Electricity Supply Corporation of Malawi v Kennedy Kaphamtengo and 23 Others Civil Appeal Number 12 of 2023 (Being Matter Number IRC PR 230 of 2009)

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Civil Appeal Number 12 of 2023 (Being Matter Number IRC PR 230 of 2009)
Date of Judgment:	July 15, 2025
Bar:	Mr. Fiskani Nkhoma, Counsel for the Appellant Counsel for the Respondents: Mr. Chikondi Khondiwa

1. This an appeal filed by Electricity Supply Corporation of Malawi Limited (ESCOM) against the Judgment of the Industrial Relations Court (IRC) on liability delivered on 28th October 2022 and an Order on assessment of compensation dated 17th August 2023.

2. Under section 65 of the Labour Relations Act (as amended in 2021), decisions of the IRC are final and binding. However, a decision of the IRC may be appealed to the High Court on a question of law and fact or jurisdiction. This Court is aware that an appeal is by way of a re-hearing. This entails reviewing the evidence and the court's decision with the aim of determining whether the lower Court arrived at a correct decision. An appeal is not a second attempt at one's luck in a claim: see Steve Chingwalu and DHL International v Redson Chabuka and Another [2007] MLR 382 at 388. The role of this Court is therefore not to retry the case but determine whether there is a reviewable error made by the Court below: see Mutharika & Another v Chilima & Another MSCA Constitutional Appeal Number 1 of 2020.

3. The grounds of appeal on record are that:

3.1. The Chairperson erred in law in determining that the Applicants' contracts were contracts of employment when the Applicants were independent contractors;

3.2. The Chairperson erred in law in determining that the Applicants' contracts had become contracts for unspecified period of time when the Applicants' employment was not connected to the Respondent's permanent activity;

3.3. The Chairperson erred in law in failing to determine that the Applicants were engaged for a specific period of time which was marked by the phasing out of the pre-paid meters;

3.4. An award of 48 month's salary for each of the Applicants is manifestly excessive;

3.5. The Chairperson erred in law in not adhering to the dictates of sections 63(4) and 63(5) of the Employment Act;

3.6. The decision of the Chairperson sitting with panelists is against the weight of evidence.

4. It should be noted that the Respondents also filed a Notice of Appeal against the Order on assessment of compensation on 11th September 2023, on the ground that the said Order was made against the weight of evidence.

5. The factual background to this matter is that following an advertisement for part-time meter readers that appeared in a newspaper in or about January 2002, the Respondents applied and got engaged by the ESCOM as part-time meter readers posted in different locations. They respectively signed what were called 'Part Time Meter Reading Contracts' and were initially made to believe that the contracts were for 12 months only. However, this was not actually the case as

neither the advertisement in the newspaper nor the contracts themselves restricted the contracts to 12 months. (Per Exhibits KK 1 and KK 3 to the Witness Statement of Kennedy Kaphamtengo).

6. The Respondents' contracts provided that they would be reporting to a zone supervisor who was an employee of the Appellant and stationed at the Appellant's office. The Respondents were also given tools by ESCOM such as dust coats, identification documents bearing the name of the Appellant, pliers for disconnections, books, ladders and transport in form of pick up vehicles. The Respondents also received on the job training together with the rest of the Appellant's employees and received salaries prepared by the zone supervisor and paid by ESCOM. The Appellant's zone supervisor was also handling all disciplinary issues concerning the Respondents.

7. Despite being verbally told by the Appellant that their contracts were for 12 months, the Respondents continued to work for about 6 years, when on 22nd May 2008 they received letters from the Appellant informing them that their contracts were expiring on 30th June 2008. No explanation was given to the Respondents.

8. However, the Respondents still continued to work normally even after 30th June 2008 until 17th December 2008, when they received another letter extending their contracts to 31st January 2009. Again, no explanation was given to the Respondents about the expiry of their contracts. In fact, when it came to 31st January 2009 the Respondents continued to work normally as before without

hearing anything from ESCOM. It was only in or about April 2009 that the Respondents received telephone calls from their supervisor that they should return all the Appellant's property to the Appellant's office and hand over the records to new meter readers who had been employed by ESCOM. That was the end of the Respondents' employment.

