FDH Bank Ltd v Chengaikane Kahumbe Civil Appeal Number 7 of 2021 (Being IRC Matter Number 561 of 2016)

Ruling/Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Civil Appeal Number 7 of 2021 (Being IRC Matter Number 561 of 2016)
Date of Judgment:	November 25, 2024
Bar:	Mr. Francisco Chikabvumbwa, Counsel for the Appellant Counsel for the Respondent: Mr. Gabriel Kambale

1. This is an appeal against the Judgment of the Chairperson of the Industrial Relations Court (IRC), sitting with panelists, dated 6th November, 2019. The IRC found in favour of the Respondent, that the process through which she was declared redundant was unfair and that the Appellant's conduct constituted unfair labour practice. Her compensation was assessed at K102,430,224.00 payable subject to this appeal. However, execution was levied and a stay was

granted by the IRC, with a condition that the Appellant pays the Respondent a sum of K40,000,000.00. This appeal is against both the Judgment on liability and the Order of Assessment.

2. By way of factual background, the Respondent was employed as an Account Relationship Officer on 27th January, 2011. On 11th June, 2014 she was promoted to the post of Account Relationship Manager. About 2nd July, 2015, the Appellant's parent company, FDH Financial Holdings Limited, acquired majority shareholding in the now defunct Malawi Savings Bank. The Appellant assured its employees, including the Respondent, that their employment would not be terminated.

3. In April 2016, as part of the integration process, the Appellant carried out mass retrenchments whilst assuring the remaining employees, including the Respondent, that their employment would not be terminated. On 23rd May, 2016, the Respondent was informed that she was retained in employment but would hold the position of Client Analyst, in the revised corporate structure. Due to shortage of staff, according to the Respondent, she was requested to perform other duties of an Account Relationship Manager.

4. The Appellant averred that in February 2016, it contracted Ernst & Young to conduct a job evaluation exercise for both banks. The recommendations from this exercise were approved in June, 2016, stating that the position of Client Analyst was insignificant and of limited value to the merged bank.

5. On 5th August, 2016, the Respondent was called for a meeting with the Head of Human Resources. She was given no prior notice of the meeting nor the agenda. During the meeting she was informed that she was being considered for redundancy. She was asked to comment on the information but expressed surprise as she had already survived the April, 2016 mass retrenchments. She was escorted to her office and ordered to collect her belongings and leave the premises.

6. In terms of the law, under section 65 of the Labour Relations Act, Cap 55:01 of the Laws of Malawi, 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 jurisdiction (as the law stood before the 2021 amendments, which included 'question of fact'). 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.

7. The Appellant filed eight grounds of appeal which will be disposed off seriatim below.

Ground 1: Whether or not the IRC erred in law and fact by finding that the Respondent was unfairly dismissed as an Account Relationship

Manager when the evidence showed that at the date of her dismissal for redundancy the Respondent had been employed in the position of Client Analyst.

This ground of appeal succeeds as there was ample evidence before the IRC (Exhibits CK 5 and CK6) that at the date of her dismissal for redundancy, the Respondent had been employed in the position of Client Analyst and not as an Account Relationship Manager. This Court agrees with the Appellant that the standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this a case the Respondent: see Commercial Bank of Malawi v Mhango [2002-2003] MLR 43 (SCA). The Respondent failed to discharge this burden with any documentary evidence; there was no latter of appointment to that effect. She only orally testified that she was requested to act in the position of Account Relationship Manager, whilst substantively serving as Client Analyst. She also conceded that she never received or claimed any acting allowance as required, when one is formally appointed.

8. ***Ground 2: Whether or not the IRC erred in law by failing to realize that the evidence showed that the Respondent was in fact consulted by the Appellant before her employment as Client Analyst was terminated on the 9th August, 2016.***

It is on record that on 5th August, 2016, the Respondent was called for a meeting with the Head of Human Resources. She was given no prior notice of the meeting

nor the agenda. During the meeting she was informed that she was being considered for redundancy. She was asked to comment on the information but expressed surprise. She was escorted to her office to collect her belongings and asked to leave the premises.

This is surely short of a genuine engagement of an employee. How do you call an employee to such a life-changing meeting without prior notice and agenda? This was certainly a notification of a unilateral decision which did not seek honest feedback as required by the law: see Eric Thomson and 53 Others v Telekom Networks Malawi Plc IRC Civil Appeal Number 9 of 2023. This Court therefore upholds the finding of the IRC that this was procedurally unfair and constituted unfair labour practice.

9. ***Ground 3: Whether or not the IRC erred in law by failing to realize that at the date of the termination of the employee's employment for redundancy, consultation was not part of the law of Malawi.***

In Eric Thomson and 53 Others v Telekom Networks Malawi Plc IRC Civil Appeal Number 9 of 2023, this Court already profusely pronounced itself on its understanding: that consultation during redundancies is a requirement of the law in Malawi. This ground of appeal must therefore fail summarily.

