



THE MALAWI JUDICIARY
IN THE INDUSTRIAL RELATIONS COURT
PRINCIPAL REGISTRY
MATTER NO. IRC 284 OF 2017

In the dispute between:

BETTY CAROLINE MAHUKA.....APPLICANT

-AND-

**ELECTRICITY SUPPLY CORPORATION
OF MALAWI LIMITED.....RESPONDENT**

CORAM: **TAMANDA C. NYIMBA** : Acting Chairperson
 P. Matsimbe : Counsel for the Applicant
 T. Roka : Counsel for the Respondent
 Mike Chipembere : Court Clerk

JUDGMENT

1 INTRODUCTION

1.1 This judgment resolves an action instituted by the applicant against the respondent. The applicant seeks compensation for constructive dismissal, damages for unfair labour practices, terminal benefits projected over a three-year contract term and the costs of this action. The respondent resists the suit in its entirety.

1.2 The matter proceeded to a full hearing following the parties' inability to reach a compromise or settle the dispute during the pre-hearing conference stage.

2 EVIDENTIAL BACKGROUND

2.1 At the hearing, the applicant testified on her own behalf. She was the sole witness in these proceedings, as the respondent elected not to call any witnesses to testify on its behalf.

2.2 While the applicant adduced extensive evidence, it is unnecessary to rehearse her testimony in its entirety. The salient factual matrix, as drawn from the applicant's examination-in-chief record, cross-examination and re-examination is as follows:

- 2.3 The respondent engaged the applicant in May 2010 in the senior capacity of Director of Finance. Her initial employment was governed by a three-year renewable contract¹ effective from 1 May 2010 to 30 April 2013. Following the expiration of her initial term, the applicant sought a renewal. The respondent's Board of Directors, acknowledging her exemplary performance, renewed her contract for a further three-year term running from 1 May 2013 to 30 April 2016. To substantiate her positive impact on the respondent's financial trajectory, the applicant tendered the respondent's Financial Statements². These statements demonstrated that under her tenure, ESCOM transitioned from a heavy reliance on bank overdrafts in 2010 to a highly liquid and profitable position, accumulating billions in profits by 2015.
- 2.4 On or about 10 February 2016, in anticipation of the expiration of her second term, the applicant formally expressed her intention to seek a further three-year renewal³. In response, the respondent's Board approved a renewal but restricted the tenure to a period of only eight months running from 25 May 2016 to 31 December 2016. This decision was communicated to her via a memorandum from the Director of Corporate Affairs dated 3 May 2016⁴ which indicated that a formal written contract would be transmitted for her signature by the end of May 2016.
- 2.5 The anticipated formal contract, however, was never provided. Consequently, the applicant neither signed nor was furnished with the eight-month contract. She remained in post continuing to draw the benefits and observe the conditions stipulated in her expired three-year contract. She testified that she had intended to engage management regarding the unilateral variation in the contract's duration upon receipt of the formal document but the opportunity never materialized. The applicant perceived this eight-month extension as a victimizing measure linked to the impending unbundling of ESCOM. She contended that this variation directly contradicted the respondent's own internal memorandum of 30 November 2015⁵ which provided formal assurances to all ESCOM staff that their employment contracts would remain unaffected by the unbundling process.

¹ Exhibit **BCM 1**.

² Exhibit **BCM 2**.

³ Exhibit **BCM 3**.

⁴ Exhibit **BCM 4**.

⁵ Exhibit **BCM 5**.

