



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CONSTITUTIONAL CASE NUMBER 04 OF 2025**

**(Before Hon. Justice N’riva, Hon. Justice Kamowa and Hon. Justice Muhome)**

**BETWEEN:**

**ELIZA STEVEN.....1<sup>ST</sup> CLAIMANT**

**THE REGISTERED TRUSTEE OF DOMESTIC  
AND VULNERABLE WORKERS**

**ASSOCIATION (DOVWA).....2<sup>ND</sup> CLAIMANT**

**-and-**

**ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF FINANCIAL INSTITUTIONS.....2<sup>ND</sup> DEFENDANT**

**WOMEN LAWYERS ASSOCIATION (WLA).....1<sup>ST</sup> AMICUS CURIAE**

**INITIATIVE FOR STRATEGIC  
LITIGATION IN AFRICA (ISLA) .....2<sup>ND</sup> AMICUS CURIAE**

**CENTRE FOR HUMAN RIGHTS (CHR) .....3<sup>RD</sup> AMICUS CURIAE**

**INSTITUTE FOR HUMAN RIGHTS  
AND DEVELOPMENT IN AFRICA (IHRDA). .....4<sup>TH</sup> AMICUS CURIAE**

**CORAM: HON. JUSTICE JACK N’RIVA**

**HON. JUSTICE CHIMWEMWE KAMOWA**

**HON. JUSTICE ALLAN HANS MUHOME**

Mr Steven Mponda, Counsel for the Claimants

Mr Gibson Mtilatila, Counsel for the Claimants

Mr Chrispine Kalusa, Counsel for 1<sup>st</sup> Defendant

Mr Zumbe Kumwenda, Counsel for 2<sup>nd</sup> Defendant

Ms Vitumbiko Mbizi, Counsel for the Amici Curiae

Hon. Montfort Misunje, Assistant Registrar

Ms Ellen Gwedeza, Senior Court Clerk

Mr Ives Gogoda, Court Clerk

Mr Spencer Luya, Court Clerk

## **JUDGMENT**

**N'RIVA, J**

My Lady and My Lord, I have had the advantage of reading in advance the opinion of Hon. Justice Muhome. I agree with it, and for the reasons he gives, I would dismiss the claims.

**KAMOWA, J**

My Lords, I too have had an opportunity to read the opinion of my brother, Hon. Muhome J. I fully associate myself with it, and for the reasons he gives, I too, would dismiss the claims in their entirety.

**MUHOME, J**

### **Introduction**

1. The 1<sup>st</sup> Claimant, Eliza Steven, is an adult Malawian who has been employed as a domestic worker in various households since 2009. The 2<sup>nd</sup> Claimant, the Registered Trustees of Domestic and Vulnerable Workers Association (DOVWA), is a non-governmental organization that promotes and protects the rights of domestic and vulnerable workers in Malawi. It brings this matter on behalf of its members, including the 1<sup>st</sup> Claimant.

2. The 1<sup>st</sup> Defendant, the Attorney General, is the principal legal advisor of the Government of Malawi and represents the Ministry of Labour and the Ministry of Finance, which are responsible for regulating and implementing the Employment Act, Cap. 55:02 of the Laws of Malawi (the ‘Employment Act’) and the Pension Act No. 6 of 2023 (the ‘Pension Act’), respectively.
3. The 2<sup>nd</sup> Defendant is the Registrar of Financial Institutions appointed under section 8 of the Financial Services Act, Cap. 44:05 of the Laws of Malawi, as the supervisory and regulatory authority for the financial services industry which includes pension services.
4. The Court admitted four Amici Curie, the Women Lawyers Association (WLA), the Initiative for Strategic Litigation in Africa (ISLA), the Centre for Human Rights (CHR) and the Institute for Human Rights and Development in Africa (IHRDA).

### **Case for the 1<sup>st</sup> Claimant**

5. The 1<sup>st</sup> Claimant brought this constitutional challenge on the basis that two statutory provisions exclude domestic workers and workers in private sector establishments with fewer than five employees from: -
  - a) being provided with written particulars of employment (under section 27(4) of the Employment Act); and
  - b) participating in a contributory pension scheme (under section 11 of the Pension Act).

6. She alleges that the exclusion violates several constitutional rights, namely; the right to non-discrimination (section 20); the right to social protection and development (sections 13 and 30); the right to fair and safe labour practices (section 31) as guaranteed by the Republican Constitution of Malawi, 1994.
  
7. The 1<sup>st</sup> Claimant, therefore, seeks the following reliefs: -
  - 7.1 a declaration that section 27(4) of the Employment Act is invalid for being inconsistent with the Constitution with immediate and retrospective effect;
  
  - 7.2 a declaration that section 11 of the Pension Act is invalid for being inconsistent with the Constitution with immediate and retrospective effect;
  
  - 7.3 any other order or declaration this Court deems fit; and
  
  - 7.4 costs of this action.
  
8. Counsel for the 1<sup>st</sup> Claimant filed skeleton arguments and made oral submissions, for which the Court is grateful.

### **Case for the 2<sup>nd</sup> Claimant**

9. The 2<sup>nd</sup> Claimant made similar claims as the 1<sup>st</sup> Claimant and filed a sworn statement of its Executive Director, Dominic Makawa Samuel. During the hearing, he duly adopted the same and was cross-examined. However, we shall not deal with this piece of evidence as we have concluded below that the 2<sup>nd</sup> Claimant does not have *locus standi* before this Court.

### **Case for the Defendants**

10. The Defendants, in their respective defences, stated that the impugned sections are constitutional and justifiable under section 44 of the Constitution. They also invited this Court to strike out the 2<sup>nd</sup> Claimant's case for lack of standing.
11. Counsel for the Defendants filed skeleton argument and made oral submission, for which the Court is grateful.

### **Brief by the Amici**

12. The Amici filed a detailed brief and made oral submissions, through Counsel. The Court has considered the same in resolving the challenge herein and shall make specific reference to the brief where necessary. Otherwise, in summary, Counsel drew the Court's attention to the State's domestic and international legal obligations to eliminate discrimination against women working as domestic workers. This was achieved by focusing on the relevant historical context contributing to the exclusion of domestic work from social protection.