9. It was the Respondents' case in the IRC that they were employed by the Appellant as permanent employees and therefore they could not be terminated without reason and without being given an opportunity to be heard. Alternatively, that even if they might have been employed initially for a term of 12 months, their contracts of employment became contracts for unspecified period at the expiry of 12 months both at common law and under the Employment Act and therefore could not be terminated without reasons and opportunity to be heard.

10. On the other hand, ESCOM's case in the IRC was that the Respondents were engaged as independent contractors for an initial period of 1 year and that even if they were to be found as employees of the Respondent, their dismissal was fair due to operational requirements of the Appellant at that particular time as ESCOM was phasing out postpaid meters.

11. The IRC found that the Respondents were employees of ESCOM and further that they were treated unfairly and awarded them compensation for unfair dismissal, severance allowance and notice pay. This was later assessed at K170,480,769.35.

12. This Court has reviewed the evidence before the lower Court and submissions made in this Court including written arguments and proceeds to determine each ground of appeal, in their order.

Whether the Chairperson erred in law in determining that the Respondents' contracts were contracts of employment

13. The law to determine whether a person is an employee or an independent contractor is well settled. The starting point is section 3 of the Employment Act, which defines an employee as follows:

"'Employee' means –

(a) a person who offers his services under an oral or written contract of employment, whether expressed or implied;

(b) any person, including a tenant share cropper, who performs work or services for another person for remuneration or reward on such terms and conditions that he is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor; or

(c) where appropriate, a former employee."

14. On similar facts, in John Mtitima and 23 others v ESCOM Civil Appeal Number 20 of 2012, the High Court determined that the Applicants were employees. A similar conclusion was made in the reported case of Chiwembu and Others v Dairiboard (Malawi) Ltd [2008] MLLR 145 f.

15. Relying on the foregoing decisions, this Court finds that the finding of the IRC cannot be faulted, as the Respondents herein qualified as employees. Firstly, the Respondents offered their services under an express contract of performance of work or services for ESCOM for remuneration. Secondly, the Respondents had economic dependence on ESCOM. Thirdly, they had an obligation to perform duties for the Appellant. Finally, the relationship between the parties more closely resembled the relationship of an employer and an employee. Further to that, the applicants were under the control of ESCOM, including on disciplinary matters.

Whether the Chairperson of the Industrial Relations Court erred in law in determining that the Applicants' contracts had become contracts for unspecified period of time when the Applicants' employment was not connected to the Respondent's permanent activity

16. The Court below presumed 'a novation of the contract.' We agree with Counsel for ESCOM that, novation is a process where, by express agreement of the parties, the original contract is substituted with a replacement contract and where the parties forego any rights afforded to them by the original contract – see Leveraged Equities Ltd v Goodridge [2011] 19 FCR 71. This Court finds no

express agreement leading to novation.

17. However, the Respondents having worked with ESCOM continuously for various number of years, their employment with the Appellant was by operation of section 28(3) of the Employment Act, employment for unspecified period of time. This meant that the termination of their employment ought to have complied with section 57, which was not the case.

18. In the premises, the lower Court's conclusion that the termination constituted unfair dismissal was legally sound. It is in keeping with the conclusions of this Court on similar matters in ESCOM v Frackson Gwaza & 46 Others IRC Civil Appeal Number 1 of 2024. In any event, the advert and the sample contract that the Respondents signed with the Appellant shows that the contract was not limited to 12 months. The Respondents were verbally told by the Appellant that the contract was for 12 months which has no legal consequences as parole evidence cannot override written evidence: see Joseph Chidanti Malunga v Fintec Consultants and Another MSCA Civil Appeal Number 60 of 2008.

