Finca Malawi Limited v Sellah Kambilinya Mtsekwe

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice M.A Tembo
Cause Number:	Civil Appeal Case Number 13 of 2024 (Being IRC Matter No. 618 of 2019)
Date of Judgment:	October 02, 2025
Bar:	Mr. Chikavumbwa, Counsel for the Appellant Mr. Msuku, Counsel for the Respondent

1. This is the decision of this Court on the present appeal brought by the appellant against the decision of the Industrial Relations Court, the Court below, made on 11th July, 2023 finding for the respondent on her claim that the appellant had constructively dismissed her and awarding the respondent compensation for unfair dismissal as well as severance allowance. The respondent contests the appeal.

2. The respondent claimed in the court below that she had been forced to resign from the appellant's employment due to the conduct of the appellant, hence her claim for constructive dismissal. The appellant denied the alleged conduct.

3. The respondent's case in the court below was as follows. The appellant employed her in 2006 as a Data Collector. In 2010, she was promoted to a Teller and in 2014 she was further promoted to the position of Senior Accounts Assistant. In this position, she was second in the department next to the supervisor supervising Tellers who were later called Bank Officers at Blantyre Branch.

4. In 2017, she made an application for a loan of K700, 000.00 which facility was available to all other employees and at the time she made the application, there were a number of them who did so. She did not get a response, yet her colleagues had received their loans. She made an inquiry from the Branch Manager, Mr Wilson Namwera, who then advised her and showed her an instruction from the Head of banking Services, Ms Joana Gausi that she had approved her loan for the sum of K500, 000.00 but on condition that she accepts a transfer to Kasungu. The condition attached to her loan surprised her because no one had discussed it with her and she was also surprised as to why the transfer had to be attached to the loan when all her friends got the loan without any conditions.

5. A few days later, she was called by the Human Resources Manager, Mr Charles Ngulube who formally advised her that her loan had been approved in the sum of

K500, 000.00 but on condition that she transfer to Kasungu. She mentioned to Mr Ngulube that it would be difficult for her to transfer to Kasungu because she had a child who is asthmatic and she had to now and again take her to Blantyre Adventist Hospital for treatment. She pleaded with him to consider transferring her to any branch close to Blantyre for the sake of her child. Mr Ngulube told her that this was not within his control but he would get instructions from the Head of Banking Services who had given the instruction.

6.The following day, she was called again by the Human Resources Manager who advised her that according to him, following her refusal to go to Kasungu, she would be transferred to Limbe Branch as Banking Officer which was a junior position that she had held prior to her promotion. He further advised her that approval for her loan had been revoked. She was instructed to report to Limbe Branch the same day. She protested the two decisions, first posting her to a lower position and secondly, revoking her loan approval when all her colleagues had their loans approved without any conditions. Her protests were ignored.

7. Since she needed the job desperately especially having regard to the condition of her daughter, she had no choice but to go to Limbe Branch on the posted position. According to the appellant, this was because they had abolished the position of Senior Accounts Assistant. She stated that she had no prior communication about abolition of her position, nor was she told about it when she was told to go to Kasungu. She stated that in her capacity as a Senior Assistant Accountant, she was also in the position of the supervisor, supervising tellers whose title changed to bank officers when the respondent started banking service.

8. On 7 June, 2019, she received a letter of transfer transferring her from Limbe to Mangochi. Due to the condition of her child, she made inquiries on the health facilities in Mangochi. She learnt that with her child's condition, Mangochi would not be very conducive for her. She learnt that Mangochi District Hospital had one asthma nebulizer which is most often down due to its age. She engaged the respondent on this and even wrote them requesting for consideration bearing in mind that her initial request not to transfer to Kasungu was based on the same considerations though she suffered some victimization from it.

9. On 18 June, 2019, the appellant responded that they had taken note of her concerns but the transfer to Mangochi still stands. On 20 June, 2019, she wrote the respondent advising that owing to their insistence for her to transfer to Mangochi which would seriously jeopardize the life of her child she had taken a painful decision to leave the employment of the respondent.

10. On 9 July, 2019, whilst she was serving her notice, she was called by the respondent's Chief Executive Officer, Mr. Chris Kizza to his office. She was surprised that he started the conversation by saying that he had been told that she was writing rude letters. She explained to him her predicament and emphasized that it was not that she was against being transferred but that in the course of pursuing her employment, she also had to consider the health of her daughter. In their discussion, he asked her whether she would insist in being in Blantyre to which she said no. She indicated that she could comfortably go to Mulanje, Chikwawa, Luchenza, Zomba or Mwanza Branches from which she could

easily access health facilities at Blantyre Adventist Hospital in case of urgent need. The CEO asked her about Lilongwe and she explained that ordinarily she would have no problems with Lilongwe because there are equally good health facilities in Lilongwe but the challenge is that due to the natural dusty environment in Lilongwe, it would defeat the very purpose and idea of her child's health since the general medical advice is to avoid being in dusty environment. The CEO indicated that he had understood her position. He stated that he had been given incorrect information that she did not want to move out of Blantyre. He was then surprised that she stated that she could work in other branches like Zomba, Mwanza, Chikwawa, Mulanje or Luchenza. He committed to look into the matter.

11. On the same day she had a meeting with the CEO, just before knocking off, she received another letter from the HR department reversing her transfer to Mangochi and transferring her to Lilongwe. To her, it was clear that the letter followed her meeting with the CEO since the HR department had earlier already refused to consider her request which had forced her to consider leaving the employment. She then followed up with the CEO again seeing that she had been posted to a place she had already expressed her reservation owing to the reasons she had advanced which was her child's health. The CEO indicated to her that he was surprised that the HR department posted her to Lilongwe because he had explained to them the content of their discussion and that he had understood her predicament.

12. He however, stated that he did not want to be seen to be interfering with the HR department and therefore she had to go to Lilongwe or act in what was in her

best interest. In the circumstances, it became clear to her that the appellant had made up its mind to push her to a point where her stay with them would be impossible following which, she had no choice but to write another letter leaving the employment.

13. During cross-examination, the respondent stated that at the time she was employed she was not married and she did not have a child. She was married on 6 July, 2009 and the child she is referring to was born on 6th December, 2016.

14. She stated that she filled a form to apply for a loan and she handed it to her supervisor who took it to the Head of Banking Services. The feedback is given in writing and she received it only that she does not have a copy. She failed to access a copy from the Branch Manager as he denied her to get it. Her colleagues that also applied for a loan were granted. She wondered why the loan was bonded to her transfer.

15. She stated that her proposed to transfer to Kasungu was verbally communicated and she was not issued with a written instruction. She stated that she was supervising others as she was Senior Accounting Officer. In Limbe, she was working as a Banking Officer. She was not aware that there was change in positions. After she went to Limbe Branch she stated that she did not see anyone holding the position she was holding.

