement but instead the learned judge made an award for 8 years. It was submitted that the learned judge was cognisant that one cannot be employed forever and that each case will be decided on its own facts. It was further submitted that the **Terrastone** case acknowledged that courts can award compensation beyond the minimum depending on the circumstances of the case, but that the court should provide reasons for assessment of damages that are in excess of those provided by law. It was also submitted that the **Terrastone case** did not overrule the principle of **Chawani case,** nor considering that have to be taken into amount when assessing damages in the context of section 63 (4) and 5 of the Employment Act. The case of **Stanbic Bank v Mtukula** was cited for the proposition that compensation is payable to an employee beyond the date of compensation.

The respondent prayed that the appeal be dismissed in its entirely with costs for being irregular and for want of merit.

The oral submissions of Counsel for the appellant follow the written submissions as do the oral submissions of Counsel for the respondent. In the oral submission counsel for the appellant made it clear that the appeal was in two parts; the first being on liability and the second being on assessment of damages by Assistant Registrar of the High Court. As to the question of the liability, the oral arguments focus on proof of contribution to dismissal and who bears the burden of proof. It also raises the question whether the High Court has jurisdiction to overturn a finding of fact on mitigation. The question raised is whether evidence of mitigation should be made only at assessment and not before assessment. Regarding the assessment made by the Assistant Registrar, the prayer is that it should be overturned for being excessive and for not being just and equitable as required by law. It was further argued that the one third of remaining retirement period or eight years upon which the calculation was made was arbitrary. The case of **Willy Kamoto v Limbe Leaf** was cited in the oral argument to support a proposition that the law is not aimed at completely protecting the employee into the future since either the employer or the employee could terminate the employment at any time according to set procedures.

The oral arguments of counsel for the respondent reaffirm the position the respondent took that the issue of liability was settled by the default judgment. It was submitted that the appellant having failed to appeal on the issue of liability after court refused its application to set aside default judgment, it cannot now purport to argue an

appeal on liability. It was further submitted that although the **Chawani case** was decided before the Employment Act and although it was premised on section 43 of the Constitution, it remains good law on employment matters. Counsel observed that the **Chawani case** was applied to the present matter only to a limited extent of future loss, not immediate loss. Counsel submitted that the 1/3 of the expected retirement time was not meant to set precedent but was justified in the circumstances of the case. He also submitted that a lot of factors are taken into account in arriving at a just and equitable compensation. Counsel argued that the burden of providing each of mitigation was on the appellant and that it was not for the respondent to show mitigation. According to counsel, the **Chawani case** was decided before the Employment Act was enacted and it was not a matter of unfair dismissal. He observed that **Chawani case** was premised on section 43 of the Constitution which was valid before the Employment Act and is still valid after the Employment act was enacted. He submitted that in considering a just and equitable compensation under section 63 (5) of the Employment Act, section 43 of the Constitution can be taken into account.

According to counsel for the respondent, the case of **Terrastone** has laid down the principles for determining just and equitable compensation. The manner of dismissal and whether there has been a replacement job are factors to consider in determining just and equitable compensation. Increments should also be taken into account, so counsel argued.

According to Counsel for the respondent, the appellant never adduced any evidence of available job that the respondent would have applied for and did not show that had he applied he would have got the job. On the contrary, the respondent gave evidence that he had applied for job but did not receive offers. Although section 63 (5) of the Employment Act does not use the word "fair" it is incumbent upon the court to endeavour to achieve fairness. It was necessary for the court in assessment to consider the question of contribution to own dismissal when the default judgment confirmed constructive dismissal and settled the issue of liability. The 1/3 period of the remaining years to retirement was just and equitable and within the discretion of the awarding court. Counsel prayed that all grounds relating to assessment of compensation ought to be dismissed and the judgment of the High Court ought to be affirmed.

