THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 619 OF 2023

In the dispute between:

FLORA JELENJE MAKATA……...………………………….….…………..APPLICANT

-AND-

SOUTH ATLANTIC ASSET MANAGEMENT LIMITED……………..RESPONDENT

CORAM:	**TAMANDA C. NYIMBA**	: Acting Chairperson
	Hope Mvonye	: Counsel for the Applicant
	Fred Chipembere	: Counsel for the Respondent
	Rosemary Msimuko	: Court Clerk

RULING

1 PRELIMINARIES

1.1 Before this Court is the applicant's notice of motion seeking the disposal of this matter on points of law pursuant to section 67(3) of the Labour Relations Act and Rule 5A(1)(c) of the Industrial Relations Court (Procedure) Rules. The applicant prays for a declaration that the respondent was not entitled to withhold her contractually due salaries based on allegations of continued absenteeism given that no disciplinary proceedings were ever instituted against her and no formal findings were made to warrant such a sanction. Furthermore, she seeks an order for the payment of her withheld wages, damages for unfair labour practices and interest on the withheld sum at the rate of 5%.

1.2 In support of the motion, the applicant filed an affidavit in support deponed by herself. The application is vehemently opposed by the respondent who filed an affidavit in opposition deponed by its Human Capital Development Manager, Mr. Chris Mwase. Through their respective Counsel, both parties filed skeleton arguments outlining their positions.

1.3 The parties' papers were formally adopted at the hearing of the motion during which Counsel augmented their written arguments with oral submissions.

1.4 I commend learned Counsel for both parties for their comprehensive submissions. I assure the parties that I have meticulously evaluated all arguments and authorities ventilated before me. Accordingly, the absence of an express reference to any specific submission or authority in this ruling should by no means be construed as a failure by this Court to have considered it.

2 THE FACTUAL MATRIX

2.1 Under the procedure deployed by the applicant, it is a well-established principle that this Court must proceed upon the uncontested facts (those proven, admitted or agreed upon by the parties) that are materially relevant to the disposition of the present motion. Accordingly, the core undisputed facts, as gleaned from the respective affidavits in support and in opposition, are as follows:

2.2 The applicant is an employee of the respondent. The respondent paid the applicant her salary up to December 2022 after which all such payments ceased. The sole justification advanced by the respondent for withholding the applicant's remuneration is the allegation that she absconded or otherwise failed to report for work without justifiable cause. At no point prior to or during the cessation of these wages did the respondent institute disciplinary proceedings, formulate formal disciplinary charges or secure any finding from a disciplinary committee concerning the alleged abscondment.

2.3 The foregoing constitutes the entirety of the material undisputed facts.

2.4 However, it is imperative to note that several other factual assertions remain sharply contested. Specifically, the applicant avers that she was offered employment as a Customer Service Executive on 21 May 2020, served a probationary period and was subsequently confirmed in June 2021 at a monthly salary of MK338,461.64. She further contends that she rendered services from April 2021 to July 2023 during which her wages were unlawfully withheld leaving an unpaid balance of MK7,784,617.72.

2.5 In stark contrast, the respondent contends that the company was only licensed on 6 October 2020 and commenced operations in May 2021. Consequently, the respondent disputes the applicant's claims regarding probation and confirmation denying that she was in its employ in April 2021 and asserting instead that her employment commenced only in June 2021. Furthermore, the respondent maintains that it paid the applicant a total net sum of MK4,902,692.36 up to December 2022 and outrightly denies that the alleged sum of MK7,784,617.72 remains owing.

2.6 As I shall conscientiously demonstrate in the analysis below, while these factual disputes are indeed evident on the face of the record, they do not, in my considered view, bear upon the threshold question of liability. Rather, these contested issues are matters of details, computation or arithmetic that may be properly deferred to subsequent assessment proceedings (should the applicant's motion succeed) and they do not preclude the determination of liability on points of law.

3 ISSUES FOR DETERMINATION

3.1 Having carefully gone through the motion and having appreciated the papers in support as well as in opposition, the issues this Court is being called upon to determine are as follows:

(1) Whether this matter is suitable to be disposed of on points or questions of law;

(2) Whether the respondent was legally entitled to unilaterally withhold or stop paying the applicant's salaries on allegations of abscondment without conducting a disciplinary hearing; and

(3) Whether the conduct of the respondent amounts to unfair labour practices, and whether the applicant is entitled to the reliefs prayed for, with quantum deferred to subsequent assessment.