16. She stated that she refused to go to Mangochi because her child is asthmatic. She asked her cousin about the hospitals in Mangochi who said most cases are referred to Zomba and Blantyre. She stated that the child was diagnosed with asthma before she was transferred. She stated that she did not inform HR about the issue but she informed her boss, Joana Gausi.

17. She further stated that the transfer to Kasungu was victimization because the loan was tied to the transfer and then later being sent to Limbe on demotion. She was entitled to get a loan. She stated that she raised the issue of marital status because her job involved handling cash she would not rush to the hospital in case of the child's asthma attack but the husband job is flexible thereby being able to rush to the hospital with the child.

18. She stated that her immediate supervisor was Julie Zonzi and the Head of Department was Joana Gausi. She was in good terms with both and she did not know if they did not want her in the institution. She stated that she engaged with her bosses before resigning. HR wrote letters and she replied to them and in her letter she did not give options. She stated that it is not that she did not want to work outside Blantyre. It only occurred to her to suggest other workplaces when she had a meeting with the CEO.

19. During re-examination, she stated that she engaged the CEO but prior to that she was engaging HR. She felt she was entitled to the loan because she had all the requirements. She stated that apart from her no one was denied a loan.

20. On the other hand, the case of the appellant was stated by its witness, Mr Kazumba Munthali. He stated as follows. That he works for the appellant as the Human Resources Officer and he has worked for the appellant since June, 2006. In the month of June 2019, pursuant to FINCA rotational policy on employees, the Human Resources wrote Sellah Kambilinya informing her of a decision transferring her from Limbe Branch to Mangochi Branch. By letter dated 11th June, 2019, in acknowledging the receipt, the respondent wrote seeking considerations that the transfer be reversed citing the medical condition of her child who is asthmatic and required regular checkups and further cited that her husband was working within Blantyre.

21. On 18th June, 2019, the Human Resources wrote the respondent citing policy requirement that staff be rotated after specified period within their tenure of employment. The requirement is a key term of employment contract for the purposes of internal controls between the appellant and respondent, to which the respondent accepted to be bound. In trying to find a possible compromise, the appellant decided to transfer the respondent to Lilongwe, which has better medical facility than Mangochi, her initial proposed duty station. Surprisingly, the respondent refused to go to Lilongwe as well, citing a new reason than the one she had raised before. It is against this background and that the appellant was unable due to operational reasons to accept the respondent’s refusal to transfer, and insisted that she report for duty in Lilongwe.

22. By letter dated 20th June, 2019, Sellah Kambilinya resigned from employment and cited refusal of her transfer request to be maintained within Blantyre by the company. Accordingly, she cited that Mangochi does not have better health facilities compared to Blantyre where her asthmatic child could easily be treated and that her husband works in Blantyre and she required staying close to him. Having refused the compromise to go to Lilongwe the appellant had no choice but to accept her resignation.

23. Following the said resignation and whilst serving the notice, the respondent met Mr. Chris Kizza the CEO as he then was and discussed the matters surrounding the purported transfer, her refusal and the resignation. It is against this background that the CEO suggested to the respondent to reverse her resignation and alternatively, move to Lilongwe as proposed, which has better health facilities like Blantyre and it would be easier to access medical attention for her asthmatic child. On 9th July, 2019, on the CEO recommendations on the meeting they had with the respondent regarding her transfer to Mangochi where they verbally agreed to take up a role in Lilongwe. He wrote to the respondent informing her of the consideration on the transfer request and that she be transferred to Lilongwe.

24. By letter dated 12th July, 2019, contrary to the verbal agreement she made with the CEO on her proposed move to Lilongwe, the respondent refused to take up the role in Lilongwe and attributed her refusal to the dusty nature of Lilongwe, which is unfavorable to her child's health and her marriage commitments. Following the said resignation, the terminal benefits were duly calculated and accordingly paid to her. Considering the contract of employment, the policy of

the appellant and the respondent's refusal to be transferred, the appellant had no choice but to accept the resignation.

25. The respondent acted contrary to an express term of her contract of employment.

26. The position which the respondent was offered at Limbe Branch and any other branches was the same as she previously held, the only change being in the name/title. The position of senior Accounts Assistant which she previously held was phased out at the time the respondent transitioned to a Deposit Taking Microfinance Institution. The roles, duties, remuneration and benefits of this renamed position were the same as her previous job title of Senior Accounts Assistant.

27. He explained the loan application process that when an employee makes a loan application, the success of the loan application is determined on case-by-case basis and any application does not guarantee that such loan will be successful. The appellant at all times reserves the right to grant a loan with or without conditions and even to refuse a grant of the loan. The loan that the respondent applied for was not granted and at no time was a condition attached to her loan application. It is the discretion of the credit committee upon review of performance, period of service and any other disciplinary matters at the time of the loan application. As such the loan applications are not as of right any

application can be accepted or denied depending on the satisfaction of the conditions at the time of application.

28. Accordingly, an employee is informed on the decision of the committee either by email, in person or through a phone call depending on the availability. The company policy on transfers does not in any way set loans as a condition for transferring employees. As per agreement between the appellant and respondent, the appellant was at liberty to transfer the respondent to any of its branches as and where operational needs so required. Contrary to policy needs, the employee willfully refused or neglected to take up a role on the branch posted, a direct breach of policy and refusal to take instructions from the supervisors.

29. During cross-examination, he stated that he cannot remember the people who were in the Loans Committee in 2017. He may have been in the committee but he cannot remember. He does not remember why the respondent's application was rejected. He conceded that he had not given evidence that the committee considered the respondent's application.

30. He stated that he did not bring evidence of recommendations of the CEO. The CEO only told them of their conversation. He stated that what changed were the respondent's title and not the roles. The respondent was doing the same things

she was doing before.

31. During re-examination, he stated that the policy came into force in June, 2021 and that prior to that there was Handbook of 2016. He stated that he cannot recall why the respondent's loan application was rejected. The committee can attach conditions to grant or reject loan application. He was not part of the meeting between the respondent and the CEO but the CEO informed the HR about the meeting.

32. The court below observed that in terms of section 31(1) of the Constitution of Malawi, every person shall have a right to fair and safe labor practices and fair remuneration.

33. It next observed that section 60 of the Employment Act provide that an employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship. It cited case law on the application of this provision. It noted that in the case of *Banda v Dimon (Malawi) Limited* [2008] MLR 92, Ndovi, J, stated that an employee will be deemed to have been constructively dismissed where the employer is guilty of conduct which an employee cannot be expected to cope

with. And that he stated that:

There is also an implied term of contract of employment that employers will not behave in a way which is not in accordance with good industrial practice to such an extent that the situation is intolerable or is such that an employee cannot be expected to put up with it any longer.... i.e. constructive unlawful termination.

34. The court below also alluded to the case of *Chiwalika v Southern Region Water Board*, Civil Cause Number 171 of 2014 (HC), in which the claimant had, with the approval of the defendant who were his employers, enrolled for school in Zomba. Before he had finished his school, the defendant transferred him to Nkula. The claimant queried this as it could have meant him no longer attending school. The defendant still forced him to go to Nkula and when he did not, they threatened him with dismissal. The court found the transfer to be unreasonable and that it amounted to constructive dismissal.