10. ***Ground 4: Weather or not the IRC erred in law and fact by failing to realize that at the date of the termination of the Respondent's***

employment, the Respondent had become redundant to the Appellant's requirements.

This Court has reviewed the evidence that the Appellant in February 2016 contracted Ernst & Young to conduct a job evaluation exercise for both banks. The recommendations from this exercise were approved in June, 2016, stating that the position of Client Analyst was insignificant and of limited value to the merged bank.

This piece of evidence, therefore, confirms that the Respondent had become redundant to the Appellants' requirements as at the date of her termination and so this ground succeeds.

11. ***Ground 5: Whether or not the IRC erred in law by failing to realize that unfair dismissal is a creature of statute and can only exist if the conditions set out under the statute (Employment Act) are satisfied and that in the case of the Respondent the said conditions were not satisfied.***

This ground of appeal is dismissed on the authority of Eric Thomson and 53 Others v Telekom Networks Malawi Plc (see Ground 3, above).

12. ***Ground 6: Whether or not the IRC erred in law by assessing compensation for the Respondent for unfair dismissal on the basis of future loss when the same is not supported by the law.***

Section 63(4) of the Employment Act provides as follows:

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

This Court considers that the two heads of immediate loss and future loss (and sometimes manner of dismissal) are simply guiding. What is essential is that the compensatory amount should be just and equitable. The Court has wide discretion in making the award. The discretion, however, must be exercised judiciously and equitably. A Court is not allowed to dream up a figure without showing how it was arrived at. The IRC in this matter clearly demonstrated how the compensation was arrived at, making reference to section 63(4).

This Court finds the award herein to be just and equitable in the circumstances having regard to the loss sustained by the Respondent. Further, there is no argument that the Respondent caused or contributed to the dismissal. The present case can be distinguished from Terrastone Construction Ltd v Solomon

Chatuntha SCA Civil Appeal Case Number 60 of 2011, where the Supreme Court of Appeal ordered the minimum compensation where the employee contributed to the dismissal, through theft.

13. ***Ground 7: Whether or not the IRC erred in law in the assessment of the Respondent purported unfair dismissal by failing to take into account that in any event the position of Client Analyst that the Respondent held at the date of termination was abolished on the appellant's organizational structure.***

As determined, under Ground 4 above, this Court holds that the Respondent had become redundant to the Appellants' requirements as at the date of her termination and so the assessment of the compensation may have been on the higher side. However, this Court observes that this Judgment on appeal is entered about five years, since the Judgment on liability was passed by the IRC. Surely, the value of the balance of the compensation has significantly devalued and so it would be unfair, on the part of the Respondent, that the same be re-assessed. In addition, the appeal has not succeeded on the fundamental grounds, therefore this Court upholds the Order of Assessment by the IRC.

14. ***Ground 8: Weather or not the IRC erred in law by ordering the Appellant to pay the sum of K40,000,000.00 to the Respondent pending the determination of the appeal notwithstanding that by its order on assessment of compensation the IRC specifically ordered that the total award on assessment was payable subject to the appeal decision of the***

High Court.

The Assessment Order of the IRC, Chairperson sitting with panelists, stated that 'the total award on assessment is payable subject to the appeal decision of the High Court.' Thereafter, the Claimant filed a warrant of execution which was stayed, by the Deputy Chairperson, subject to the payment of K40,000,000.00. The Appellant argued that the Assessment Order, having been made by the Chairperson sitting with panelists, could not be varied by the Deputy Chairperson. This is correct under Rule 5 A(2) of the IRC (Procedure) Rules.

However, this Court's reading of the statement that 'the total award on assessment is payable subject to the appeal decision of the High Court' does lead to the conclusion that there was a stay. To begin with, Courts do not favour the practice of depriving a successful litigant, the fruits of his litigation in anticipation of the outcome of appeal: see Mike Appel and Gatto Limited v Saulos Chilima (2014) MLR 231.

In addition, section 65(3) of the Labour Relations Act provides that 'The lodging of an appeal under subsection (2), shall not stay the execution of an order or award of the Industrial Relations Court, unless the Industrial Relations Court or the High Court directs otherwise.' Furthermore, the Appellant did not apply for a stay, neither did it seek clarity from the IRC, itself, on whether the statement in issue meant that the Court had granted a stay. This ground of appeal is therefore dismissed.

15. In conclusion, therefore, this appeal partially succeeds as determined herein. As it will be appreciated, the main findings of the lower Court on procedural unfairness and unfair labour practice cannot be faulted. Neither can the assessment of compensation. The balance of the compensation shall be paid to the Respondent within 7 days from the date of this Judgment. Each party shall bear their own costs.

Made in Open Court this 25th day of November, 2024.