Important statistics proving the vulnerability of women and domestic workers, in general, were also presented.

### **Issues for Determination**

13. The following are the issues that this Court has been invited to determine: -

13.1 whether the 2<sup>nd</sup> Claimant, the Registered Trustees of Domestic and Vulnerable Workers Association (DOVWA):

- i. has sufficient *locus standi* in the matter; and
- ii. can maintain an action or invoke representative standing on behalf of domestic workers;

13.2 whether section 11 of the Pension Act which gives powers to the Minister to exempt any class or category of employers and employees from complying with the requirements of the mandatory occupational pension scheme is unconstitutional;

13.3 whether the inclusion of domestic workers in the Minister's Pension (Exemptions) Order, 2025 made pursuant to section 11 of the Pension Act is unconstitutional on the ground that it infringes upon the rights of domestic workers under sections 13, 20, 30(3) and 31(1) of the Constitution;

13.4 whether section 27(4) of the Employment Act is unconstitutional on the ground that it infringes upon the rights of domestic workers provided under sections 13, 20, 30(3) and 31(1) of the Constitution; and

13.5 whether the Claimants are entitled to the declarations sought.

### **Burden and Standard of Proof**

14. The burden of proof in civil matters lies upon the party that substantially asserts the affirmative of the issue. See *Constantine Line Limited v Imperial Smelting Corporation* (1942) A.C. 154 p. 174; *Tembo and others v Shire Bus Lines Ltd* (2004) MLR 405 at 406 and *Mayeso Gwanda v The State* Constitutional Case Number 05 of 2015.
15. This rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative.
16. It is also trite law that the standard of proof in a civil case is on a balance of probabilities per Denning J. (as he then was) in the often-cited case of *Miller v Minister of Pensions* [1947] 2 All ER 372.

## Presumption of Constitutionality

17. There is always a presumption of constitutionality and as such the person who alleges that a certain statutory provision is unconstitutional bears the onus of proving the unconstitutionality of the provision. The Supreme Court of India in *Ram Dalmia v Justice Tendolkar* AIR 1958 SC 538 stated the following on the presumption of constitutionality: –

... (b) that there is always a presumption in favour of the constitutionality of an enactment and this burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; (c) that it must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.. (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the time and may assume every stage of facts which can be conceived existing at the time of legislation; (f) that while good faith and knowledge of the existing conditions on the part of the legislature are presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporation to hostile or discriminating legislation.

## **Supremacy of the Constitution**

18. The supremacy of the Constitution is apparent under section 5 of the Constitution. It states that: -

Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

19. It follows from the foregoing that the provisions of the Constitution provide for a validity test for all laws including statutory provisions. Under section 48(2) of the Constitution, it is clear that the statutory provisions are under Constitutional dictates. Section 48(2) of the Constitution states that: -

An Act of Parliament shall have primacy over other forms of law, but shall be subject to this Constitution.

20. This means that any inconsistency of law with the provisions of the Constitution has a logical consequence of being rendered unconstitutional. Testing the constitutionality of a law, therefore, entails the act of subjecting to the examination of the consistency of that particular law with the general spirit of the Constitution.
21. Simply put, the Constitution is a superior law upon which all other laws derive their legitimacy and validity.

## Constitutional Interpretation

22. Section 11 of the Constitution provides for the principles that Courts ought to apply when interpreting its provisions.
23. This provision gives the Court the principles that must be taken full account of whenever it is interpreting the provisions of the Constitution. It states that the interpretation of the Constitution must be that which promotes the values which underlie open and democratic society; takes full account of Chapter III and IV of the Constitution; and where applicable, has regard to current norms of public international law and comparable foreign case law.
24. In the case of *Nseula v Attorney General and Another* [1999] MLR 313 the High Court opined that constitutional interpretation requires a unique and cautious approach. The Court, thus, stated that the Constitution must not be interpreted in isolation, but must be read in the context as a whole. The reasoning of the Court in this case was that when construing the Constitution, the Court ought to accord and give meaning and interpretation that which would render it effective. The Constitution should, thus, be given a generous construction which would not unjustifiably erode civil liberties (See the Botswana case of *Letsweletse Motshiemang v Attorney General; LEGABIBO (Amicus Curiae)* MAHGB-000591-16, 228 (High Court 2009).
25. In *DPP v Norman Paul Chisale & 6 Others* Constitutional Reference 1 of 2021 [2022] MWHC 7 the Court quoted with approval the holding of the South African Court in the case of *S v Acheson* (1991) (2) SA 805 (Nm) 813 A-C in which the Chief Justice stated that: -

[The Constitution] is 'a mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding the people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

26. In *Re Reference by Western Highlands Provincial Executive*, [1996] 3 LRC 28 the Court held that in any questions relating to the interpretation or application of any provision of a Constitution, the primary aids to interpretation ought to be found in the Constitution itself and where a provision of the Constitution is so clear and unambiguous, an interpretation can be made of it without recourse to interpretational aids and recourse should only be had of such materials when the meaning of the words used is not clear.
27. The primary duty of the Judge when interpreting the Constitution is, as assiduously stated by Aguda J.A. in a Botswana case of *Attorney General v Dow*, [1992] BLR 119 (CA) to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.
28. This Court is, therefore, duty-bound to take into account these principles when interpreting and applying the provisions that the 1<sup>st</sup> Claimant is alleging to have been violated by section 27(4) of the Employment Act and section 11(2) of the Pension Act.

## Discussion and Analysis

***Whether the 2<sup>nd</sup> Claimant, the Registered Trustees of Domestic and Vulnerable Workers Association (DOVWA): has sufficient locus standi in the matter; and can maintain an action or invoke representative standing on behalf of domestic workers***

29. The 2<sup>nd</sup> Claimant stated that it is: -

a non-governmental organisation duly registered as a trust and responds to labour related issues of domestic and vulnerable workers in Malawi.

30. Section 15(2) of the Constitution provides that: -

Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.