35. Lastly, the Court below referred to the case of *Mbwana v Blantyre Sports Club* , Civil Cause Number 1430 of 2009, in which the defendant had unilaterally changed the plaintiff's roles. Reversing the decision and declaring it illegal, the court held that the position of 'David and Goliath' scenario where the employers believed they could dictate anything at will is no longer applicable in modern employment law. Labour relations require consultations and making those decisions that would balance the interests of both parties.

36. The court below then determined as follows. It noted that the respondent was working for the appellant as a Senior Accounts Assistant. She was later transferred from Blantyre Branch to Limbe Branch and changed her role from Senior Accounts Assistant to Banking Officer. The respondent stated that she was not aware that there was change in positions. The appellant stated that the position which the respondent previously held was phased out at the time the appellanttransitioned to a Deposit Taking Microfinance Institution thereby the only change being in the name/title. The roles, duties, remuneration and benefits of this renamed position were the same as her previous job title of Senior Accounts Assistant. The respondent was not made aware of this type of transition by the respondent. She claims that this amounted to a demotion.

37. The court below then observed that the appellant did not exhibit any memorandum to show that it informed its employees, in particular the respondent, about change of positions when it became a Deposit Taking Microfinance Institution. It had not also provided evidence that the said

communication was through a staff meeting. This left the court below with an inescapable conclusion that there was no such thing as change of positions. The appellant as a reputable institution would have easily provided their evidence in this regard. In the absence of such evidence, the court below was inclined to believe the respondent that the appellant demoted her.

38. The court below noted that the respondent made a loan application which was not granted to her. And that the respondent stated that when she applied for the loan she did not receive any feedback. Further, that she then followed up the issue only to be told that she will be granted the loan with a condition that she transfers to Kasungu. It noted that the appellant stated that the success of the loan application is determined on case-by-case basis and any application does not guarantee that such loan will be successful. Further, that the loan that the respondent applied for was not granted and at no time was a condition attached to her loan application. And that an employee is informed on the decision of the committee either by email, in person or through a phone call depending on availability.

39. The court below found that the appellant did not give the reason why it turned down the loan application for the respondent. Further, that the appellant had not provided in form of minutes that its Loan Committee sat and considered the respondent's loan application and found it unsatisfactory. Additionally, that the appellant had not furnished evidence that it communicated to the respondent about the fate of her application.

40. The court below was therefore in agreement with the respondent that her loan application success was tied to her transferring to Kasungu, which was quite unusual. And that this explains why the appellant avoided to put its feedback on the loan application in writing.

41. Regarding transfers, the court below indicated that, much as the appellant had the right to transfer its employees based on the exigencies of its service would demand, it was good industrial practice to 'consult' or put loosely 'to talk to the affected employee' of the intended posting. It added that the affected employee is under a duty to abide by lawful instructions including to be posted away from his/her duty station. The court below reasoned that in the present case such loose consultations were had, options were availed to the respondent and to the appellant. But that the appellant opted to be inflexible. Its CEO apparently tried to salvage the situation but the result was the same.

42. The court below reasoned that, without trying to lay down a principle of law that would tie the employers hand to post away employees, its view was that employees are humans, they may for one reason or the other find the place of transfers inimical to their suits. And that the employer has to consider those reasons and make a decision. It asserted that in the present case the said consultations were done, but that the finding of the court below was that the appellant decided to take it all. That the respondent's concerns were tangentially taken on board. The court below indicated that the respondent had genuine concerns to decline posting but the appellant conveniently foreclosed the options that she had offered. It reiterated however that it was not saying that an employee has to dictate where they are to be posted. Looking at the sequence of the events in this case in their totality, the court below was of the fortified view that the conduct of the appellant forced the respondent to resign. It therefore found that the appellant constructively dismissed the respondent. The appellant was ordered to compensate her and pay her severance allowance.

43. The court below then made an order on assessment of compensation. It reasoned as follows. It noted that the respondent was in the appellant’s employment between 2006 and 2019. That at the time of leaving employment, the respondent was entitled to K201, 960.00 as salary, 10% employer contribution towards pension and 100% medical cover for herself and 50% for 4 dependants. And that the retirement age at the appellant is 55 years and the respondent was aged 40 years.

44. It noted that the respondent testified that since leaving employment, she had been applying for jobs but had not been successful. And that she tendered one such application. Further, that the appellant's witness further testified that at the time the respondent left, she was paid all her terminal benefits including leave days.

45. The court below indicated that the issue before it was what quantum should be awarded to the respondent as damages for compensation. In this regard, this Court wishes to quickly reiterate that the court below should only be concerned with assessing the amount of compensation under the Employment Act. The court below should not be concerned with damages at all. The Employment Act does not provide for damages but compensation.

46. The court below alluded to the relevant law governing the matter of compensation as follows. Section 8 (2) of the Labour Relations Act empowers the Industrial Relations Court to award compensation. However, the court below again wrongly alluded to damages saying that the basis of an award of damages is to give a claimant compensation for the damage or any loss or injury that he or she has suffered. And that this is a position taken by Lord Blackburn in *Livingstone vs Rawyards Coal Company* (1880) 5 AC 25.

47. It indicated further that it is given a wide latitude to the extent that entrenched common law principles are applicable in assessing compensation provided the same revolves around the principle enacted in Section 63 (4). And that this was reflected in the Supreme Court decision in Wawanya v Malawi Housing Corporation, MSCA Civil Appeal case number 40 of 2007. It noted that, in that case, the question of whether the compensation could be said to be compensation under common law or under the Employment Act was answered by the Supreme Court on page 8 of the transcript in this way:

Our reading of Section 63(4) is that a court has considerable latitude in awarding compensation under the Employment Act. In the end, it really should not make any difference whether one wants to call the award an award under Section 63 of the Employment Act or a common law award or any other description as one may please.

48. 48. This Court however maintains that the Employment Act is clear on what is to be awarded, namely, compensation. It is therefore not open to courts to decide otherwise than is unambiguously prescribed in the statute.

49. The court below correctly noted that 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.

50. It also correctly noted that section 63(5) of the Employment Act prescribes minimum awards that the court may award. It noted that this provision does not take away prescription in Section 63(4) of the Act. It then however erroneously indicated that section 63(5) of the Act provides that:

The amount to be awarded under sub-section (4) shall not be less than:

a) Two weeks' wages for each completed year of service up to and including the fifth year.

b)Two weeks' wages for each completed year of service for the first five years, plus three weeks' wages for each completed year of service from the sixth year up to and including the tenth year.

c)Two weeks' wages for each completed year of service for the first five years, plus three weeks' wages for each completed year of service from the sixth year up to and including the tenth year, plus four weeks' wages for each completed year of service from the eleventh year onwards.