4 THE APPLICABLE LAW

4.1 This being a civil action, the burden of proof is on the party who asserts the affirmative,[1] namely the applicants. As regards the standard of proof in civil cases, the same is on a balance of probabilities.

[1] ***Chipiliro Banda v Southern Bottlers Ltd*** [2012] MLR 53 (HC).

4.2 Rule 16 of the Industrial Relations Court (Procedure) Rules makes provision for the procedure to be followed respecting applications or motions not fully covered by the said rules. Section 67(2) of the Labour Relations (Amendment) Act, 2021 grants power to this Court to determine matters of law and fact. Rule 5A (1) (c) of the Industrial Relations Court (Procedure) Rules also provides for disposal of a matter on a point of law.

4.3 In ***Charles Nsaliwa v. Malawi Communications Regulatory Authority***[2], the Court emphasized that the decisive consideration is whether there are material factual disputes requiring resolution through evidence. In ***Council of the University of Malawi v. Benjamin Chirwa and Others***[3], the Court similarly affirmed that the jurisdiction to dispose of a matter on a point of law should only be exercised where no factual disputes exist and a legal determination will fully dispose of the matter.

4.4 Further, sections 31(1) and 43 of the Constitution of the Republic of Malawi guarantee every person the right to fair labour practices and the right to lawful and procedurally fair administrative action, respectively. Section 56(3) of the Employment Act explicitly and strictly prohibits an employer from imposing a monetary penalty or fine on an employee. While section 59(1)(e) of the Employment Act permits disciplinary sanctions or summary dismissal for absence from work without permission, the time-honoured rules of natural justice dictate that such sanctions can only be lawfully imposed following a fair hearing.

4.5 To maintain brevity, I will set out any further applicable statutory and case authorities where appropriate in the *"Analysis and Disposal"* segment that follows.

5 ANALYSIS AND DISPOSAL

5.1 This Court avoids placing parties in what it terms "gratuitous suspense" regarding its decision. Consequently, for the reasons to be set out below, the applicant's motion must succeed.

(1) Whether this matter is suitable to be disposed of on points or questions of law;

[2] Civil Appeal No. 30 of 2015 [Unreported] at pp. 5-6.
[3] Civil Appeal Number 12 of 2016 (Being IRC Matter No. 195 of 2014) [Unreported].

5.2 Learned Counsel for the respondent vehemently argued that because there are profound factual disagreements regarding the applicant's employment commencement date, confirmation status and the exact figure of salaries paid or outstanding, this matter does not qualify for determination on a point of law and must proceed to a full trial. The authorities relied upon by Counsel for the respondent in support of this contention espouse the same principles established in *Charles Nsaliwa*[4] and *Council of the University of Malawi*[5] cases cited earlier. Indeed, it is trite law that the jurisdiction to dispose of a matter on a point of law should only be exercised where no factual disputes exist and a legal determination will finally dispose of the matter.

5.3 Be that as it may, and having regard to the circumstances of the instant motion, I remain unpersuaded by the respondent's contentions. In advancing this argument, it is my considered opinion that the respondent fails to appreciate the critical distinction between a dispute of material fact regarding liability and a dispute regarding quantum. For a matter to be barred from summary disposal under the *Charles Nsaliwa*[6] test, the unresolved factual disputes must be strictly material to the determination of liability itself.

5.4 In the matter at hand, the paramount question of liability is simply this: *Can an employer unilaterally withhold or cease paying an employee's salary on allegations of abscondment without first convening a disciplinary hearing?* On this precise issue, there is absolutely no dispute of fact. It is common cause that: (a) the respondent ceased paying the applicant's salary after December 2022; (b) the sole reason for this cessation was the applicant's alleged abscondment; and (c) no disciplinary hearing was ever convened.

5.5 The factual disputes regarding whether the applicant's employment commenced in May 2020 or June 2021 and whether she is owed K7,784,617.72 or an alternative sum are entirely irrelevant to the threshold question of law. These are quintessential disputes of quantum and mathematical calculation that can be properly and adequately resolved in a subsequent remedy or assessment hearing.

[4] As above n.2.
[5] As above n.3.
[6] As above n.2.

5.6 Therefore, since the material facts concerning liability are wholly agreed upon and admitted, the liability question is unequivocally ripe for disposal on a point of law. To subject the parties to a full trial on liability would be to convert this Court into an arena for unwarranted delay. The first issue is accordingly resolved in the affirmative.

