



THE MALAWI JUDICIARY
IN THE INDUSTRIAL RELATIONS COURT
PRINCIPAL REGISTRY
MATTER NO. IRC 574 OF 2022

In the dispute between:

PALIANI CHINGUWO.....APPLICANT

-AND-

MALAWI CONGRESS OF TRADE UNION (MCTU).....RESPONDENT

CORAM: **TAMANDA C. NYIMBA** : Acting Chairperson
 Bruno Matumbi : Counsel for the Applicant
 Yasin Domasi : Counsel for the Respondent
 Rosemary Msimuko : Court Clerk

JUDGMENT

1. Before me is the applicant's action wherein he alleges unfair dismissal, a claim the respondent strongly contests. Pursuant to his IRC Form 1, the applicant seeks the following reliefs: compensation for unfair dismissal, three months' notice pay, exemplary damages, a full account and payment of his pension fund from 2012, severance pay entitlement, indemnity for legal fees and costs of the action.
2. Inevitably, the matter proceeded to a full hearing following the parties' failure to find common ground or wholly settle the dispute at the Pre-hearing Conference stage. The applicant testified on his own behalf. Mr. Madalitso Njolomole, who serves as the respondent's Secretary General, led evidence in defence of the respondent.
3. While extensive testimony was adduced, recounting it in its entirety is unnecessary. The following summary distils the essential evidence elicited from the witnesses of both parties during examination-in-chief, cross-examination and re-examination.
4. The applicant's case is that he was employed by the respondent as a Researcher/Labour Economist on 12 November 2007. He stated that on 1 August

2012, he was seconded to the Southern Africa Trade Union Coordination Council (SATUCC) for two years, for which the respondent granted him unpaid leave. SATUCC is the umbrella body for national federations of trade unions in Southern Africa of which the respondent is one of 22 affiliates. The applicant was based in Gaborone, Botswana, serving as a Research and Information Officer. His primary responsibilities included program coordination and liaising with SATUCC affiliates including the respondent herein.

5. On 7 September 2014, the applicant informed the respondent that his secondment contract had been extended by three years, indicating an expected return to Malawi in September 2017. He asserted that although the respondent did not provide a written response, he received verbal assurance from Grace Nyirenda, the respondent's Deputy Secretary from 2008 to 2016. She allegedly assured him that a formal response would be sent in due course and that he could proceed with the extended secondment in the interim. The applicant maintained that this verbal assurance, coupled with ongoing work-related communication between himself and the respondent, led him to believe that the respondent had no objection to the extension.
6. The applicant further testified that his secondment was extended again until 2020. He contended that the respondent was fully aware of his whereabouts throughout this entire period given its status as a SATUCC affiliate, its seat on the SATUCC board and the physical interactions he had with its representatives at various SATUCC conferences.
7. In October 2020, the applicant resigned from SATUCC, intending to return to Malawi in December 2020 to resume his duties with the respondent pursuant to the terms of his secondment. He formally wrote to the respondent on 20 May 2020, well in advance of his return, requesting to resume work in December. He received no written reply. Instead, he averred that the respondent's Secretary General, Mr. Denis Kalekeni, verbally assured him that he was welcome to return to his position and that a written response would follow.
8. The applicant returned to Malawi on 26 December 2020. On 29 December 2020, he met Mr. Kalekeni in person at the Cross Roads Hotel in Lilongwe during the Communications Workers' Union of Malawi (COWUMA) congress, where Mr. Kalekeni reiterated that a formal reply would be issued shortly.

9. Despite numerous written and telephonic follow-up inquiries regarding the practical arrangements for his return, the applicant stated that the respondent never provided a clear position. Following a change in the respondent's leadership in May 2021, the applicant sought the intervention of the former Secretary General, Robert Mkwezalamba, who attempted to reason with the new leadership regarding the applicant's employment status, to no avail. The applicant thus remained in suspense for nearly a year and a half.
10. Subsequently, in May 2022, the applicant engaged the firm of Messrs Excellence Law Partners, who issued a demand letter to the respondent on 18 May 2022 seeking, *inter alia*, compensation for constructive dismissal. On 24 May 2022, the respondent replied stating that the applicant had been summarily dismissed for absenteeism and that his position had been filled. The correspondence did not specify when this dismissal took effect.
11. Conversely, the respondent's case, presented through Mr. Njolomole, was that the applicant was guilty of abscondment. The respondent contended that after the secondment extension expired in 2017, the applicant remained silent, failing to return to work or provide any explanation for his absence for three consecutive years. It was the respondent's position that absconding without permission effectively amounted to a constructive resignation. Consequently, because the applicant had voluntarily removed himself from employment, the respondent maintained it had no mandate or obligation to subject him to a disciplinary hearing.
12. The foregoing concludes the abridged and relevant evidence in this matter.
13. Before shifting attention to the primary issues for determination, it is necessary to dispense with certain peripheral reliefs sought by the applicant. As the circumstances of this matter clearly demonstrate, the applicant's claim for the costs of this action lacks merit and is therefore summarily dismissed¹. Furthermore, the applicant has evidently abandoned his claims for exemplary damages and indemnity for legal fees. I note this because, apart from merely listing them in the pleadings, the applicant failed to address these claims in his witness statement or final submissions. Consequently, as these claims are unmeritorious and clearly abandoned, they require no further consideration in this judgment.