51. Section 63 (5) of the Employment Act actually provides as follows:

The amount to be awarded under sub-section (4) shall not be less than:

(a) One weeks' pay for each year of service for an employee who has served for not more than five years;

(b)Two weeks' pay for each year of service for an employee who has served for more than five years but not more than ten years;

(c)Three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years;

(d) One months' pay for each year of service for an employee who has served for more than fifteen years.

52. The court below then referred to that case of *Willy Kamoto v Limbe Leaf Tobacco Malawi Ltd* MSCA Civil Appeal Case number 24 of 2010, in which the Supreme Court of Appeal held that compensation could never be aimed at completely protecting the employee into the future.

53. It also referred to the case of T*errastone Construction Ltd v Solomon Chatantha* MSCA Civil Appeal Case number 60 of 2011, in which the Supreme Court of Appeal held that:

> Our labour law is concerned with the attainment of fairness for both employer and employee. In weighing up the interest of the respective parties is of paramount importance to ensure that a balance is achieved so as to give credence not only to commercial reality but also to a respect of human dignity.
>
> Section 63(4) is not a blank cheque for the court to decide any amount to be paid. It needs to be read with Section 63(5) whenever compensation is awarded. In my view, it is a guideline on how a court may give an award under subsection (5) and should not be read in isolation.

54. It indicated that it is important that courts must not be seen to award damages, with elements of punishment to the employer. Again, the concern here has to be with compensation and not damages.

55. The court below then referred to *Stanbic Bank Ltd v Mtukula* [2008] MLLR 54, in which the Malawi Supreme Court of Appeal said on page 62 that ‘We, therefore, think that for the 19 years of service, the appellant would receive three months pay for each year which would translate to 57 months' pay’.

56. It also alluded to the case of *First Merchant Bank Ltd v Eisenhower Mkaka and Others* Civil Appeal no. 1 of 2016 (High Court) (unreported) in which Mkandawire J stated the following:

In assessing compensation, the Industrial Relations Court had to stick to the spirit of Section 63 of the Employment Act. Under this provision, it is the duration of service before termination that matters a lot in the calculation of compensation that falls due, not the loss of salary increments and sundry amenities from the date of dismissal to the date of judgment or the assessment of damages compensation."

There are 17 respondents and each one of them had worked for the appellant for a different number of years. Each one of them gave evidence during the assessment. Each appellant should therefore have been treated separately in assessing compensation.

57. The court below then posited that, in all the decisions it referred to it is held that the period of service by the employee is the most important factor when

computing compensation under Section 63 (4) as read with Section 63(5) of the Employment Act. And that other factors would be taken into account but this is the most important one. And that, for example, it follows that someone who has served for 16 years may not get the same compensation as someone who has served say five years.

58. The court below stated that the issue of immediate and future loss as seen in the cited cases of the Malawi Supreme Court of Appeal above has moved away from the issue of future and immediate loss as decided in *FW Kalinda v Limbe Leaf Tobacco Co. Ltd*, Civil Cause No. 1542 of 1995.

59. The court below was mindful and alive to the fact that employment is not a lifetime opportunity especially now when the economic turn down is hard and hitting hard on our companies. It noted that in the recent past many companies have closed down their businesses due to the effect of COVID-19 and some due to the economic turn downs. And that to move the court to award compensation up to the retirement age is a wayward kind of argument which are not supported by law. It indicated that the law focuses on the duration the employee was an employee of the employer.

60. It indicated that it would award above the minimum award compensation because the dismissal herein is wholly on the appellant. Further, that when deciding to award compensation which is above the minimum, the court below

was guided by the principle that the award must be just and equitable. Considering the loss sustained by the respondent when she was out of employment.

61. The court below stated that it was alive to the fact that the most crucial aspect is the issue considered in the case of *STN Nkhumbalume v Blantyre City Assembly*, Civil Cause No. 88 of 2010, where the cout put a markup of 20% on the assessed damages. It added that in some cases, courts have in fact ordered compound interest. See *Phillip Madinga v Nedbank*, Civil Appeal No. 101 of 2005.

62. The court below also noted that in the case of *Tourism Development & Tourism Company et al v Ken Williams Mhango,* (2008) MLLR, 314 Mkandawire J stated:

The appellant was not just entitled to notice pay as it is clear that as a result of the appellant's action in unfairly dismissing him, he lost all the salary and any benefits he would have earned from the date of dismissal to the date he would have retired.

The appellant loss should include salary and benefits which he would have been paid and which he may reasonably be expected to have received but for dismissal.

63. It also observed that in the case of FW Kalinda v Limbe Leaf Tobacco Co Ltd, Civil Cause No. 1542 of 1995 on an order of assessment of damages, Justice Dorothy nyaKaunda Kamanga stated that:

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

64. Further, that in the case of *Catarina Franzel v CFAO Malawi Limited*, IRC Matter Number 343 of 2020 and *Willen Chamkuwa v Macsteel Malawi Limited,* Matter IRC 266 of 2012, it was held that specifically, when assessing compensation, courts have included lost pension benefits and medical cover entitlements.

65. The court below considered that in addition to the salary, there was also a 10% pension contribution. It found that there was medical cover although the appellant argued that the respondent had not elected to participate in the medical scheme. It noted the medical scheme contribution rates rates of K22, 000.00 for a member and K21, 000.00 for a dependant. And that according to the respondent's conditions of service, she was entitled to cover four dependants at

half rate. And that this translates to K42, 000.00 per month for the dependants (21,000 times ½ times 4) and K22, 000.00 for herself. And that this gives a total of K64, 000.00 per month. It determined that the total monthly package, therefore, comes to K286, 156.00 that is K201, 960.00 salary, K20, 196.00 pension contribution and K64, 000.00 medical contribution.

66. The court below observed that the respondent sought that immediate loss ought to be K286, 156.00 times 12 times 4 years which translates to K16, 024, 736.00. And that on future loss, she was then 40 against the retirement age of 55. She sought to be awarded 7.5 years which ought to be calculated as follows K286, 156.00 times 7.5 years which translates to K25, 754, 040.00 hence the total claim for unfair dismissal of K50, 134, 531.20.

67. It noted that on the other hand, the appellant argued that the respondent be paid K1, 817, 640 as the minimum compensation given the years served. And that she be awarded K1, 666, 170 as severance allowance.

68. It reiterated that its concern is the duration the respondent was an employee of the appellant. And that she never contributed to her dismissal. In its considered view, the court below awarded the respondent 4 months' salary for each completed year of service on the years she had worked for the respondent. It calculated the compensation as K286, 156. 00 x 4 which equals K1, 144,624

per year served. And then K1, 144, 624 x 13 years which equals K14, 880, 112.

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

70. The court below then alluded to the First Schedule of the Employment Act and calculated the severance allowance as follows: first five years K201, 960.00 multiplied by half then multiplied by five which gives K504, 900.00. Sixth to tenth year K201, 960.00.00 multiplied by three quarters then multiplied by five which gives K757, 350.00. Last three years K201, 960.00 multiplied by three which gives K605, 880.00. The lower court determined that the total sum to be awarded as severance allowance is K1, 868, 130.00.