31. From this provision it goes without saying that persons who establish a sufficient interest in the protection and promotion of rights can enforce and protect rights under the Constitution. However, to move the Court, such person or persons must have “sufficient interest” in the matter they so bring to the Court. We wish to agree with the decision in *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General and others* [2014] MLR 363 (HC) that the existing authorities on the

principle of “sufficient interest” are still valid and have not been overthrown, or overtaken, by the 2010 amendment that added the description “natural or legal” to the types of litigant section 15(2) accommodated.

32. In support of this doctrine, the legal precedents set in *President of Malawi & Anor. v Kachere & Ors.* (MSCA Civil Appeal 20 of 1995) [1995] MWSC 2 (19 November 1995); *Civil Liberties Committee v Ministry of Justice & Anor.* (MSCA Civil Appeal 12 of 1999) [2004] MWSC 1 (7 April 2004) and the persuasive case of *Attorney General v NGO Coordination Board ex parte Kituo Cha Sheria* [2017] eKLR are instructive. In the *Attorney General v NGO Coordination Board ex parte Kituo Cha Sheria* case, the Kenyan High Court unequivocally held that an applicant must establish a personal or direct interest in the matter at hand, rather than relying on broad or generalized concerns affecting the public. The Court emphasized that the principle of *locus standi* serves as a procedural filter, ensuring that judicial resources are reserved for genuine disputes that necessitate resolution by the Court.
  
33. A similar principle was articulated in the Australian High Court decision in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493. The Court therein underscored that standing cannot be established on the basis of mere concern or sincere interest in a public issue. Instead, a tangible connection to the matter or demonstrable harm must be evident for a party to be granted standing. The decision emphasizes the importance of the doctrine of *locus standi* in maintaining judicial focus and efficiency.

34. In the landmark case of *Sierra Club v Morton* 405 U.S. 727 (1972), the United States Supreme Court ruled that an organization must demonstrate a direct, tangible link to the harm being claimed, rejecting mere ideological interest as insufficient for standing. This decision highlighted the necessity of aligning Court access with concrete legal injuries rather than abstract advocacy.
35. Similarly, the United Kingdom case of *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 reinforced the requirement that applicants must show a sufficient personal or direct interest in the matter. The House of Lords clarified that standing should be assessed in light of the specific facts of the case, ensuring that frivolous or generalized claims do not encumber judicial processes.
36. Moreover, in Canada, the Supreme Court's decision in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45, introduced a flexible approach to public interest standing. While the Court acknowledged the importance of procedural safeguards, it also stressed the need to consider the public's access to justice. Applicants could be granted standing if they demonstrated a serious issue to be tried, a genuine interest, and the absence of a more appropriate plaintiff.
37. In our jurisdiction, the Supreme Court of Appeal has recently buttressed this point in *The President of Republic of Malawi (Prof. Peter Mutharika) and Secretary to Cabinet (Justice Lloyd Muhara) v Human Rights Defenders Coalition and Others* SCA Civil Appeal Number 5 of 2022. In that matter, the two Justices directly affected by the appellants' decision—the Honourable

Chief Justice Andrew Nyirenda SC and Honourable Justice Edward Twea SC—were not parties to the judicial review application. Instead, the action was commenced by third parties (the Human Rights Defenders Coalition, the Association of Magistrates, and the Malawi Law Society) claiming a public interest in the issue.

38. The Supreme Court made a pertinent observation that while public interest litigation serves a vital role in holding government accountable, it must not be allowed to degenerate into a free-for-all where any entity can litigate on behalf of individuals who are fully capable of asserting their own rights. The doctrine of *locus standi* exists to ensure that only those with a direct and substantial interest in a matter can invoke the Court's jurisdiction.
39. In the present matter, domestic workers, like the 1<sup>st</sup> Claimant, can sue in their own right. We are of the opinion that the 2<sup>nd</sup> Claimant has failed to demonstrate that it has suffered any injury that must be addressed legally and so we find that the 2<sup>nd</sup> Claimant lacks standing.

*Whether section 11 of the Pension Act which gives powers to the Minister to exempt any class or category of employers and employees from complying with the requirements of the mandatory occupational pension scheme is unconstitutional*

and

*Whether the inclusion of domestic workers in the Minister's Pension (Exemptions) Order made pursuant to section 11 of the Pension Act is unconstitutional on the ground that it infringes upon the rights of domestic workers under sections 13, 20, 30 (3) and 31 (1) of the Constitution*

40. Section 11(1) of the Pension Act provides that: -

The Minister, in consultation with the Minister responsible for labour and with the registrar, may, by order published in the Gazette, exempt any class or category of employers or employees from complying with the requirements of this Part.

41. The Pension (Exemptions) Order, made pursuant to section 11 of the Pension Act has listed 10 exemptions. They are - the President; the First Vice-President; the Second Vice-President; a member of Parliament; a councilor; a domestic worker; an employee on a non-renewable contract for a specified task, whose term does not exceed a period of six months; an employee who, at the time of engagement, is above the retirement age of the employer; an expatriate and a seasonal employee on a non-renewable contract.

42. The 1<sup>st</sup> Claimant argues the foregoing provisions offend sections 13, 20, 30(3) and 31(1) of the Constitution.
43. The Attorney General submitted that the categorical distinction is rationally connected to legitimate governmental purposes including administrative feasibility, financial and compliance implications, employment protection, and progressive policy implementation. He invited this Court to follow the South African Constitutional Court's approach in socio-economic rights cases that emphasizes reasonableness and progressive realization. In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), the Court held that the state's program must be reasonable, must make provision for those in desperate need, and must demonstrate progressive realization within available resources.
44. Counsel for the 2<sup>nd</sup> Defendant argued that section 11 of the Pension Act, is clear. It merely gives the Minister the power to exempt any class or category of employers or employees from complying with the requirements on the mandatory occupational pension scheme. The power to exempt is then exercised by publishing an exemption order in the *Gazette*.
45. The approach to be taken by a Court when faced with a statutory provision that is clear was spelt out by the Supreme Court of Appeal in *Royal International Insurance Holdings Ltd v Gemini Holdings Ltd and another* [1998] MLR 318. In the words of Unyolo, CJ (as he then was), at page 32: -

It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of a statute are themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such a case the intention of the legislature is best declared by the words themselves.