¹ See section 72 of the Labour Relations Act.

14. I must also acknowledge and express my profound indebtedness to learned Counsel for both parties for their comprehensive submissions and invaluable assistance. I categorically assure the parties that I have meticulously considered all arguments, facts and legal authorities canvassed therein. Therefore, the mere absence of an express reference to a particular submission within the body of this judgment should by no means be construed as a failure by this Court to take it into account.
15. Having considered the evidential matrix and the parties' papers, the issues for this Court's determination are: (a) whether, in dismissing the applicant, the respondent accorded the applicant both procedural and substantive justice; (b) whether the applicant was unfairly dismissed; and (c) whether the applicant is entitled to the remedies sought.
16. As this is a civil action, the burden of proof rests with the party asserting the affirmative², namely, the applicant. The applicable standard of proof is the balance of probabilities. The meaning of this standard is best illustrated by contrasting the requirements for succeeding versus failing to meet it. In *Miller v. Minister of Pensions*³ Denning J had this to say:
- "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."*
17. This Court has a tradition of not placing parties in what I term "gratuitous suspense" regarding the final determination reached upon evaluating the evidence in light of the applicable law. Accordingly, for the reasons detailed below, it is my judgment – on a preponderance of probabilities – that the applicant's action must succeed. My reasoning follows.
18. First, I outline the core legal principles. For an employment termination to be considered fair, it must satisfy the requirements of both substantive and procedural justice. A failure in either area is invariably terminal and results in a dismissal that is legally indefensible or unfair. Substantive justice is concerned with the reason for dismissal while procedural justice relates to the manner in which the dismissal occurred.

²*Chipiliro Banda v. Southern Bottlers Ltd* [2012] MLR 53 (HC).

³[1947] 2 All ER 372.

19. Section 57(1) of the Employment Act provides that the employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirement of the undertaking. The burden of showing that the reasons for dismissal are valid is on the employer⁴.
20. Section 57(2) of the Employment Act provides that the employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.
21. Section 61(2) of the Employment Act provides that in addition to proving that an employee was dismissed for reasons stated in section 57 (1), an employer shall be required to show that in all circumstances of the case he acted with justice and equity in dismissing the employee.
22. In the instant matter, the respondent dismissed the applicant on the grounds of abscondment arguing that his absence from 2017 to 2020 amounted to a constructive resignation. Evidently, the dismissal was grounded in conduct. Bearing in mind the nature of this dismissal, this Court proceeds to ascertain whether the respondent afforded the applicant both procedural and substantive justice.
23. I proceed to examine the first limb, namely, procedural justice, which encompasses the manner in which the dismissal occurred. Upon evaluating the testimony extracted from the witnesses in this matter, it is abundantly clear that the respondent terribly failed to accord procedural justice to the applicant.
24. The respondent advanced a rather audacious defence contending that the applicant's prolonged silence effectively stripped it of any mandate to invite him to a disciplinary hearing. Relying heavily on the Supreme Court of Appeal's wisdom in *Moyo v National Bank of Malawi*⁵, the respondent argued against a rigid and mechanical application of the right to be heard, asserting that summoning the applicant for an inquiry would have been a hollow exercise of no consequence.

⁴ Section 61(1) of the Employment Act; *Mangulama v. Raiply Malawi Limited* Matter No. IRC 254 of 2003 [Unreported].

⁵ MSCA Civil Appeal 19 of 2009.