71. Therefore the court below awarded the respondent the sum of K1, 868, 130.00 as severance allowance. The total award was K16, 748, 242. 00. The court below then indicated that the total sum was due in 2019. It then boosted the award with 30% taking into consideration the devaluation of the Kwacha and price of goods escalation recently. That is, K16, 748, 242.00 x 30% = K5, 024, 472. 60 and K16, 748, 242.00 + K5, 024, 472.60 = K21, 772, 714.60.

72. Being dissatisfied with the decision of the court below, the appellant filed this appeal indicating six grounds of appeal as per its memorandum of appeal filed on 8th August 2024, namely:

1. That the court erred in holding that the respondent was constructively dismissed.

2. That the court erred in failing to consider the respondent’s failure to mitigate her loss.

3. The court erred in law in basing its decision on an irrelevant consideration of the alleged conduct of the appellant.

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

5. The court erred in not justifying its decision to award the respondent damages above the statutory minimum.

6. The judgment and order on assessment of compensation was against the weight of the evidence.

73. As a preliminary point, this Court wishes to state that the grounds of appeal as they appear in the memorandum of appeal are apt. These grounds of appeal have also been well addressed by the respondent in her skeleton arguments on appeal. Order XXXIII of the Subordinate Court Rules, which applies to appeals from the court below, is clear that grounds of appeal shall be contained in a memorandum of appeal to be filed once a record of appeal is done by the lower court following the initial filing of a notice of appeal. The appellant followed the relevant procedural steps in filing the memorandum of appeal. The appellant had filed some grounds of appeal in its initial notice of appeal but that was unprocedural. Those grounds of appeal cannot hold. The respondent's contention that the appellant be held to grounds of appeal filed in the initial notice of appeal cannot therefore hold.

74. This Court wishes to indicate that an appeal like the present one is determined by way of a rehearing. This entails that this Court will examine the record before the court below in terms of the evidence and then consider the relevant law and the decision of the court below regarding the grounds of appeal herein. See *National Bank of Malawi v Right Price Wholesalers Ltd* [2013] MLR

276 (SCA).

75. 75. This Court observes that it shall hear appeals from the court below on matters of law or jurisdiction and fact in terms of section 65 of Labour Relations Act, as amended by the Labour Relations (Amendment) Act, 2021, which provides that:

(1) Subject to subsection (2), decisions of the industrial Relations Court, shall be final and binding

(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction and fact within thirty days of the decision being rendered.

76. Prior to the foregoing amendment, appeals from the Industrial Relations Court were only on matters of law or jurisdiction and not fact.

77. Regarding the grounds of appeal touching on the assessment of compensation herein, as observed by the parties herein, this Court is guided not to interfere with an award made by the trial court below except where the award is excessive or it is based on an error of the law. See *Standard Bank v Mtukula*

[2006] MLR 399 (SCA), *Willy Kamoto v Limbe Leaf Tobacco Company Limited* [2010] MLR 467 (SCA) and Flint v Lovell [1935] 1 K.B. 354.

78. This Court shall deal with the grounds of appeal as argued by the appellant. The appellant indicated that it would argue the first and last grounds of appeal would be argued separately whereas the rest of them will be argued at once.

79. On the first ground of appeal, the appellant asserted that the court below erred in holding that the respondent was constructively dismissed when the evidence did not support such a finding.

80. In terms of the applicable law, both parties on this appeal and the court below correctly stated that constructive dismissal is provided for in section 60 of the Employment Act which states that an employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship. See *Banda v Dimon (Malawi) Limited* [2008] MLR 92. The respondent therefore correctly observed that this clear statutory definition of constructive dismissal prevails in contrast to the definition alluded to by the appellant that an employee is so dismissed where the employer is guilty of conduct which is a significant breach going to the root of the contract

of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. See the contrasting definition in *Western Excavating (ECC) Lrd v Sharp* [1978] IRLR 27 CA.

81. In terms of section 61 (3) of the Employment Act, it shall be for the employee to provide the reason which made the continuation of the employment unreasonable.

82. The question therefore is whether the appellant's impugned conduct as indicated by the respondent herein made it unreasonable to expect the respondent to continue the employment relationship herein with the appellant. This is a question of both law and fact. The respondent challenged this ground of appeal as not raising specific challenges on findings of fact by the court below. But such a challenge is not warranted given that this ground of appeal challenging a finding of constructive dismissal necessarily raises questions of both fact and law.

83. The impugned conduct of the appellant relates to the issue of demotion of the respondent on posting from Blantyre to Limbe, the issue surrounding granting a loan with a condition to transfer to Kasungu and revocation of the said loan on failure to transfer to Kasungu and the issue of the transfer of the respondent from Limbe to Lilongwe. These issues are the basis for the finding by

the court below that the appellant made it unreasonable for the respondent to carry on with her employment herein.

84. Regarding the issue of demotion of the respondent on posting from Blantyre to Limbe, the appellant contended that demotion is a form of disciplinary action under section 56 (2) of the Employment Act. And that in simple terms it means that an employee's rank is reduced and wages would be reduced too. It observed that according to the decision of the court below, the reason the court below found demotion herein is that the appellant did not advise the respondent about the change in the name of her new position at Limbe. It observed that there was no finding by the court below that the respondent's position or perks were reduced on her transfer to Limbe. It also asserted that contrary to the respondent's assertion that she was not aware of the change in her position, in her witness statement she said she was aware that the appellant restructured upon becoming a deposit taking institution. It asserted further that the respondent bore the burden of proving the demotion by showing the job description and roles of her two positions but that this was not done. It therefore argued that the finding by the court below that there was a demotion is unsupported by the evidence.

85. It additionally argued that the respondent's position was changed in 2017 and that she however resigned two years later in 2019. It observed that two years was an unreasonably long period of time after the event of the transfer to Limbe for the respondent to say she was constructively dismissed because of the

said event. It insisted that the respondent should have acted within a reasonable time after the event. See *The State v MDC ex parte Mpinganjira* Misc Civil Cause No. 63 of 2003. This Court was unable to get a copy of this decision. However, this Court found some foreign persuasive authority on the point as well. See *CCM Fertilizers v Peter Shanta Arthur Sukumar* [2003] 3 ILR 944, in which the employee's delay of two and a half months in making a complaint was deemed to have accepted a breach of the employment contract that could have led to a constructive dismissal claim. The appellant argued that the respondent herein waived her right to resign and claim constructive dismissal given the unreasonable two-year delay from her posting to Limbe to her resignation.

86. On her part, the respondent contended that she was actually demoted by reason of the change in her roles although her wages remained the same. She indicated that she previously was in a supervisory position but the new role meant she lost that supervisory role. And that no wonder she was given a new job description which means there was not just change in the name of her position. This Court agrees with the respondent's contention having found some persuasive foreign authority from the Malaysian Court of Appeal on the point that a transfer to a new position can be considered a demotion notwithstanding that there was no salary reduction or change in job grade, because the employee had to perform tasks which were previously performed by subordinates. See *CIMB Bank Berhad v Ahmad Suhairi Bin Mat Ali & Anor* [2023] 1 LNS 1968.