Whether the Chairperson erred in law in failing to determine that the Applicants were engaged for a specific period of time which was marked by the phasing out of the pre-paid meters

19. This ground of appeal apparently arises from the fact that the Appellant's witness told the Court below that the Appellant engaged the Respondents on

part time basis because it was phasing out post-paid meters and in the years from 2008, the Appellant had started the process of putting pre-paid meters and therefore the Appellant did not require much labour for people to be conducting meter reading, disconnections and reconnections.

20. However, it is clear that the Court below was not satisfied with the Appellant's said allegations. This is because at the time that the Appellant was terminating the Respondents, new meter readers had already been recruited and were waiting to take over the Respondents' jobs. In addition, ESCOM did not bring any evidence before the lower Court that it was actually phasing out post-paid meters. There were no minutes or board resolutions to that effect. In the circumstances, this Court agrees with the Respondents' submission that the Chairperson did not err in law in failing to determine that the Respondents were engaged for a specific period of time which was allegedly marked by the phasing out of pre-paid meters.

Whether an award of 48 month's salary for each of the Applicants is manifestly excessive and Whether the Chairperson erred in law in not adhering to the dictates of sections 63(4) and 63(5) of the Employment Act.

21. These grounds of appeal relate to the Order on assessment of compensation dated 17th August 2023. Firstly, this Court observes that the IRC did not uniformly award the Respondents 48 months' salary as compensation for unfair dismissal. The period of compensation varied from 12 months' salary (for B

Makowa on page 8 of the Order on assessment of compensation), to 24 months (for C Chiwanda on page 10) to 36 months (for M Loga on page 9, V Kalonga and F Mgobola on page 10) to 42 months (for E Leo on page 11) and 48 months for the rest of the Respondents.

22. Contrary to ESCOM's position, the Respondents have argued that a maximum of 48 months' salary as compensation is on the lower side and against the weight of evidence before the Court. They cited several decisions to justify an enhancement to 84 months. Firstly, in the case of General Simwaka v The Attorney General MSCA Civil Appeal Number 6 of 2001 (unreported), the Supreme Court of Appeal awarded the appellant compensation up to retirement. Secondly, in the case of Chawani v The Attorney General [2000 – 2001] MLR 77 (SCA) the Supreme Court again awarded the appellant damages in the form of salaries up to the time he would have been lawfully retired. Thirdly, in the case of Mbewe v Reserve Bank of Malawi Matter Number IRC PR 381 of 2012 (unreported) the Court awarded the applicant compensation totaling a period of 42 months. Lastly, in the case of Kachinjika v Portland Cement Company [2008] MLLR 161 (HC) the Court awarded 48 months' salary to the plaintiff.

23. Counsel for ESCOM, was emphatic that the award of 48 months is excessive. He relied on Stanbic Bank v Mtukula [2008] MLLR 54 where the Supreme Court of Appeal approved of a 3 months' pay for each of the 19 years that the employee had served. He submitted that the Respondents herein should be awarded 3 month's pay instead of the 48 month's pay.

24. This Court has reviewed both submissions in relation to the Order of assessment of compensation and considers that there are no grounds for tampering with the findings of the IRC. In Terrastone Construction Ltd v Solomon Chatuntha SCA Civil Appeal Case Number 60 of 2011, Hon. Msosa SC, CJ cautioned that: 'It is important that Courts must not be seen to award damages with elements of punishment to the employer.' Compensation which, in our view, is the same as damages is aimed at recompensing the victim for his loss, with a view to restoring him as near as possible to the position he would have been in but for the unlawful act. It is not a bonus.

25. This Court finds the award herein to be just and equitable in the circumstances having regard to the loss sustained by the Respondents. It is not a proper case that needs boosting of the award, as prayed in cross appeal by the Respondents. The view of this Court is that boosting should be an exception rather than a norm as opined in Vanguard Life Assurance Limited v Enock Jones Kamphonje Miscellaneous Civil Case Number 64 of 2024.

26. In conclusion, therefore, the appeals fail and each party shall bear their own costs.

Made in Open Court this 15th day of July, 2025.