- 2.6 Contemporaneously with these contractual uncertainties, the applicant testified that the Finance Department, under her leadership, detected significant anomalies within the Procurement Department. Specifically, the Procurement Department was bypassing standard procedures by directing suppliers to deliver materials to ESCOM without the requisite authorizations such as Local Purchase Orders (LPOs) or formal contracts. These procurement irregularities were subsequently corroborated by ESCOM's internal audit report of June 2016⁶. The anomalies primarily involved substantial transactions with a supplier known as Multistar. Materials were procured through a single-sourcing method, despite the Public Procurement and Disposal of Assets (PPDA) office having only approved a restricted tender method, and without any underlying contracts or inspection reports to verify the delivery of acceptable goods.
- 2.7 Acting in her capacity as Director of Finance, the applicant refused to authorize payments for these unverified deliveries in the absence of proper documentation and explicit Board authorization. Following her refusal, the Chairperson of the Board, Mrs. Jean Mathanga, convened a meeting in Lilongwe on 26 June 2016. The composition of this meeting was highly irregular. It was attended only by the Board Chairperson (Mrs. Mathanga), the Chairperson of the Appointments and Remuneration Committee (Mr. Chikumbutso Mkwamba) and the Chairperson of the Finance and Audit Committee (Mr. Frank Kunje). Crucially, government *ex-officio* directors and other Board members were excluded contrary to standard corporate governance procedures. Management was represented by the applicant, the Chief Executive Officer (Mr. John Kandulu) and the Director of Procurement (Mr. Fanuel Nkhono). Notably, the Company Secretary, whose duty it is to minute such meetings, was also excluded. During this meeting, Mr. Nkhono was instructed to draft a report on the irregular procurements while the applicant was tasked with producing a brief expenditure-against-budget report to illustrate the impact of these transactions on ESCOM's cash flows.
- 2.8 The applicant testified to her shock at remarks made by Mrs. Mathanga during the Lilongwe meeting, specifically her statement that "*no one should be in trouble, we just have to regularize the payments.*" The meeting proceeded without a formal agenda. When draft minutes were later circulated to the applicant, they contained

⁶ Exhibit **BCM 6** at pages 4 and 5.

items that had not been discussed (such as a resolved 2015 issue concerning damaged HRC fuses). The applicant formally registered her objections and extensive observations regarding these minutes in an email dated 17 July 2016⁷. However, none of her concerns were taken on board.

2.9 Following the Lilongwe meeting, on 15 July 2016, the Chief Executive Officer, Mr. John Kandulu, transmitted an email⁸ to the applicant. In this correspondence, he characterized the Lilongwe gathering as a “Board meeting” and instructed the applicant to immediately effect payments to the supplier stating that the “Board instructed Management to prepare and sign a contract with the supplier after which a payment should be made.” The applicant maintained her refusal to process the payments asserting that the Lilongwe meeting did not constitute a properly convened Board meeting. She reiterated this position in an email to Mr. Mkwamba on 17 July 2016⁹.

2.10 By this time, the applicant was verbally barred from attending ordinary Board meetings by Mrs. Mathanga, a directive relayed through the Company Secretary, Mr. Sitolo. The applicant was henceforth restricted to attending only Board Committee meetings. This exclusion was unprecedented in her six-year tenure. She testified that on one occasion, circa June or July 2016, she was kept waiting outside a Board meeting at the Mount Soche Hotel for two hours before being permitted entry solely to present her budget.

2.11 Perceiving a lack of recourse and anticipating no support from the Board Chairperson following the outcome of the Lilongwe meeting, the applicant tendered her resignation on 18 July 2016. However, following discussions with the CEO, she formally rescinded this resignation on 21 July 2016¹⁰. She testified that this rescission was predicated on a mutual understanding that the CEO and the Company Secretary would travel to Lilongwe to persuade the Board Chairperson to convene a properly constituted Board meeting. The objective was to transparently discuss the procurement anomalies, mandate verification through a commission of inquiry, akin to the precedent set in 2015, and secure proper corporate directives prior to authorizing any payments.

⁷ Exhibit BCM 8.

⁸ ID 4.

⁹ Exhibit BCM 9.

¹⁰ ID 2.