We pause to observe that there has been an uncomfortable back-and-forth movement of the matter between the High Court and Industrial Relations Court, engaging a multiplicity of High Court Judges and other judicial officers. The refusal by the Deputy Chairperson to act in accordance with an order of a High Court judge, who then conducted herself differently is particularly troubling. Not only is it an uncomfortable and unusual conduct in our justice system, but it was also not backed by law. Precedent demands that

a court receiving an order or direction from a superior court must act in accordance with that order or direction. That is not to say that the inferior court is prevented from observing any legal difficulty the order from the superior court may present. It is certainly not part of our jurisprudence for an inferior court to simply refuse to follow an order or direction of a superior court and act in its own way in the same case. The situation is different when the two courts are facing different cases in which case the inferior court must distinguish the cases and show that it chooses to follow a different path because the cases are different. In the present case there appeared to be no justifiable reason whatsoever for the Industrial Relations Court to refuse to do as the High Court judge had directed it.

Our next consideration is on the question of the effect of the default judgment that was entered by the Industrial Relations Court. We observe that the default judgment was not assailed at any point before this appeal. We agree with Mbendera SC, J, as he then was, that the judgment in default in this case put issues of liability beyond contention and that the only issue that remained was assessment as directed by the judgment. An application to set aside the judgment in default had been rejected and there was no appeal against that rejection. The notice of appeal before us is against the judgment of the High Court rendered by Muhara J on 22nd October 2015. That judgment relates to the quantum following assessment of damages. A judgment following an appeal against an award of damages that has been made by the Industrial Relations Court on 19th January 2015. Neither the appeal to the Court below nor to this Court related to the issue of liability. Attempts to raise the issue of liability were made during argument in this Court. There had been two sets of skeletal arguments by the appellant, the second set specifically referring to appeal on assessment of damages. Indeed, during oral submissions, counsel for the appellant took time to argue on matters of liability before he stated thus:

> *"That disposes the appeal on liability. Now, on assessment by the Assistant Registrar of the High Court was in a rather unfortunate position as all she was only asked to do was the calculations as the underlying assessment was already done by the High Court."*

We observe that the notice of appeal made no reference to an appeal against liability. The attempt to address us on liability was without basis in the notice of appeal and in the grounds of appeal. The issue of liability was settled through the judgment in default as entered by the Industrial Relations Court and as affirmed by Mbendera SC J, as he then was, in his later judgment in the matter. Both Mwale J, and Muhara J, reaffirmed Mbendera SC, J's position in their judgments. We hold that there was no appeal on liability and no premise upon which this Court can made any pronouncement on liability.

The focus of this appeal must be dictated by the amended notice of appeal which contains the grounds of appeal, all of which focus on assessment of compensation. The default judgment on page 48 of the record states that

> "No Notice of intention to defend having been served by the Respondent herein it is this day adjudged that the respondent do compensate the appellant damages for unfair labour practices, unfair dismissal, loss of legitimate income expections, severance pay and pension benefits to be assessed."

This judgment in default was signed on 15th November 2011 by the Registrar of the Industrial Relations Court. We think that any assessment of compensation must be guided by the terms of the judgment in default which specifies the heads on which compensation should be made. We must stress that where termination of employment is determined under the Employment Act or under some other statute, determination of the measure of damages shall be in accordance with the Employment Act or that other statute. We observe that the unfair dismissal in the present case is governed by the Employment Act.

Remedies for unfair dismissal are provided for in section 63 (1) of the Employment Act as being:

(a) An order for reinstatement
(b) An order for re-engagements; and
(c) An award of compensation as specified in subsection (4).

Section 63 (4) provides that;

> "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 attributable to action taken by employer and the extent, if any, to which the employee caused or contributed to the dismissal"

According to section 63(5) of the Employment Act:-

"The amount to be awarded under subsection (4) shall not be less than-

(a) one week 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 served for more than ten years but not more than fifteen years and

(d) one month pay for each year of service for an employee who has served for more than fifteen years, and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57(3)." Section 57(3) of the Employment Act provides that:

> "The following reasons do not constitute valid reasons for dismissal or for the imposition of disciplinary actions
>
> (a) An employee's race, colour, sex, language religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities,
> (b) An employee's exercise of any of the rights specified in Part II of the Labour Relations Act.
> (c) an employee's temporary absence from work because of sickness or injury;
> (d) an employee's exercise or proposed exercise of the right to remove himself from a work situation which he reasonably believes presents an imminent or serious danger to life or health,
> (e) an employee's participation or proposed participation in industrial action which takes place in conformity with the provision of Part V of the Labour Relations Act,
> (f) an employee's refusal to do any work normally done by an employee who is engaged in industrial action; or
>
> (g) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws, regulations or collective agreement."