87. Regarding delay in claiming constructive dismissal, the respondent contended that she reacted later to a series of cumulative actions on the part of the appellant and that this delay on the single act of the appellant should not be held against her.

88. On the evidence on the record before the court below, this Court is prepared to agree with the respondent and the court below that the respondent was indeed demoted without a proper explanation since she was moved from a supervisory position to a non-supervisory position. This is notwithstanding that the respondent's wages remained the same. See *CIMB Bank Berhad v Ahmad Suhairi Bin Mat Ali & Anor* [2023] 1 LNS 1968.

89. However, this Court agrees with the appellant and is persuaded that the respondent did not act within a reasonable time to resign due to the demotion to claim constructive dismissal. The period of two years that intervened shows that the demotion was not a reason for resignation. That issue was water under the bridge in so far as the respondent was concerned. This is clearest when one looks at the letter she wrote to the appellant dated 11th June 2019, in protest to her intended transfer to Mangochi from Limbe, in which she stated that she was glad that the appellant considered her request favourably in 2017 not to transfer her to Kasungu but to Limbe where she was based then.

90. In the circumstances, the 2017 demotion cannot be a ground for finding that the respondent was constructively dismissed in 2019. It is possible, as submitted by the respondent, that in an appropriate case, a series of impugned actions over time and even several years could constitute grounds for a claim of constructive dismissal. See for example, the South African case of a female Seventh Day Adventist Church Pastor who was hounded over several years by congregants that never accepted her as a pastor leading to mental health challenges and her resignation as the Church never supported her in the face of her challenges, in the case of *Makombe v Cape Conference of the Seventh Day Adventist Church and Others* (C04/2023) [02025] ZALCCT 19 (28 March 2025). However, in the present case, the 2017 demotion cannot form part of what the respondent called cumulative actions leading to constructive dismissal in 2019 due to the time lapse and circumstances alluded to above.

91. Regarding the issue of the loan, the appellant contended that although the respondent asserted that she had been denied a loan on declining to be transferred to Kasungu, the respondent neither produced a letter of transfer to Kasungu nor a letter showing that the loan was conditional on her transfer to Kasungu. It also argued that the only evidence of the respondent is that she was told about the loan being conditional by an employee of the appellant whom the respondent did not call as a witness. It added that the respondent was under a duty to prove this allegation. It lamented that the court below agreed with the respondent's story because the appellant did not produce minutes of the loan committee meeting in question. And that the court below erred in accepting the respondent's assertion that her loan approval was conditional on a transfer to

Kasungu and that the same was later revoked.

92. On her part, the respondent argued that she gave her testimony on the conditional loan. And that she mentioned specific officers of the appellant who transacted with her regarding that matter of the loan. She asserted that it was the duty of the appellant to call its officers to refute her testimony and that failure to do so without any explanation entails some negative inference against the appellant. See *Maonga & Others v Blantyre Print & Publishing Co Ltd* 14 MLR 240. She also indicated that it is clear that the appellant admitted that she had indeed applied for the loan in issue and that the same was revoked.

93. This Court agrees with the respondent that she made positive assertions regarding the loan herein which she applied for and which was declined eventually as admitted by the appellant's witness. The appellant however failed to refute the other aspects of the loan issue. It did not call its officers who were specifically mentioned in that regard. No explanation was given why that was so. The issue of the transfer to Kasungu is recorded by the respondent in her letter to the appellant's Human Resources office dated 11th June 2019 and marked as KM2. In that letter, the respondent was asking not to be transferred to Mangochi from Limbe but appreciated the appellant's earlier decision not to transfer her to Kasungu but Limbe from Blantyre. The appellant cannot therefore dispute the intended Kasungu transfer now when it never refuted this aspect in the letter that the appellant tendered in evidence. The court below was therefore justified in the circumstances to find that the appellant made transfer to Kasungu a

condition to a loan that it granted to the respondent since it failed to call any witness to refute the same and there is evidence regarding the loan and the transfer to Kasungu.

94. However, for the same reasons indicated regarding the issue of the demotion, the loan and Kasungu transfer issue also happened in 2017 and cannot be a basis for the respondent to resign two years later in 2019 and claim that it is a basis for constructive dismissal.

95. The last aspect on constructive dismissal relates to the appellant's transfer of the respondent to Lilongwe. The respondent took action to resign within a reasonable time in relation to her transfer to Lilongwe. The issue to be determined is whether the transfer to Lilongwe was unreasonable action on the part of the appellant to warrant the respondent to leave her employment and found a claim of constructive dismissal.

96. The appellant contended that the respondent was bound by the policy of her employment whereby she would be rotated around the appellant's branches. It asserted that it had asked the respondent to transfer to Mangochi and she gave an excuse why she could not do so, namely, that her child is asthmatic and there were no adequate necessary health facilities in Mangochi in that regard. It added that without any evidence being provided by the respondent about the said

asthma, it considered the respondent's situation and transferred her to Lilongwe. It noted that the respondent then gave another excuse that Lilongwe is dusty and not suitable to her asthmatic child and additionally that she did not want to leave her husband behind in Blantyre. It asserted that its transfer of the respondent was not unreasonable in the circumstances.

97. On her part, the respondent indicated that when the appellant insisted that she transfer to Mangochi she resigned. And that after that, whilst serving notice, the appellant's CEO called her to discuss the issue where she told the CEO that she understood that she had to be rotated outside Blantyre but that she was open to be transferred to other districts near Blantyre so that she could take care of her asthmatic child. She indicated that after the meeting with the CEO, the appellant's Human Resources still transferred her to Lilongwe although there were other options that she had expressed to be transferred to near Blantyre. She added that the appellant does not deal with the issue of what she discussed with the appellant's CEO. She insisted that the appellant's conduct was unreasonable to transfer her to Lilongwe in the circumstances.

98. This Court agrees with both parties and the court below that an employer has a prerogative to transfer an employee. It is also good industrial practice, and a fair labour practice, to consult the employee prior to a transfer. And, if the employee has concerns there must indeed be reasonable room to engage. Unilateral transfers without consultation may open employers up to claims of unfair treatment and may even lead to claims of constructive dismissal. Further, where a transfer is driven by discrimination, bad faith, victimization or ill

intention then the same can be challenged as unreasonable. See persuasive case authority on this from Malaysia, namely, *CIMB Bank Berhad v Ahmad Suhairi Bin Mat Ali & Anor* [2023] 1 LNS 1698.

99. In the present case, it is clear that the appellant consulted the respondent about the transfer to Mangochi herein. She indicated to the appellant that she had to look out for her child's asthmatic conditions and could not got to Mangochi which did not have necessary medical facilities. Lilongwe had necessary medical facilities. The respondent refused to go to Lilongwe because it is dusty and not conducive to the health of her asthmatic child and she resigned.