- 2.12 The anticipated Board meeting was never convened by Mrs. Mathanga. Furthermore, subsequent to rescinding her resignation, the applicant resigned from the Internal Procurement Committee (IPC). She adduced evidence that whenever she raised dissenting views regarding procurement quantities or pricing during IPC meetings, she would promptly receive telephone calls from Mr. Frank Kunje (Chairperson of the Finance and Audit Committee) directing her to cease her opposition to the Director of Procurement, Mr. Nkhono.
- 2.13 On 26 July 2016, Mrs. Mathanga decided to come to ESCOM unaccompanied to meet with management. During this meeting, she insisted that the CEO possessed the authority to approve the contested payments. The applicant construed this as a calculated maneuver to compel her, in her capacity as Director of Finance, to authorize the disbursement of MK4.6 billion to unverified suppliers. Concluding that her working environment had been rendered intolerable and without viable remedy, the applicant tendered her final resignation on 27 July 2016, effectively revoking her earlier rescission.
- 2.14 In her final letter of resignation¹¹, the applicant expressly cited the irregular procurement processes. Following her resignation, the full Board convened on 18 August 2016 and passed a resolution authorizing management to pay the supplier. This resolution, however, was presented as a “loose minute” and lacked the corporate seal. The applicant declined to act upon it, testifying that throughout her six-year tenure, corporate tradition dictated that all valid Board resolutions were authenticated with a red seal. Although her notice period was slated to expire in October 2016, she initially remained in post to facilitate a handover. When no successor was identified and the working conditions became, in her view, wholly unbearable, she prematurely vacated her office on 30 September 2016 leaving her handover notes with the CEO.
- 2.15 Under cross-examination, the applicant made several material concessions. She confirmed that her initial resignation letter of 18 July 2016¹² cited “personal grounds” and omitted any reference to a hostile work environment or undue pressure to authorize payments. She further conceded that her rescission letter of 21 July 2016¹³ neither disclosed the substance of her discussions with the CEO nor

¹¹ ID 3.

¹² ID 1.

¹³ ID 2.

contained allegations of workplace hostility. She acknowledged that her final resignation letter of 27 July 2016¹⁴ marked the first instance in which she formally tabled the issue of wrongful or irregular procurement in her direct correspondence with the Board.

2.16 Regarding the renewal of her contract, the applicant admitted that her second term had expired and that she was subsequently offered an eight-month extension (from 25 May to 31 December 2016) via the correspondence of 3 May 2016¹⁵. She conceded that she neither formally accepted nor rejected this offer but simply continued to discharge her duties without initiating formal discussions on the terms. She also acknowledged that the CEO's email of 15 July 2016¹⁶ was framed as a "request" and lacked explicitly coercive or commanding language. Crucially, she admitted that she circumvented the formal Grievance Procedure¹⁷, having failed to lodge any written complaint with the Board regarding the alleged undue pressure. Furthermore, she conceded that she tendered her final resignation on 27 July 2016, a mere day after verbally demanding a full Board resolution on 26 July 2016, thereby affording the Board insufficient time to lawfully convene in accordance with its Articles of Association. Finally, she conceded ignorance of section 42(1) of the Companies Act 2013, which provides that a corporate seal is not a mandatory requirement for the validity of a corporate resolution.

2.17 The foregoing encapsulates the evidential foundation of the applicant's case and the substratum upon which her claims for relief are grounded.

3 THE PARTIES' ARGUMENTS AND SUBMISSIONS

3.1 The applicant's primary contention is that she was constructively dismissed as a direct consequence of a toxic and hostile work environment. She argues that she was subjected to intense, undue pressure by senior Board members and the CEO to authorize MK4.6 billion in irregular and unverified payments, transactions which flouted internal procurement procedures and the Public Procurement Act. She further contends that she harboured a legitimate expectation that her contract would be renewed for a standard three-year term and that the eight-month renewal offer

¹⁴ ID 3.

¹⁵ Exhibit BCM 4.

¹⁶ ID 4.

¹⁷ ID 5.

was a punitive measure of victimization that contravened the unbundling memorandum¹⁸.

3.2 Conversely, the respondent submits that the applicant's resignation was entirely voluntary and did not amount to constructive dismissal. The respondent underscores that the initial resignation letter¹⁹ cited purely "personal reasons" and that the applicant never formally invoked the company's Grievance Procedure²⁰ to lodge a written complaint with the Board. The respondent further contends that the CEO's email²¹ was a mere request rather than a coercive directive and that the applicant resigned precipitously, within twenty-four hours of raising her concerns, thereby depriving the Board of a reasonable opportunity to address them. Finally, the respondent argues that ESCOM bore a legal obligation to pay the supplier for goods already consumed under the "indoor management rule". Furthermore, that under section 42(1) of the Companies Act 2013, the absence of a corporate seal on the subsequent Board resolution of 18 August 2016 did not invalidate the Board's decision.