The case of **Chawani v The Attorney General** [2000-2001] MLR 77 (SCA) was cited in aid of assessment of compensation in employment matters. That case was concerned with the appropriate remedy which may be available to a person whose employment has been unlawfully or unlawfully terminated in contravention of section 43 of the Constitution. It was a case of employment in a public body and involved the interpretation of section 27(1) of the Public Service Act. It was decided before the enactment of the current Employment Act 2000. As to section 43 of the Constitution the case of **Chawani** laid down some very important principles.

They include that;

(1) Section 43 of the Constitution is simply an enactment of the principle of natural justice which requires that no person shall be condemned without being heard.
(2) Section 43 of the Constitution requires that where an administrative action would adversely affect the rights freedoms interests and legitimate expectations of a person it must be lawful and fair and supported by reasons which must be given to the affected person.
(3) Section 43 of the Constitution does have as its purpose the protection of an individual's legitimate expectation but it simply gives a person a right to lawful and fair administrate action and a right to be given reasons which must support the administrative action.
(4) Section 43 of the Constitution is not concerned about damages, it is about fair administrative action or practice and does not show or state the consequences of such breach.
(5) Section 43 of the Constitution and Section 27 of the Public Service Act take away the power of Government of Civil Servants without giving justifiable reasons by merely giving three months notice.

In the **Chawani case**, the appellant abandoned his claim for damages for breach of constitutional rights among other abandoned claims. The Supreme Court of Appeal proceeded to consider the question whether taking into amount section 43 of the Constitution and section 27(1) of the Public Service Act the Government had power to terminate of the appellant earlier than the date of his mandatory retirement.

The court proceeded to observe that-

> *"In deciding this issue, we fully appreciate that the employment of the appellant could have come to an end before the time of the mandatory retirement if the post held by the appellant was abolished or if he absconded. Then perhaps in a rare case the appellant could properly be retired in the public interest after complying with section 43 of the Constitution before he attained the age of retirement. He could also be properly retired on medical grounds before 1 November 2004. However, considering the remarkable success which the appellant achieved during his career in the Civil Service and considering the period of time which remained before he could attain the age of mandatory retirement, we take the view that the Government could not properly terminate the appellants contract of employment earlier than the time when he would attain the mandatory retirement. He is, therefore, entitled to damages covering the period between the date of wrongful termination to the date of the appellants mandatory retirement."*

There can be no doubt that the case of **Chawani** remains good law regarding the interpretation of section 43 of the Constitution. The Court was very clear on the interpretation of both section 43 of the Constitution and section 27(1) of the Public Service Act. It is important to note that on the issue of assessing compensation in relation to termination of employment, the Court did not attempt to lay down a principle that would generally apply to unfair termination of employment. The case considered that Dr. Chawani was employed in a public body to whom section 27(1) of the Public Service Act applied and had archived remarkable success in his career with a few years to retirement. The Court was clear that employment could be terminated before the mandatory retirement age for various reasons including abolishing of the position. Dr. Chawani was awarded compensation to the date of mandatory retirement in the particular circumstances of his case, which circumstances would not apply to every case.