46. In the case of *R v Chinthiti and Others* [1997] 1 MLR 59, Nyirenda, J. (as he was then) took a similar position when he was asked to determine whether section 294(2) of the Criminal Procedure and Evidence Code (CP & EC) inhibited the accused's right to a jury trial and therefore was unconstitutional for offending the accused's right to equality as guaranteed under section 20 of the Constitution as well as the right to a fair trial as guaranteed under section 42(f) of the Constitution.
  
47. Ruling against an argument that section 294(2) of the CP & EC had no safeguards and, therefore, there was nothing to stop the Minister from exercising his powers impromptu, discriminately and even maliciously against a certain sector of the community, the Court stated, at page 63, as follows: -

In order to determine whether a particular provision of law offends or derogates from another, the question really is whether that is the case on the words of the provision on a literal interpretation or a purposive interpretation thereof. The question is not what the provision would result into if it fell into the wrongs hands. Many legal provisions are capable of abuse, but that does not make them repugnant to the rule of law, justice and human rights...

48. Similar to section 11 of the Pension Act in that the provision merely gave the Minister power to take a certain course of action, the said section 294 of the CP & EC, the subject of the *Chinthiti Case*, read as follows: -

Subject to subsection (2) all criminal trials before the High Court shall be by jury. The Minister may direct that any case or class of case shall be triable by the High Court without a jury.

49. This Court concurs with the Defendants that, the fact that section 11 of the Pension Act grants power to the Minister to exempt certain categories of employees from the mandatory occupational pension scheme does not make section 11 of the Act inconsistent with the principles of national policy in section 13, the right to equality in section 20, the right to development in section 30 and the right to fair and safe labour practices in section 31 of the Constitution. This is demonstrated below.

## **Examination of section 11 of the Pension Act against the Constitution**

### **Section 20 of the Constitution – Right to Equality**

52. Section 20 of the Constitution provides as follows: -

(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

(2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

53. Section 20 essentially, enshrines three aspects of equality: (a) non – discrimination; (b) equal protection under the law; and (c) positive measures to combat and eliminate inequality, which we proceed to analyze.

### ***Non – Discrimination***

54. According to the Human Rights Committee, discrimination implies ‘any distinction, exclusion, restriction or preference’ which is based on any of the prohibited grounds and ‘has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.’<sup>1</sup>

55. After defining the concept of discrimination, the Human Rights Committee went on to observe that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>2</sup>

56. From the above definition and observation, there are at least four elements of discrimination: -

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<sup>1</sup> CCPR General Comment No 18 ‘Non-discrimination’, Thirty-Seventh Session, 1989, para 7.

<sup>2</sup> CCPR General Comment No 18 ‘Non-discrimination’, Thirty-Seventh Session, 1989, para 13.

- a) at least two people or groups must have been treated differently;
  - b) the differentiation must amount to inferior treatment, place the person at a disadvantage, or deprive him or her of (access to) benefits, privileges or rights;
  - c) the differentiation must be based on a prohibited or analogous ground; and
  - d) the differentiation must be unreasonable or unjustifiable.
57. The duty of the person claiming discrimination is to prove the first two elements of discrimination, thus, that at least two persons who are in an analogous position have been treated differently and in a manner that materially affects the position of either of them. The defendant must then prove that the differential treatment was not based on a prohibited or analogous ground and/or that it is justifiable. See, *ANE Sakala v The Registered Trustees of the Designated Schools Board*, Civil Cause Number 2652 of 1999 (*ANE Sakala Case*).
58. Thus, where it is proven that two people are objectively speaking in an analogous situation, discrimination should be presumed unless the defendant demonstrates that there is a justifiable reason for the differential treatment and that the stated reason is not related to a prohibited or analogous ground.
59. What constitutes ‘being in an analogous situation or position?’ In the *ANE Sakala Case*, the plaintiff was employed by the Designated Schools Board as a bursar. The Board then decided to devolve the school. In its resolution, the Board decided to relocate secretariat staff and pay them terminal benefits. However, when calculating terminal benefits, the Board used a formula for the plaintiff, a contract employee, which was different to other employees who

were in a comparable situation to the plaintiff (other contract employees). The Court found that the plaintiff had been discriminated against when the formula used meant that she received less benefits than other secretariat staff who were on contract.

60. In the present matter, the Claimant, Eliza Steven, ought to have demonstrated to this Court that she has been treated differently as compared to other employees in an analogous position (comparable situation) by the inclusion of domestic workers in the list of exempted employees from the mandatory occupational pension scheme. The Claimant should have also demonstrated that she has been treated differently because of the existence of any of the analogous grounds for discrimination in section 20(1) of the Constitution.
61. This Court finds that section 11 of the Pension Act does not prescribe requirements that exclude the 1<sup>st</sup> Claimant from being placed on pension on the basis of a particular analogous ground listed in section 20(1) of the Constitution. In fact, section 11 of the Pension Act does not restrict employers from providing pension to their domestic workers. Section 11 of the Pension Act does not directly discriminate against the 1<sup>st</sup> Claimant.
62. To restate, section 11 merely empowers the Minister to exempt a class or category of employees from the mandatory occupational pension scheme. The 1<sup>st</sup> Claimant alleges that by issuing the Pension (Exemption) Order, through which domestic workers are exempted from the mandatory occupational pension scheme, the Minister responsible for Finance actuates the indirect discrimination in section 11 of the Pension Act. Thus, the consequential

exercise of power given under section 11 of the Act by the Minister, has resulted in a situation where domestic workers have been disadvantaged.

63. The Court is aware that, indirect discrimination demands tribunals to look beneath the surface and consider the consequences of State's conduct and laws to ensure that there is no discrimination, on the basis of an analogous or prohibited ground, lurking underneath. This Court holds the view that the inclusion of domestic workers in the Minister's Pension (Exemption) Order, does not amount to any indirect discrimination. Domestic workers are not exempted from the mandatory occupation pension scheme 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparable serious manner.'<sup>1</sup>

64. It is our firm belief that the exemption of domestic workers recognizes the unique and informal nature of domestic work which makes it impossible for them to be put on pension in the same manner as employees in formal employment. We are persuaded by the Attorney General's submission that the categorical distinction is rationally connected to legitimate governmental purposes including administrative feasibility, financial and compliance implications, employment protection, and progressive policy implementation.