100. This Court has considered that the respondent refused to transfer to Lilongwe due to the dusty condition of Lilongwe given that her child's asthma. Asthma is a medical issue. However, no medical evidence was brought by the respondent before the appellant or indeed before the court below to show that her view was a plausible one in this case. In particular, to show that her child would suffer frequent asthmatic attacks in Lilongwe in comparison to the branches of the appellant located in districts near Blantyre. In the circumstances, this Court does not find the appellant's insistence on her transfer to Lilongwe to be unreasonable. The appellant was entitled to accept her resignation and never acted unreasonably herein. This is because there is no medical indication to support the respondent's claims and position regarding the reason for her refusal to transfer to Lilongwe to do with asthma and Lilongwe dust.

101. In the foregoing circumstances, there was no legally acceptable basis for the respondent to resign and then make a claim for constructive dismissal. The finding of the court below that there was constructive dismissal herein is therefore reversed and the appellant succeeds on its first ground of appeal.

102. This Court now deals with the other four grounds of appeal, save for the sixth one, namely, that the court below erred in failing to consider the respondent's failure to mitigate her loss; that the court below erred in law in basing its decision on an irrelevant consideration of the alleged conduct of the appellant; that the court erred in law in not adhering to the dictates of sections 63 (4) and 63 (5) of the Employment Act; and, that the court below erred in not justifying its decision to award the respondent damages above the statutory minimum.

103. The appellant indicated that the issue here is what principles the court below has to follow when assessing compensation. It noted that the relevant law is contained in section 63 (4) of the Employment Act which provides that 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 the employer's action or the extent of contribution to the dismissal by he employee. It argued that the starting point is section 63 (5) of the Employment Act which

sets minimum compensation basing on years of service at the time of dismissal whereby the just and equitable compensation is the minimum provided. It added that after the minimum, the court will then decide if it should award more for example by looking at the manner of dismissal. It also indicated that the fact that the respondent did not contribute to the dismissal herein should not have moved the court below to award more compensation but rather that if there had been contribution by the employee that would be taken into account in favour of an employer in reducing the compensation. It referred to the case of Terrastone Construction Limited v Chatuntha, MSCA Civil appeal case number 60 of 2011.

104. On her part, the respondent contended that in terms of section 63 (4) of the Employment Act the starting point on assessing compensation is an amount that the court considers just and equitable and that the same depends on loss attributable to the actions of the employer and the extent of contribution by the employee if any. She added that contribution to dismissal by the employee will be a shield to the employer in terms of the amount of compensation payable. This is the same point made by the appellant. However, the respondent disagreed with the appellant's assertion that the starting point is the minimum award in section 63 (5) of the Employment Act.

105. This Court agrees with the respondent that the starting point has to be the loss suffered by the employee due to actions attributed to the employer and to reduce compensation to the extent the employee contributed to causing the loss. This is clear from section 63 (4) of the Employment Act and the case of

Terrastone Construction Limited v Chatuntha, MSCA Civil appeal case number 60 of 2011 where compensation was reduced by the Supreme Court after a dumper truck driver was dismissed without being heard in circumstances where he contributed to his own dismissal by being found with the employer's nails tied to his leg, namely, having commited a theft. This Court also had a chance to expound these same views on this aspect recently in the case of Standard Bank Plc v Kalumo and Others Civil appeal number 18 of 2024 (High Court) (unreported). As correctly submitted by the respondent, one cannot start with the minimum award. In terms of section 63 (5) of the Employment Act, the minimum award is a threshold to be checked once the final award of the compensation is made under section 63 (4) of the Employment Act. The assessing court has to check after assessing compensation whether it does fall below the minimum required. If the award of compensation falls below the minimum then the court will have to award the minimum. In that case, the assessing court is logically not obligated to justify why it is making an award above the minimum awards indicated in section 63 (5) of the Employment Act. The appellant's contention regarding the assessment of compensation starting point is therefore untenable. The court below did not have to state any justification for awarding above the minimum set in section 63 (5) of the Employment Act.

106. However, in the immediately foregoing premises, this Court agrees with both parties that the fact that the respondent employee did not contribute to the dismissal herein should not have moved the court below to award more compensation but rather that if there had been contribution by the employee that would be taken into account in favour of an employer in reducing the

compensation. The court below therefore erroneously considered lack of contribution by the respondent as a reason for deciding to award the respondent an amount above the minimum award provided under section 63 (5) o the Employment Act. The court below should simply have assessed the loss suffered by the respondent and then checked if the respondent contributed to the same. Then it should have checked whether the awarded amount fell below the minimum allowed in section 63 (5) of the Employment Act.

107. The appellant then objected to the boosting of the award made by the court below arguing that it has no legal basis, was punitive and arbitrary. It indicated that the boosting of the award of compensation was based on facts for which it was not responsible such as inflation and devaluation, which the court below mentioned. It noted that there is also no objective explanation for the 30 per cent boost. Additionally, that the sum is due from the date of judgment and that the employer cannot therefore be punished for the factors like inflation in the intervening period from the date of dismissal up to the date of judgment that may be long. It agreed on this Court’s probing that perhaps the prevailing wages for the grade in question may be a better measure to base the compensation on, given that it reflects the true market determined wages.

108. On her part, the respondent contended that the boost is justifiable to cater for a sum that the court considers just and equitable under section 63 (4) of the Employment Act when assessing compensation.

109. This Court has had occasion to consider this same aspect of boosting of awards of compensation and severance recently in the case of Standard Bank Plc v Kalumo and Others Civil appeal number 18 of 2024 (High Court) (unreported). It's conclusion in that case, and in the present case, is the same. Firstly, the court below has no statutory authority to boost an award of severance allowance. There is nothing in the Employment Act authorising a boost of the severance allowance. When it comes to compensation, a careful reading of section 63 (4) of the Employment Act also entails that an award of compensation is not amenable to a boost. This Court wishes to reiterate that it is extremely doubtful that the legislature intended or implied that loss to an employee due to inflation or devaluation, that is now sought to be addressed by a boost, is to be treated as loss attributed to action taken by the employer. Devaluation and inflation are independent of actions of an employer. These macroeconomic phenomena cannot be actions of an employer. If a boost is meant to cover loss occasioned to the employee because of delays in conclusion of court proceedings then that is also an aspect that cannot be attributed to the employer to ground such a boost. The court below therefore erred in boosting the award of compensation and severance allowance.

110. The question remains as to how the assessing court below should deal with the aspect of erosion of the value of the wages of the claimant by the time of assessment of compensation. The court below in the present case and in many other cases has been confronted with this question on realizing that wages' values has been eroded, for among other reasons, due to the notorious delays

visited upon matters before conclusion in the court below as well as due to intervening inflation and devaluation of the kwacha.