Also cited before us is the case of **Terrastone Construction Limited** v **Solomon Chituntha** MSCA Civil Appeal Number 60 of 2011 on unlawful dismissal and the issue of quantum of damages awardable in compensation. That case made reference to section 31 (1) of the Constitution on the right to fair and safe labour practices and to fair remuneration. It is also made reference to section 43 of the Constitution on the right to lawful and procedurally fair administrative action and the right to be furnished with reasons in writing for administrative action where a person's rights, freedoms legitimate expectations or interest are affected or threatened, if those interests are known. The case observed that these provisions give directions to the way workers are to be treated, protecting them from exploitation, abuse or being taken advantage of by employers. It is section 63 of the Employment Act that gives the court the power to grant an employee who is unfairly dismissed various remedies, including compensation under section 63 (1) (c) for unfair dismissal or an unfair labour practice. As the case observed, this payment is not one for measured damages or quantified losses suffered by the employee, for the provision does not require proof from the employee or specific financial losses resulting from the dismissal. According to section 63(4) of the Employment Act, an award of compensation shall be such amount on the Court considers just and equitable in the circumstances of the case. The term *"just and equitable"* is not defined, but it is clear that the Court retains wide discretion in the matter. We affirm that the requirement to compensate an employee who is unfairly dismissed is complementary to Section 31 (1) and 43 of the Constitution. We also reaffirm that our labour laws are concerned with the attainment of fairness for both the employer and employee and ensuring that a balance between the interests of the respective parties is achieved so as to give credence, not only to commercial reality, but to also respect for human dignity. We reaffirm the following words of the **Terrastone** judgment:

"Section 63(4) is not a blank cheque for the court to decide any amount to be payable. It needs to be read into 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. This section provides for a minimum award, but the court can award more than this minimum award depending on the circumstances of the case as provided in section 63(4) of the Act."

Notably, the Court in **Terrastone case** stressed the point that courts must not be seen to award damages with elements of punishment to the employer.

In **Kalowekamo v Malawi Environmental Endowment Trust** MSCA Civil Appeal No. 28 of 2005 which concerned a refusal to renew a two-year employment contract without giving reasons, the Industrial Relations Court had found that there had been unfair dismissal for contravening section 57(1) and (2) of the Employment Act. This Court observed that a fixed term contract of employment is not caught by section 57(1) and 2 of the Employment Act because section 28(2) of the same Act provided that:

"A contract of employment for a specified period of time shall automatically terminate on the date specified for its termination and unlessit is expressly or tacitly renewed or prolonged, no notice shall be required for its termination."

On the basis of the provisions of section 28 (2) of the Employment Act, this Court observed that:-

"It can therefore be argued that fixed contracts of employment cannot be the subject of an action for unfair dismissal under the provisions of the current Employment Act, especially after the expiry of the period of the contract or after the completion of the task envisaged by the contract. We are therefore unable to agree with the learned Judge that although the appellant contract was for a fixed period, the respondent committed the statutory tort of unfair dismissal."

We observe that although the case of **Kalowekano** was cited in the case before us it bears little or no relevance to the issues in this case. It cannot be relied upon in resolving the present appeal.

Also cited before us was the case of **Wawanya v Malawi Housing Corporation** MSCA Civil Appeal No 40 of 2007 concerning a contract of employment for a fixed term of three years but unfairly terminated after the claimant had been in office for only five days. The issues in that case were narrowly focused. This Court found that the Claimant

could not benefit from Section 63(2) of the Employment Act for reinstatement or re-engagement because he was estopped by his own pleadings which did not include a prayer for such remedies. The point was made that parties are bound by their pleadings and that it is no part of the duty of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. In other words, the court itself is bound by the pleadings of the parties as much as the parties themselves are bound by them.

Regarding the issue of measure of compensation in terms of Section 63(4) and Section 63 (5) of the Employment Act, the case observed that a court has considerable latitude in awarding compensation under the Employment Act. It further stated that:-

> *"In the end it really should not make any difference whether one wants to call the award an award under section 63 of the Employment Act or a common law award or any other description as one may please. The provision allows for what the court would consider just and equitable in the circumstances of the case. If the court was minded and the circumstances were compelling, there is nothing to stop it from awarding compensation for the unexpired terms of a fixed term contract or indeed a shorter period. Where the contract of employment provides, for a period of notice for termination and also payment in lieu of such notice the compensation under section 63(4) may be in addition to the payment in lieu of notice".*

This Court upheld the award of three months pay and three months of housing allowance made by the judge in the Court below after observing the following:-