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<sup>1</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 46. This South African case reported on SAFLII defines an analogous ground of discrimination.

65. As a matter of fact, the International Labour Organisation (ILO) acknowledges that in terms of social security coverage, domestic work is considered as a sector that is difficult to cover, partly because work is performed in private households and frequently for more than one employer. The occupation is also characterized by high job turnover, frequent in-kind payments, irregular wages and a lack of formal work contracts.<sup>1</sup>

### *Equal and effective protection under the law*

66. Within the essential contents of the right to equality in section 20(1) of the Constitution is the constitutional guarantee of the right to equal and effective protection under the law against discrimination. At the very minimum, equal protection implies equality of treatment under the law. Thus, the law should not discriminate. It must treat all people similarly without creating arbitrary differentiations.

67. The concept of equal protection of laws was discussed in the case of *Attorney General v Malawi Congress Party and 2 Others* SCA [1997] 2 MLR 181 (*Press Trust Case*). The Supreme Court of Appeal stated that the concept of equal protection of laws is a positive concept. It postulates for the application of the same law alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political influence.

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<sup>1</sup> <https://www.ilo.org/resource/news/ensuring-protection-and-rights-domestic-workers-africa>

68. The Respondents in the *Press Trust Case* had asserted that the 1995 Press Trust (Reconstruction) Act was in substantive breach of certain provisions contained in Chapter IV of the Constitution including the right to equal protection of the law. The Supreme Court of Appeal rejected this assertion and stated as follows: -

...in our view, the Press Trust is not like any other known trust in Malawi, because its tentacles spread throughout the whole of the Malawian economy. The Press Trust (Reconstruction) Act is, therefore, not discriminatory because of its unique character, and further because it did not alter the original nature of the Press Trust.

69. It is the conclusion of this Court that the inclusion of domestic workers in the Ministerial Pension (Exemption) Order does not, of itself, negate the right of domestic workers to equal and effective protection under the law. This is the case when one considers that the concept of equal protection under the law postulates for the application of ‘the same law alike and without discrimination to all persons similarly situated’.

70. To illustrate the point that domestic workers have a unique character and the mandatory pension regime under the Pension Act cannot apply to them in the same manner or similarly or ‘alike’ workers in formal employment, an example can be given of the innovative pension scheme coverage for the informal sector in Zambia. In Zambia, the **National Pension Scheme (Informal Sector) (Membership and Benefits) Regulations, 2019** were promulgated as a way of extending pension scheme coverage beyond the formal economy.

71. In promulgating the statutory instrument to extend pension coverage for the informal sector, there was recognition that the informal economy workers are normally excluded from mandatory coverage under pension schemes because these schemes conventionally are designed to address the social protection needs of the working population with a formal employment relationship, established through a written contract and providing for regular and predictable income. See, Jairous Joseph Miti, Mikko Perkiö, Anna Metteri and Salla Atkin, *Pension coverage extension as social innovation in Zambia: Informal economy workers' perceptions and needs* (2021) Tampere University, Finland.<sup>1</sup> Advisedly, our Parliament may wish to borrow a leaf from this arrangement.
72. Currently, in Malawi, the Minister responsible for finance has exempted domestic workers from the 'mandatory occupational pension scheme' due the unique nature of domestic work. However, domestic workers can still be on pension.
73. This is because under the Pension Act: -
- a) any class or category of employees can become a member of a pension scheme and voluntarily save for retirement in a voluntary pension scheme – section 15 of the Pension Act; and

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<sup>1</sup> Jairous Joseph Miti, Mikko Perkiö, Anna Metteri, Salla Atkins, *Implementing a Public Policy to Extend Social Security to Informal Economy Workers in Zambia*, Forum for Development Studies, 10.1080/08039410.2023.2209583, 50, 3, (425-443), (2023).

b) employers are at liberty to make contributions on behalf of employees in a voluntary pension fund – section 16 of the Pension Act.

74. In addition, the Court also notes that section 35A of the Employment Act, read with Part II of the First Schedule, provides for a gratuity equal to five per cent (5%) of the employee's final monthly salary for each completed month of service. We find this progressive enough despite the 1<sup>st</sup> Claimant's, rather persuasive argument that gratuity is a once-off terminal benefit, whereas pension provides a regular, sustainable income after retirement. We hold the view that it is the primary and continuous function of the Executive and Legislature, not necessarily the Courts, to review the gratuity/pension policies as mandated under the Constitution.

***Positive measures to combat and eliminate inequality***

75. Section 20(1) of the Constitution prohibits discrimination in law and in fact, and requires the State to protect everyone from discrimination. Section 20(2) fortifies subsection (1) by specifically empowering the state to pass legislation 'addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices', and to render such practices criminally punishable by the Courts.

76. Section 20(2) of the Constitution seems to emphasize the importance of legislation to the quest for equality. However, which type of equality? In the case of *Chinthiti Case*, the Court said that the principle of equality of individuals under law does not require mere formal or mathematical equality, but a substantial and genuine equality in fact.

77. According to the *Chinthiti Case*, section 20(2) of the Constitution emphasizes the importance of legislation to the quest for substantive equality.
78. It is the conclusion of this Court, in accordance with the above exposition of section 20 of the Constitution, that there is nothing in section 11 of the Pension Act, nor the Pension (Exemption) Order which transgresses section 20 of the Constitution. Equality claims must be considered within the context of structural and systemic factors as well as institutional and social arrangements.

### **Section 30 of the Constitution – Right to Development**

79. Section 30 of the Constitution reads as follows: -
- (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and persons with disabilities in particular shall be given special consideration in the application of this right.
  - (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
  - (3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
  - (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

80. The preamble to the Declaration on the Right to Development makes it plain that development is a process.<sup>1</sup> Our reading of section 30(1) of the Constitution and the Declaration on the Right to Development, makes it clear that all persons are entitled to participate in and contribute to economic, social, cultural and political development. Further, the enjoyment of the right to development places emphasis on the need to not only pay attention to the well-being of the whole population but particular attention should be given to women, children and the disabled.
81. The Amici passionately submitted that the fact that the overwhelming majority of domestic workers tend to be women makes domestic work gendered. This gendered dynamic is rooted in social and economic inequalities that disproportionately affect women, including limited access to education, employment, and economic opportunities in Malawi.
82. The Convention on the Elimination of Discrimination Against Women (CEDAW) Committee has considered domestic work extensively as a women's human rights issue. Express reference is made to domestic work throughout its general recommendations on women migrant workers,<sup>2</sup> women's access to justice,<sup>3</sup> gender-based violence against women,<sup>4</sup> the right of girls and women to education,<sup>5</sup> the gender-related dimensions of disaster

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<sup>1</sup> General Assembly Resolution 41/128: "...development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."