25. However, this Court cannot countenance such a flagrant circumvention of statutory safeguards. The right to be heard, encapsulated in the venerable maxim *audi alteram partem*, is not a mere procedural nicety that an employer can whimsically discard. Rather, it is the absolute bedrock of fair administrative action enshrined in section 43 of the Constitution of the Republic of Malawi. As articulated in ***Ernest Mtingwi v Malawi Revenue Authority***⁶, section 57(2) of the Employment Act places an exacting demand on an employer to provide an employee with a genuine opportunity to defend themselves against allegations before the guillotine of termination is allowed to fall.
26. The indisputable evidence on record is that on 20 May 2020, the applicant formally wrote to the respondent requesting to resume his duties. Rather than seizing this opportune moment to summon the applicant, lay the grave allegations of abscondment at his feet and afford him the sacred sanctuary of a disciplinary hearing to exculpate himself, the respondent remained cloaked in silence before ambushing him with a summary termination letter two years later, in May 2022.
27. To ambush an employee in such a manner is to act as both the aggrieved accuser and the ultimate judge. As the Court eloquently held in ***Kambalame v ADMARC***⁷, even where an employer possesses a valid reason for dismissal, it does not act fairly if it arbitrarily severs the relationship without conducting an inquiry aimed at giving the employee an opportunity to explain their case and defend themselves. Similarly, in ***Khoswe v National Bank of Malawi***⁸, it was emphasized that a compromise of the principles of natural justice renders a dismissal inescapably unfair and unlawful.
28. By completely bypassing a disciplinary hearing and unilaterally resolving to sever the employment relationship without affording the applicant the slightest opportunity to contradict the allegations of absenteeism, the respondent's actions were manifestly bereft of procedural justice. This Court, therefore, finds that the respondent completely denied the applicant procedural justice, rendering his dismissal unfair.

⁶ Civil Cause No. 3389 of 2004.

⁷ IRC Matter No. 274 of 2003.

⁸ Civil Cause number 718 of 2002.

29. I now turn to the second limb, substantive justice, which concerns the validity of the reason for dismissal. In matters where the Court must determine if an employer's reason for dismissal is fair or valid based on the facts known at the time, it examines the cited misconduct or reason to ascertain whether the termination was justified. If the reason is not supported by evidence, the Court may conclude that there was no justification for the dismissal⁹.
30. In the present case, the respondent asserts that the applicant absconded. The question is whether this allegation is supported by sufficient evidence to enable this Court to conclude that there was justification for the dismissal. The respondent's assertion is untenable in light of the applicant's cogent evidence.
31. The indisputable evidence before this Court is that the applicant was seconded to SATUCC, an umbrella body of national federations of trade unions in Southern Africa, wherein the respondent holds a seat and actively participates in meetings and conferences. Furthermore, it is not in dispute that the respondent's own representatives physically interacted with the applicant at SATUCC conferences and meetings between 2017 and 2020. In these circumstances, the respondent cannot feign ignorance of the applicant's whereabouts. Dismissing the applicant for abscondment while having institutional knowledge of his continued presence at its own mother body falls drastically short of establishing a valid reason for dismissal.
32. Ineluctably, this Court concludes that the respondent lacked a valid reason to terminate the applicant's employment. Therefore, the dismissal was unfair, as the respondent failed to afford substantive justice.
33. All things considered, in the process of terminating the applicant's contract of employment, the respondent failed to treat him with justice and equity contrary to the dictates of section 61(2) of the Employment Act. Collectively, the sum of the foregoing considerations fortifies this Court's determination that the respondent unfairly dismissed the applicant.
34. Before turning to the issue of remedies, this Court must address a profound and inescapable irony pervading this matter. The respondent, MCTU, positions itself

⁹ *Mahowe v. Malawi Housing Corporation* Civil Cause No. 3687 of 2000 (HC) [Unreported].

as the preeminent champion of workers' rights in this country. As a venerated defender of labour rights, the standard of procedural and substantive compliance expected of the respondent is inherently and undeniably higher. This Court will not mince words regarding what transpired in this case. It is deeply disconcerting that MCTU, a principal national federation for labour unions across Malawi, would terminate its senior employee without the slightest regard for the very laws it champions. The respondent spectacularly failed to live up to its own standards. To witness MCTU act in flagrant defiance of the fair labour practices it relentlessly demands from other employers reveals a lamentable hypocrisy. Surely, the respondent cannot be heard to defend actions that are entirely antithetical to its foundational mission and ethos.

35. Finally, having determined that the respondent's termination of the applicant's employment amounted to an unfair dismissal, the applicant is entitled to all the reliefs sought. However, as previously discussed, this excludes exemplary damages, indemnity for legal fees and costs of the action.
36. On computation of the remedies, I note that neither party specifically addressed the Court in the course of trial on quantum of the reliefs. In point of fact, while it is efficient to deal with liability and assessment in an omnibus fashion, the parties were not heard on the precise topic of reckoning of the reliefs. 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 quantum without allowing them to adduce evidence or make submissions regarding the same. Accordingly, I shall defer the assessment of the reliefs. In the interim, I direct as follows:
 - (a) The parties are at liberty to agree on quantum of the reliefs within 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.
37. This was a modularized trial with determination of liability concluding the first instalment. Pursuant to the authority of *JTI Leaf (Malawi) Limited v. Kad*

*Kapachika*¹⁰, 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.

38. It is so ordered.

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

Tamanda Chris Nyimba
ACTING CHAIRPERSON

¹⁰ MSCA Civil Appeal No. 52 of 2016 [unreported].