> *"It is clear that the learned judge realized that the case for the appellant fell outside section 63 (5) of the Employment Act in that the period of service was too short. The Judge nonetheless felt in his discretion that it was just and equitable that he should award compensation in accordance with common law practice. In that award, the judge felt three months pay and three months housing allowance was a reasonable measure of remedy. It is important to make clear that the learned judge never and did not say the three months was based on a term of the contract between the appellant and the respondent. Our understanding of the Judge's determination is that three months was what the judge felt was just and equitable compensation. This comes out very clear from the passage when the judge stresses that this case could not be compared with the* ***Chawani case.*** *It is not a case deserving an award for the remaining unexpired term of the contract because the appellants period of*

*service was too short to deserve the considerations and the sentiments that compelled the court in the **Chawani case** to decide as it did."*

In the present case, the respondent having worked for the appellant for about 10 years, and with about 24 years remaining to retirement age, cannot be anywhere near deserving of getting salary compensation or indeed remuneration compensation for the remaining period to retirement. There are no circumstances that would compel this Court or any other court to make such an award.

The case of **Simwaka v The Attorney General** [2004] MLR 349 also cited before us took a similar approach to the case of **Chawani v Attorney General** (Supra). General Simwaka was prematurely retired from the Malawi Army as the Army Commander when he had 10 years and three months to retirement. His promised diplomat appointment as Malawi"s High Commissioner to Zimbabwe was frustrated with the appointment of Mrs. Chizumila in his stead. His action in the High Court, Lilongwe, based on wrongful termination of employment was dismissed on various procedural grounds despite that the Attorney General never defended it. His appeal to the Supreme Court of Appeal was allowed on the following reasoning:-

"After examining the originating summons file in the court below and the affidavit support in the summons, we are satisfied that the appellants employment with Malawi Army was prematurely terminated. We are also satisfied that in breach of section 43 (a) and (b) of the Constitution the respondent failed to give the appellant, written reasons which justified the decision to terminate the appellants employment prematurely. The respondent conduct in the circumstances was unlawful. We are unable to uphold the lower Court's decision which resulted in the dismissal of the originating summons filed by the appellant. We set aside the decision made by the learned Judge in the Court below."

On the issue of damages this court took an approach which was similar to that followed in the case of **Chawani v Attorney General** (Supra). It was said that:

*"In the **Chawani case** (supra), this Court examined section 27 (1) of the Public Service Act and stated that, the section prohibits termination of employment of a civil servant who has been appointed to an established post on permanent and pensionable terms except where it is proved that such civil servant is guilty of some misconduct. It was also stated that section 21 (1) of the Public Service Act and section 43 of the Constitution operate to prohibit government from terminating the employment of a civil servant. Employed on permanent and*

pensionable terms earlier than the date for mandatory retirement, which is usually on attainment of 55 years of age. It was decided in that case that where a civil servant employment is terminated in breach of section 27 (1) of the Public Service Act and section 43 of the Constitution, he is entitled to be paid an amount representing the salary he would have earned covering the period between the date of the termination of employment and the date when he would have attained mandatory retirement. He is also entitled to salary increments covering that period."

While acknowledging that the Public Service Act applies to the civil servants and that Malawi Army officers are not civil servants, and further that the Public Service Act may not apply to Malawi Army officers, the Court observed that there would be no justification for discrimination against army officers, especially serving in terms of privileges and benefits connected with employment, since they too are public officers. Hence the approach in **Chawani case** was adopted for the present case.

We reiterate that while the principles espoused in the **Chawani case** remain good law, they bear little or no relevant to the present case, which in contrast concerns employment generally. The case of **Chawani** does not lay down a general principle. It must be noted that the **Chawani case** was decided before the Employment Act 2000.

We have taken time to examine the judgment appealed against. The learned Judge established that on 19th January 2015 the Industrial Relations Court issued its order on assessment of damages and awarded K4, 640, 832.15 which award was appealed against. The learned Judge was satisfied that from the grounds of appeal as presented, the appeal raised questions of law and, therefore, met the requirement of sections 65 (1) and 65 (2) of the Labour Relations Act, that appeals from the Industrial Relations Court to the High Court can only be on points of law or jurisdiction. It is clear to us that the appeal to the High Court regarding the compensation awarded was far less than the total amount claimed by the respondent of K1, 115, 722,165.24. The amount claimed was made up of K10,355,185.70 compensation for loss of immediate wages K969, 921, 723.95 compensation for loss of future wages K894,043.58 immediate loss, K80, 591,018.63 compensation for loss of future 13th cheque and K95,860,193.39 loss of performance bonus. The respondent had 24 years remaining to retirement at the time his employment was terminated.