<sup>2</sup> General recommendation No. 26: Women migrant workers.

<sup>3</sup> General recommendation No. 33: Women's Access to Justice at par 54.

<sup>4</sup> General recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19 at par 29.

<sup>5</sup> General recommendation No. 36: The right of girls and women to education at par 33.

risk reduction in the context of climate change,<sup>1</sup> and trafficking in women and girls in the context of global migration.<sup>2</sup> Similarly, in its most recent concluding observations it has made observations and recommendations to African States that are directly relevant to domestic work highlighting concerns about exploitation, lack of legal protection and gender-based violence experienced by domestic workers.

83. That said, this Court finds that section 30(2) of the Constitution is self-explanatory. It emphasizes on ‘equality of opportunity for all’. The developmental measures taken by the state must ensure ‘equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.’

84. Section 30(3) of the Constitution specifically enjoins the State to take measures to introduce reforms aimed at eradicating social injustices and inequalities. Sections 30(2) and 30(3) of the Constitution emanate from Article 8 of the Declaration on the Right to Development which reads as follows: -

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be

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<sup>1</sup> General recommendation No. 37: The gender-related dimensions of disaster risk reduction in the context of climate change at par 62 and 64.

<sup>2</sup> General recommendation No. 38: Trafficking in women and girls in the context of global migration at par 28, 112, and 121.

carried out with a view to eradicating all social injustices. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

85. In a sense, the main message from section 30(3) of the Constitution is that where there is an individual or a group seeking to enforce 'equality of opportunity' in section 30(2) of the Constitution, the claim must be assessed in the light of the existing inequalities and socio-economic circumstances of the individuals or groups asserting them. Thus, section 30(3) of the Constitution allows the assessment of equality claims in section 30(2) of the Constitution to be done in a substantive manner as opposed to a formalistic approach.
86. Last but not least, section 30(4) of the Constitution obliges the State to justify its policies in accordance with the tenets of the right to development. Whilst this provision gives the Courts an express constitutional authority to ask the Government to justify its policies by reference to the right to development, this Court agrees with the 2<sup>nd</sup> Defendant that the role of the Courts in that regard is not to create or dictate policies. The role of the Court is not to consider whether there are better policies which the State should adopt.
87. This Court is mindful that an invalidation of section 11 of the Pension Act will force employers to strictly comply with the mandatory requirements of Part V of the Pension Act. In an occupational pension scheme where there is direct correlation between pension and employment, any reduction in the demand for domestic workers will not have the suggested transformative effect on the lives of domestic workers, as argued by the 1<sup>st</sup> Claimant.

88. Considering the above realities, we believe that the reliefs sought by the 1<sup>st</sup> Claimant will, in the long run, have very adverse effects on domestic workers and private sector workers as employers will more likely refrain from engaging them on full time employment so as to avoid laborious and formal obligations under the statute since such employment is generally informal.
89. In summary, therefore, the fact that section 11 of the Pension Act merely empowers the Minister to exempt certain categories of employees from the mandatory occupational pension scheme does not lead to a breach of section 30 of the Constitution. The Claimant has not shown how section 11 of the Pension Act or the Pension (Exemption) Order negates the essential content of the right to development, generally.

### **Section 31 (1) of the Constitution – Right to Fair and Safe Labour Practices**

90. Section 31(1) provides that ‘Every person shall have the right to fair and safe labour practices and to fair remuneration.’ Case law succinctly defines fair labour practices as practices that are evenhanded, reasonable, acceptable and expected from the standpoint of the employer, employee and all fair-minded persons looking at the unique relationship between the employer and employee and good industrial and labour relations. See, *S. Kalinda v Limbe Leaf Tobacco Company Limited* Civil Cause Number 542 of 1995.

91. From the myriad of cases on the subject of fair labour practices, it is almost settled that, what constitutes a ‘fair labour practice’ will be determined on a case-by-case basis taking into account the specific circumstances of each case. See, for example, the case of *Lameck Moyo v National Bank of Malawi* MSCA Civil Appeal Number 19 of 2009.
92. In the *ANE Sakala Case*, a practice by an employer which was found to be discriminatory in terms of section 20 of the Constitution was also found to be unfair in terms of section 31 of the Constitution. In essence, the practice was deemed to be unreasonable as between the employer and the employee.
93. Looking at section 11 of the Pension Act it empowers the Minister responsible for finance to exempt certain categories of employees from the mandatory occupational pension scheme. Through the Pension (Exemption) Order the Minister included domestic workers on the list of exempted employees.
94. In this respect, we further agree with Counsel for the Defendants that on account of the arguments on the right to equality, the exclusion from the mandatory occupational pension scheme of domestic workers does not entail that domestic workers have been discriminated against, which in turn would perpetuate unfairness within the meaning of unfair labour practices in the *ANE Sakala Case*. We thus conclude that exempting domestic workers from the mandatory occupational pension scheme does not violate the right to fair labour practices in section 31 of the Constitution.