111. The firm view of this Court is that, where there is erosion of the wages' value due to delay in conclusion of a case before the court below or where there is considerable inflation or a devaluation, what would be considered just and equitable under section 63 (4) of the Employment Act when assessing compensation in such circumstances would be the use of the prevailing wages around the time of the assessment for the grade of the claimant in question. This prevailing wage is just and equitable because it reflects the labour market determined value of the wage. This is in sharp contract to boosting of awards of compensation or use of other factors by the courts such as consumer price indices etc that are highly arbitrary and prejudicial to either of the parties to a matter. This Court wishes to acknowledge that this position as expressed here is a change in the view of this Court as earlier expressed in the case of The State (On the Application of ADMARC Limited) v The Ombudsman Judicial Review Case number 137 of 2018 in which this Court admittedly erroneously held the view that using the prevailing wage for the grade in question at the time of assessing compensation would not be just and equitable.

112. The appellant also took issue with the inclusion of the medical contribution by the appellant as part of the wage of the respondent. It observed that the contract of employment showed that the respondent would be entitled to a contributory scheme which she never elected to enrol on as her payslip exhibited

herein shows no deduction for such a contribution. Further, that the appellant's Handbook had a provision for 100 per cent medical cover for the respondent. It asserted that this term could however not prevail given the express terms of the contract of employment herein which provided for contribution and also because the Handbook clearly stipulated that it was not a contract but that a contract of employment would prevail in case of conflict between the Handbook and a contract of employment. It indicated that fringe benefits will be awarded to an employee only if they were part of the legal obligations of the employer and not otherwise. See Chawani v The Attorney General [2000-2001] MLR 77 (SCA).

113. On medical cover, the respondent alleged that the appellant never challenged the aspect before the court below and that it cannot raise the matter at this point. This is not true. The point being raised here was raised before the assessing court below and clearly appears at page 9 of the order on assessment of compensation. The argument advanced by the appellant is therefore compelling on this aspect of medical cover. Although the Handbook spoke of 100 per cent medical cover for the respondent, the handbook clearly stipulated that it was not a contract and that its provisions could be superseded by the terms of the contract of employment. As correctly argued by the appellant, the employment contract of the respondent clearly provides for contributory medical cover at 50 per cent for the respondent and her dependents. The respondent was meant to elect to enrol on the contributory scheme by contributing. She never did that. That entailed that the appellant was under no obligation to contribute. It was therefore an error on the part of the court below to include this medical contribution as part of the respondent's loss.

114. The appellant also lamented that the court below did not consider that the respondent had not shown that she had mitigated her loss herein by looking for alternative employment for example. It asserted that this a factor that the court below was bound to consider. See Malawi Environmental Endowment Trust v Kalowekamo [2008] MLLR 237. The respondent retorted that mitigation of loss is alien to the Employment Act. And that it can only come in through the common law. She added that the appellant does not show how she never mitigated her loss herein since she produced one job application.

115. As this Court understands it, the appellant is lamenting that the court below never considered whether the respondent mitigated her loss to ensure that the award of compensation was just and equitable to both parties herein. As correctly asserted by the appellant, a reading of the order on assessment of compensation from the court below shows that the issue of mitigation of loss was indeed never considered by the court below. This was an error. The Supreme Court has stated that this is an issue that ought to be considered. See *Thom Mhango v Raiply Malawi Ltd MSCA Civil* Appeal number 60 of 2012.

116. Last, but not least, the appellant contended that the respondent commenced her employment in 2007 as per the contract it tendered in evidence and not 2006. It noted that in her IRC Form 1 she indicated 2007 as her year of employment and yet in her evidence at trial she alluded to 2006 as the year when she commenced her employment. The appellant argued that there was no

evidence that the respondent's employment commenced in 2006. It therefore faulted the court below for finding that the employment of the respondent commenced in 2006. It indicated that evidence as contained in the contract of employment of the respondent it exhibited herein could not be changed orally or by parol evidence as was sought herein. See *Joseph Chidanti Malunga v Fintec Consultants* MSCA Civil Appeal Number 68 of 2009.

117. The respondent indicated that the issue of the date of employment was settled at the trial and that there is no appeal on this point going by the grounds of appeal. This Court agrees with the respondent. This Court was at real pains to find the ground of appeal on which this point could be raised by the appellant herein.

118. On the last ground of appeal, the appellant contends that the judgment and order on assessment of compensation were against the weight of the evidence. The respondent did not say anything on this aspect. Given the finding of this Court that there was no evidence to justify a finding of constructive dismissal which necessitated the award herein, this ground of appeal has been made out by the appellant.

119. In the final analysis, this Court finds that the appellant has made out grounds of appeal number 1, 2, 3, 4 and 6. The appeal therefore succeeds on

those grounds. However, ground of appeal number 5 has not been made out.

120. Had the finding of constructive dismissal been properly made out, this Court would not agree with the lower court's assertion that on assessing compensation the main consideration is to look backwards to the period of employment before dismissal. The assertion by the court below is not borne out of the case authorities on the subject of assessment of compensation. See *Willy Kamoto v Limbe Leaf Tobacco Company Limited* [2010] MLR 467 (SCA). The duty of the assessing Court is to consider an amount of loss suffered by the employee, which is just and equitable considering the conduct of both the employee and employer if any, in causing the unfair dismissal. Then the assessing Court also has to consider whether the employee upon dismissal took steps to mitigate her/his loss by seeking alternative employment. The assessing Court has to consider other factors as well such as marketability of the employee, their age at dismissal and qualifications among other things. If the assessing Court is only mainly to look backwards from the date of dismissal at how long the employee served, as indicated by the court below herein, then the employee will be compensated doubly having already been paid remuneration and all work benefits for that period already served, and for which severance allowance is already also payable by statute. This does not sound just and equitable.

121. In the present case, the claimant served for 13 years with a clean record and rose through the ranks. She had been employed initially as an Office Assistant/Cleaner. She was aged 36 at the time of her dismissal as a Banking

Officer in 2019 having been born in 1983 per the evidence on record. This is an age at which she could have managed to seek and get reemployed. She was not advanced in age. It is however not clear what her qualifications are. She did not actively look for employment herein as there is no evidence on the record. She was 40 at the time of assessment of compensation. The record shows that she was earning K201 960 per month at the time of her dismissal.

122. In the circumstances, this Court would have considered it just and equitable that the compensation for loss be limited to twenty four months within which it would have reasonably been expected that the respondent would have found alternative employment if she had actively looked for the same. This translates to pay for 24 months which is K4 847 040.00. This clears the threshold minimum award provided in section 63 (5) of the Employment Act.

123. The award of severance allowance made by the court below would not have been interfered with, save for the boost.

124. Although the appellant has succeeded on its appeal, each party shall bear its own costs on this appeal given that this is an employment matter and the pertinent statutory dictate is that each party bears its own costs. See section 72 of the Labour Relations Act which is discussed in the case of First Merchant Bank Limited v Mkaka and 13 others MSCA Civil Appeal No. 53 of 2013.

Made in open court at Blantyre this 2nd October, 2025.