(2) Whether the respondent was legally entitled to unilaterally withhold or stop paying the applicant's salaries on allegations of abscondment without conducting a disciplinary hearing;

5.7 On the second issue, which raises a substantive question of law, this Court must state in no uncertain terms that the respondent's conduct flagrantly contravened the clear and unambiguous provisions of the Employment Act[7]. The respondent argues that it was justified in stopping the applicant's pay based on a "legitimate expectation that all its employees must earn their salary", alleging that the applicant had ceased reporting for duty. While it is undeniable that an employee's continued, unjustified absence from work constitutes serious misconduct warranting severe disciplinary action or summary dismissal under section 59(1)(e) of the Employment Act, an employer cannot unilaterally impose the sanction of withholding a salary. Simply put, the law does not permit an employer to become a law unto itself and circumvent the fundamental requirements of due process.

5.8 Section 56(3) of the Employment Act expressly provides that: *"[……][N]o employer shall impose a fine or other monetary penalty on an employee."* By unilaterally suspending the applicant's salary while she remained in its employ, the respondent essentially levied a continuous and massive monetary penalty. This is an absolute statutory violation. If the respondent believed the applicant had absconded, the law dictates a mandatory and civilized procedure, that is, summoning the applicant to a disciplinary hearing, presenting the charges, affording her the right to be heard, and, if found guilty, imposing a lawful disciplinary sanction under section 56(2) of the Employment Act or summarily dismissing her. What the respondent cannot do, and what this Court will never condone, is bypass all due process to unilaterally deprive an employee of her contractually guaranteed wages.

[7] Section 56 (3).

5.9 Admittedly, the proviso to section 56(3) of the Employment Act permits an employer to withhold wages for a specific period of unauthorized absence. However, this statutory concession is strictly conditional upon the objective fact of unauthorized and unexcused absence. Significantly, it is this Court's considered view that where the fact of an employee's absence is in dispute, an employer cannot unilaterally invoke the rider in section 56(3) to suspend salaries indefinitely without first subjecting the employee to a formal disciplinary hearing.

5.10 The Republican Constitution is the supreme law of the land and section 43 thereof guarantees the right to lawful and procedurally fair administrative action. As established in ***Jawadu v Malawi Revenue Authority***[8], an employer cannot act as a judge in its own cause regarding a disputed allegation of misconduct. When an employee is accused of unauthorized absence, which, to reiterate, constitutes misconduct under section 59(1)(e) of the Employment Act, the employer is legally obligated to afford the employee a fair hearing to establish the facts before imposing any sanction or indefinitely withholding wages under the guise of section 56(3).

5.11 To allow an employer to unilaterally declare that an employee has absconded and subsequently halt their salary permanently without a hearing would reduce the constitutional protection of procedural fairness to a sham. It would permit employers to bypass the general prohibition against monetary penalties by merely alleging absence as a pretext, thereby weaponizing the "if you do not work, you do not get paid" proviso as a tool of arbitrary economic punishment. It is undisputed that the applicant's employment contract was never terminated nor did the respondent dismiss her. Permanently withholding contractually due wages from an active employee based on an untested allegation is a blatant evasion of due process.

5.12 The respondent cannot seek refuge behind the section 56(3) proviso when it failed to deploy the mandatory disciplinary machinery required to establish the factual foundation upon which that very proviso relies. Having unlawfully halted the applicant's pay without a prior fair hearing and formal disciplinary finding, the respondent must bear the legal consequences of its actions. At this stage of the proceedings, the defence raised under the proviso to section 56(3) is legally incompetent as a threshold defence to the liability question.

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[8] [2008] MLLR 397.

5.13 That said, to preserve the integrity of the statutory scheme, the respondent is not entirely precluded from raising the issue of the applicant's actual work attendance at the remedy or assessment hearing. The exact "period she has been absent" (if any) is strictly a question of quantum of the relief. At the assessment stage, the respondent remains at liberty to adduce evidence proving the applicant was absent for specific periods without permission or reasonable excuse in which case corresponding deductions may be effected from the final wage award.

5.14 To wrap up the second question for determination, the respondent possessed no legal authority to unilaterally withhold the applicant's salaries and its defence on this point fails. The second issue is, therefore, equally resolved in favour of the applicant.