## Limitation on Constitutional Rights

95. For the avoidance of doubt, we have also reached a conclusion that section 11 of the Pension Act and the *gazetted* exemption Order complained of, do satisfy the conditions for the limitation of human rights as stipulated in section 44(1) and (2) of the Constitution.
96. First and foremost, a limitation on a constitutional right must be prescribed by law in this case the Pension Act. Delegated legislation which is the law promulgated by an authority empowered by Parliament to do so, constitutes ‘law’ for the purposes of section 44(1) of the Constitution. In this regard, the Pension (Exemption) Order promulgated by the Minister responsible for finance which includes domestic workers in the category of employees exempted from mandatory occupational pension scheme meets the condition that ‘the limitation must be prescribed by law’.
97. It is a legal requirement that laws prescribing restrictions or limitations must be of general application. This requirement embodies the principle that laws must apply impersonally; the law must apply to everyone equally; and must not target specific persons.
98. In the *Chinthiti Case*, a law that empowered a Minister to direct any case or class of case to be tried without a jury was found to be reasonable and constitutional. This was a limitation on a right to jury trial in all criminal cases tried in the High Court. Within the same vein, section 11 of the Pension Act which empowers the Minister responsible for finance to exempt certain

category or class of employers and employees from the mandatory occupational pension scheme is reasonable and constitutional.

99. In order to govern effectively, legislatures must treat different individuals and groups in different ways. To achieve true equality, it will frequently be necessary to make distinctions: see *Andrews v Law Society of British Columbia* (1989) 2 WWR 289. We opine that the differentiation brought about under the exemption Order does not violate equality, it merely considers the realities of the informal working sector without specifically targeting the 1<sup>st</sup> Claimant or domestic workers, generally.

100. The Court is aware that it is trite that the limitation should not negate the essential content of the right in question. ‘Essential content’ could mean the most important components of the right in question. In the case of *Dr Bakili Muluzi v The Attorney General* MSCA Constitutional Case Number 25 of 2018, Dr. Muluzi challenged the constitutionality of section 32 of the Corrupt Practices Act which provides on unexplained wealth. He argued that the provision reverses the legal burden of proof, the right to silence and the right of an accused person to be presumed innocent in section 42(2)(f)(iii) of the Constitution. The issue for determination was whether the provision which required a public officer who is found to be in possession of unexplained wealth, to give a satisfactory explanation to the Court how the wealth came under his control or possession negated the essential content of the right to remain silent and to be presumed innocent.<sup>1</sup>

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<sup>1</sup> In *Friday A. Jumbe & Humphrey C. Mvula v Attorney General*, Constitutional Case No. 1 & 2 of 2005, Katsala J. (as he then was) rejected the contention that the reverse onus created by the Corrupt Practices Act was a justifiable limitation on the right to be presumed innocent, arguing that the reverse onus provision at hand seriously impaired ‘the very essence of the right’.

101. Whether a limitation negates the most important components of the right in question, in this instance, the rights in sections 13, 20, 30(3) and 31(1) of the Constitution entails an examination of the actual meaning and components of the rights guaranteed in the aforementioned sections. From the detailed discussion of the contents of the rights in issue above, we find that the Pension Act and the Pension (Exemption) Order, do not negate the essential contents of the said rights.

102. Secondly, laws prescribing restrictions or limitations on rights must be reasonable. An illustration of the application of the reasonableness test appears in the case of *JZU Tembo & Kate Kainja v Attorney General* Civil Appeal Case Number 50 of 2003 where the High Court was considering the constitutionality of section 51 of the Constitution which disqualified a person convicted of a criminal offence involving dishonesty or moral turpitude from being a Member of Parliament. The Court held that the section justifiably limited one's political rights because it had the legitimate aim of protecting the integrity of the National Assembly and that it was not too restrictive since it did not bar the disqualified person from engaging in other political activities.

103. In the case of *Gwanda v The State* (Constitutional Cause 5 of 2015) [2017] MWHC 23 (10 January 2017) the Court cited with approval *R v Oakes* which held that for a limitation to be reasonable several factors need to be considered. Firstly, one needs to look at the importance of the purpose or the objective of the limitation; secondly, examine the proportionality between the limitation and its purpose; thirdly, analyse if there are less restrictive means of achieving the purpose; and lastly, consider whether the limitation has managed to achieve the intended purpose.

104. The Pension (Exemption) Order does not restrict the right to ‘a pension’ for domestic workers. The Order exempts domestic workers from *the mandatory occupational pension scheme*. The Order legitimately considers the informal nature of domestic work which makes it hard for domestic workers to be put on pension in the same manner as employees in formal employment. This is acknowledged by the ILO.<sup>1</sup>

105. Thirdly, the limitation must be ‘recognised by international human rights standards’. This phrase is broad. It could be interpreted to mean that the limitation in question must be recognised by international human rights law and by the domestic jurisdictions of democratic countries. To begin with, the *ILO Convention No. 189* offers specific protection to domestic workers. It lays down basic rights and principles, and requires States to take a series of measures with a view to making decent work a reality for domestic workers. The Court took notice that in Africa, only two countries have ratified the *ILO Convention No. 189*, viz, Republic of South Africa and Mauritius. Other countries such as Algeria, Cabo Verde, Gabon, Kenya, Mauritania, Mali, Senegal, Togo, Tunisia and Zambia have some legal provision for social security coverage of domestic workers.<sup>2</sup> We make a finding that the limitation of domestic workers from mandatory pension coverage is one which is recognized by domestic jurisdictions of democratic countries.

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<sup>1</sup> <https://www.ilo.org/resource/news/ensuring-protection-and-rights-domestic-workers-africa>

<sup>2</sup> <https://www.ilo.org/resource/news/ensuring-protection-and-rights-domestic-workers-africa>

106. Lastly, the limitation must be necessary in an open and democratic society. In deciding this aspect, Malawian Courts have considered whether a limitation promotes the fundamental principles of the Constitution or principles of national policy. For example, in the *Press Trust Case*, the Supreme Court of Appeal considered the fact that the Press Trust (Reconstruction) Act was passed for the benefit of the whole population of Malawi as a compelling reason for limiting the property right of the trustees of the Press Trust.

107. In *Friday Jumbe & Humphrey Mvula v Attorney General*, while noting that the term ‘open and democratic society’ is difficult to define, Mkandawire J. explained, citing section 13 of the Constitution, that it includes transparency and accountability. Consequently, he held in his dissenting opinion that the reverse onus provision in the Corrupt Practices Act was justifiable because it was intended to advance the legitimate objective of eliminating corruption and thus promoting public accountability. In contrast, Katsala, J. held that, while corruption was an evil that had to be eradicated, an open and democratic society should respect the fair trial rights of persons suspected of criminal offences. He, therefore, concluded that the reverse onus provision in issue was not reasonable or necessary in an open and democratic society.