The learned Judge analysed the law before the proceeding to deal with any of damages claimed. He proceeded to set aside the compensation awarded by the Industrial Relations Court and made the following awards:

"For the period between September 2011 to January 2015 the appellant should be paid all salary and all benefits including 13th cheque but excluding performance bonus. We order that the increment multiplies should not be 20% as claimed by the appellant. Rather it should be inflation rate for the years concerned (2011-2015) plus 3.3%. this is based on exhibit "GTM9" which is the last letter of increment the appellant received before his constructure dismissal. According to "GTM9" the appellant was awarded an increment of 10% and that increment was composed of an official inflation rate of 6.7% which resulted in real increase of 3.3%. To make matters clear once again, the effective rate of increase will be the official inflate or rate for years concerned plus 3.3%.

For future loss compensation that is to say, for the period after January 2015 it is ordered that the appellant be paid his remuneration as calculated per the preceding paragraph for a period of 8 years being one third of the twenty four years which is the period to his retirement. This has been so because we cannot assume that the appellant will remain up to the expiry of the twenty four years which is the period to his retirement. And the award has exceeded the minimum prescribed in section 63 (2) because the dismissal in your case was unfair substantively. It is different from the ***Terrastone case*** *where the employee was found to have stolen from the employer. For the future losses i.e after January, 2015 no performance bonus is payable to the appellant"*

It must be said that in making the award he did, the learned Judge clearly struggled in an attempt to reconcile a number of principles. Some such principles are quite novel and do not appear to be supported at law. The result of the exercise the learned Judge was engaged in was to over-compensate the appellant hugely. The compensation awarded by the Court below can hardly be described as just and equitable as envisaged by the applicable law. The formulae that the Court below used are unknown to law. The compensation should be from the date emoluments were withheld to the date the judgment on liability was entered, without applying any interest, inflation, incremental or 13th cheque. There should not have been employed a third of the remaining time to retirement age as this does not appear to have any basis in law. Future earnings should have been associated with delay in compensation, and a period of six months as determined by the Industrial Relations Court represents an appropriate period in the exercise of discretion. These observations we have made above bring the award within the purview of section 63 (4) and (5) of the Employment Act. The awards made by the Court below are themselves set aside. Instead, the awards made by the Industrial Relations Court are restored with appropriate adjustments as we have determined above.

It is to this limited extent that the appeal before us succeeds. Costs are in the discretion of the Court and this being a labour relations matter, it is ordered that each party bear its own costs.

Pronounced in open Court this 20th day of April, 2021 at Lilongwe.

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CHIEF JUSTICE A.K.C. NYIRENDA SC

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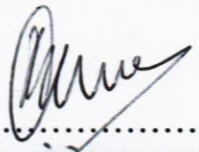
JUSTICE E.B. TWEA SC, JA



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JUSTICE R.R. MZIKAMANDA SC, JA

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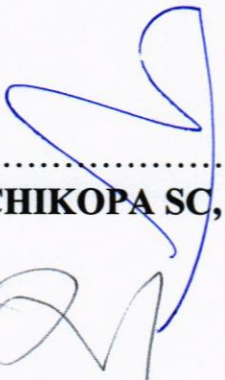
JUSTICE A.C. CHIPETA SC, JA



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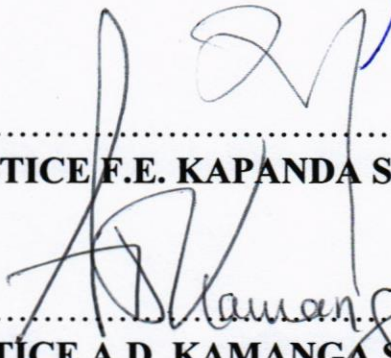
JUSTICE L.P. CHIKOPA SC, JA



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JUSTICE F.E. KAPANDA SC, JA

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JUSTICE A.D. KAMANGA SC, JA