(3) Whether the conduct of the respondent amounts to unfair labour practices, and whether the applicant is entitled to the reliefs prayed for, with quantum deferred to subsequent assessment;

5.15 This issue must again be answered in the affirmative. The arbitrary and unilateral withholding of wages from an active employee without a hearing constitutes egregious conduct by the respondent. It represents a profound abuse of economic power that flies in the face of the constitutional guarantee to fair labour practices. The respondent's conduct cannot be described as even handed, reasonable, acceptable and expected from the standpoint of employer, employee and all fair-minded persons looking at the unique relationship between employee and employer and good industrial and labour relations[9]. This conduct unequivocally amounts to an unfair labour practice in contravention of section 31(1) of the Constitution of the Republic of Malawi.

5.16 It follows, ineluctably, that the applicant is entitled to the reliefs sought. She is entitled to the payment of all contractually due wages unlawfully withheld by the respondent as well as damages for the unfair labour practice[10] to which she was subjected.

[9] ***Kalinda v Limbe Leaf tobacco Ltd*** Civil Cause No. 542 of 1995 [Unreported].
[10] See section 31(1) as read with sections 46(2)(a) and 46(4) of the Constitution of the Republic of Malawi.

5.17 However, as noted in the factual matrix, a substantial dispute remains regarding the arithmetic of the claim. The applicant avers that she was employed from May 2020 and is owed K7,784,617.72 whereas the respondent contends she was employed from June 2021 and received K4,902,692.36 up to December 2022. These are contested issues of quantum most appropriately resolved at assessment or remedy hearing where both parties may adduce evidence and present detailed calculations.

5.18 Regarding the claim for interest on the withheld salaries at the rate of 5%, the same is allowed on the authority of ***Gwembere v. Malawi Railways Limited***[11] and ***Madinga v. Nedbank***[12] which establish that interest is awardable on monies duly owed but wrongfully withheld. The applicant's salaries were undeniably and unconscionably withheld by the respondent.

5.19 The principles in *Gwembere*[13] and *Madinga*[14] are further bolstered by the recent decision in ***Jeremiah Kazunguza v. Malawi Airline Limited***[15] where on 29 January 2024, Sikwese J. ordered that interest, based on the prevailing National Bank of Malawi flat lending rate of 29.7 per cent, be paid on the sums withheld by the respondent. Furthermore, as an investment management and financial advisory firm, the respondent in this matter indisputably operates a profit-making enterprise. Consequently, by withholding the applicant's salaries, the respondent is presumed to have generated a commercial benefit or profit from those retained funds.

5.20 While the egregious nature of the withholding of the applicant's salaries in this case might otherwise warrant a higher rate, this Court is strictly bound by the pleadings. Accordingly, I cannot award the applicant more than the 5% interest specifically pleaded in her claim.

6 CONCLUSION

6.1 In light of the material agreed facts, the applicable law and the discussion conscientiously had, the applicant's motion carries the day. Judgment on liability in favour of the applicant is hereby entered. The respondent is ordered to pay the

[11] [1978–80] 9 MLR 369.
[12] [2009] MLR 386.
[13] As above n.11.
[14] As above n.12.
[15] IRC Appeal No. 31 of 2022 (Being Matter No. IRC 723 of 2018, Blantyre Registry) [Unreported].

applicant her unlawfully withheld wages, damages for unfair labour practices and interest as pleaded.

6.2 Concerning reckoning of the specific quantum, this Court notes that neither party specifically addressed the Court during oral arguments on the exact computation of the remedies. Given that the right to be heard is a fundamental tenet of our justice system, the parties would be unfairly prejudiced were I to proceed to assess the reliefs without allowing them to adduce evidence or make detailed submissions regarding the same. Accordingly, I shall defer the assessment of the reliefs and, in the interim, I direct as follows:

(a) The parties are at liberty to agree on quantum of the reliefs within fourteen (14) days from the date hereof;

(b) Failing such agreement, this Court shall preside over a remedy hearing to assess the reliefs on a date and at a time to be fixed following the filing of assessment papers by both parties and a notice of hearing by the applicant.

6.3 Determination of the liability question concludes the first part of the applicant's action. Pursuant to the authority of ***JTI Leaf (Malawi) Limited v. Kad Kapachika***[16], this decision is inchoate for purposes of appeal. It may only be escalated to the High Court once this Court renders its order on assessment of reliefs or if the parties settle the same as directed. To avoid confusion, while the right of appeal subsists under Section 65(2) of the Labour Relations Act, it is currently stayed pending conclusion of the relief proceedings or the parties reaching agreement on the same.

6.4 It is so ordered.

Pronounced this 3rd day of August 2026 at IRC, **PRINCIPAL REGISTRY**

Tamanda Chris Nyimba
ACTING CHAIRPERSON

[16] MSCA Civil Appeal No. 52 of 2016 [unreported].