108. Section 13(n) of the Constitution enjoins the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving ‘a sensible balance between the creation and distribution of wealth through the nurturing of a market economy and long-term investment in health, education, economic and social development programmes.’

109. We have carefully examined the law and form the opinion that section 11 of the Pension Act and the exemption Order made thereunder provide a sensible balance in the current economic position of Malawi. The questioned provisions are, therefore, necessary in an open and democratic society.

***Whether section 27(4) of the Employment Act is unconstitutional on the ground that it infringes upon the rights of domestic workers provided under sections 13, 20, 30(3) and 31(1) of the Constitution***

110. Section 27 of the Employment Act provides for particulars of employment as follows: -

- (1) Every employer shall give to each employee a written statement of particulars of employment.
- (2) The statement referred to in subsection (1) shall be given-
  - (a) with respect to an employee in employment at the commencement of this Act, within three months of the commencement of this Act. To each employee who is employed by the employer; and
  - (b) with respect to an employee employed after the commencement of this Act, within one month of his/her reporting for work.
- (3) The written statement referred to in subsections (1) and (2) shall include the following particulars -
  - (a) the names of the employee and of the employer;
  - (b) the date of commencement of the contract;
  - (c) the rate of remuneration and the method of calculating remuneration;
  - (d) the intervals at which remuneration is paid;
  - (e) the nature of the work to be performed;

- (f) normal hours of work;
- (g) any provision for the termination of the contract other than those provided by this Act;
- (h) any disciplinary rule applicable to the employee.

(4) For the purposes of this section, “employer” means any person, body corporate, undertaking or body of persons who or which has in his employment at least **five** employees. (Emphasis supplied)

111. The 1<sup>st</sup> Claimant argues that by limiting the requirement of employees required to be given particulars of contract to five, most, if not all, domestic workers are left without a written contract of employment.

112. The 1<sup>st</sup> Claimant argues that the said limitation breaches sections 13, 20, 30(3) and 31(1) of the Constitution.

113. In finding that section 27(4) of the Employment Act is constitutional, we shall not re-state the law which we have already discussed in relation to the constitutionality of section 11 of the Pension Act, above.

114. Suffice to say that the general law of contract permits parties to enter into contracts in writing, by word of mouth, even impliedly. See *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666. This position applies with equal force to employment contracts in Malawi. Under section 3 of the Employment Act, an “Employee” means - ‘(a) a person who offers his services under an **oral or written contract of employment, whether express or implied...**’ (Emphasis supplied). See also *Chisowa v Ibrahim Cash ‘n Carry* [2008] MLLR 385.

115. We observe that the requirement for written particulars under section 27(4) of the Act is but an amelioration of the rights of employees, in general. In its wisdom, Parliament deemed it that where the number of employees is below 5, whether they are domestic workers or not, the employer is not obligated to provide the written particulars of employment. The limitation is thus duly prescribed by law.
116. Though inconvenient, as oral contracts are difficult to prove in Court, the 1<sup>st</sup> Claimant has failed to demonstrate that this is unreasonable. Further, we are firm that the fact that a majority of domestic workers would invariably end up within the bracket of 5 employees does not, in any way offend any of the constitutional provisions that have been cited.
117. More importantly, the *ILO Convention No. 189* on information on terms and conditions of employment for domestic workers (Article 7) provides that domestic workers must be informed of their terms and conditions of employment *in an easily understandable manner, preferably through a written contract*. Thus, international law does not make it mandatory for States to provide written terms and conditions of employment to domestic workers. Considering the economic development of Malawi and the practical imperatives of requiring every domestic worker to have a written contract, it is our opinion that section 27(4) is currently necessary in an open and democratic society.

118. We also find that the limitation does not offend the principles of national policy requiring the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving ‘a sensible balance between the creation and distribution of wealth through the nurturing of a market economy and long-term investment in health, education, economic and social development programmes’ under section 13 (n) of the Constitution.

119. Neither do we find section 27(4) discriminatory, as against domestic workers under section 20: it targets all employees where their employer employs less than 5 employees, it therefore affords domestic workers equal protection under the law. An employer and an employee, so minded, are not prohibited from having a written contract, if they wish to, which is not a requirement of the law, anyway.

120. Section 27(4) does not take away the State’s obligation to introduce reforms aimed at eradicating social injustices and inequalities under section 30(3). Lastly, it is our considered view that the restriction does not negate the right to fair and safe labour practices and to fair remuneration as envisaged in section 31(1) of the Constitution.

121. We, therefore, conclude that section 27(4) of the Employment Act is constitutional and does not infringe upon the rights of domestic workers entrenched under sections 13, 20, 30(3) and 31(1) of the Constitution.

***Whether the Claimants are entitled to the declarations sought***

122. In the light of the above findings, the Claimants are not entitled to any of the declarations sought.

**Disposal**

123. In conclusion, therefore, we make the following findings: -

123.1 the 2<sup>nd</sup> Claimant, the Registered Trustees of Domestic and Vulnerable Workers Association (DOVWA) does not have *locus standi* in this matter; and cannot maintain an action or invoke representative standing on behalf of domestic workers;

123.2 section 11 of the Pension Act which gives powers to the Minister to exempt any class or category of employers and employees from complying with the requirements of the mandatory occupational pension scheme is constitutional;

123.3 the inclusion of domestic workers in the exemption Order made pursuant to section 11 of the Pension Act is constitutional and does not offend the rights of domestic workers under sections 13, 20, 30(3) and 31(1) of the Constitution;

123.4 section 27(4) of the Employment Act is constitutional and does not infringe upon the rights of domestic workers provided for under sections 13, 20, 30(3) and 31(1) of the Constitution;

123.5 the action herein, therefore, fails in its entirety;


123.6 however, considering the nature of the dispute, each party shall bear their own costs.

Made in Open Court this 16<sup>th</sup> day of April, 2026 at Blantyre, Malawi.



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**HON. JUSTICE JACK N'RIVA**



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**HON. JUSTICE CHIMWEMWE KAMOWA**



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**HON. JUSTICE ALLAN HANS MUHOME**