3.3 The Court expresses its gratitude to Counsel for both parties for their comprehensive submissions which have significantly assisted in narrowing the issues in dispute. It is pertinent to state from the outset that in arriving at the conclusions herein, I have carefully considered all submissions and authorities placed before me even if they are not all expressly referenced in the body of this judgment.

4 ISSUES FOR DETERMINATION

4.1 The resolution of this dispute hinges upon the determination of two principal issues, namely:

- *Whether the applicant's contract of employment was contractually renewed for a three-year term, or alternatively, whether she possessed a legally enforceable legitimate expectation of such a renewal; and*

¹⁸ Exhibit BCM 5.

¹⁹ ID 1.

²⁰ ID 5.

²¹ ID 4.

- *Whether the applicant’s resignation from her position in the respondent corporation occurred under circumstances that amount in law to constructive dismissal, thereby entitling her to the reliefs she seeks.*

5 THE APPLICABLE LAW

- 5.1 Section 60 of the Employment Act governs the concept of constructive dismissal. It provides as follows:

“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.”

- 5.2 Where an employee pleads constructive dismissal, the burden of proof rests squarely on that employee to demonstrate the unreasonableness of the employer’s conduct. In this regard, the following excerpt from Rachel Sophie Sikwese’s *Labour Law in Malawi*²² is instructive:

“The burden of proof is on the employee to show that the conduct of the employer was unreasonable to such an extent that the employee would not be expected to continue with the employment relationship. An employee is entitled to terminate an employment contract without notice by reason of the employer’s conduct. The Employment Act has not laid down any special criteria for constructive dismissal; hence courts apply the contractual test to determine whether the employer’s conduct constituted repudiation of the employment contract. The key element therefore is for the employee to show that the employer’s conduct breaches a fundamental term of the contract such that it can be implied that the employer does not intend for the contract of employment to continue.”

- 5.3 It is trite law that the standard of proof in civil proceedings is on a balance of probabilities. The essence of this standard is best exemplified by analyzing the

²² Rachel Sophie Sikwese, *Labour Law in Malawi*, 4th Ed, 2022; pp. 104-105.

threshold between success and failure in discharging it. In *Miller v. Minister of Pensions*²³, Denning J aptly observed:

“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.”

5.4 To articulate this principle in numerical terms, if a tribunal concludes that the probabilities are perfectly balanced, that there is a 50 percent likelihood that the applicant’s version is true, the claim must fail. Conversely, if the tribunal finds it to be at least 51 percent probable that the applicant’s version is true, the applicant has tipped the scales, discharged her burden and must carry the day.

5.5 Any further relevant statutory provisions and jurisprudential authorities shall be cited and applied in the ensuing “*Analysis and Disposal*” segment of this judgment.

6 ANALYSIS AND DISPOSAL

6.1 It is the practice of this Court not to subject parties to what I term “gratuitous suspense” regarding the final determination of their cause. Accordingly, for the reasons detailed anon, it is the judgment of this Court that, on a preponderance of probabilities, the applicant’s claims for constructive dismissal, terminal benefits for a projected three-year contract term and damages for unfair labour practices are not well-founded and must be dismissed.

6.2 The applicant’s action inevitably fails following this Court’s conscientious scrutiny of the issues formulated earlier, evaluated against the evidential matrix and the applicable legal principles. I proceed to deploy this Court’s reasoning, resolving the issues in their logical sequence.

- *Whether the applicant’s contract of employment was contractually renewed for a three-year term, or alternatively, whether she possessed a legally enforceable legitimate expectation of such a renewal;*

²³[1947] 2 All ER 372.

- 6.3 The applicant contends that because her two preceding contracts were for three-year terms, she possessed a legitimate expectation that her contract would be renewed for a commensurate three-year period. She argues that the eight-month renewal offer constituted a form of victimization and a breach of the general unbundling memorandum.
- 6.4 This Court is unable to accept this proposition. It is a trite principle of contract law that a fixed-term contract, by its very nature, expires by the effluxion of time. There exists no automatic right of renewal unless the contract expressly guarantees it. In the present matter, the applicant's second contract expired on 30 April 2016. Under the fundamental doctrine of freedom of contract, it was incumbent upon the parties to mutually agree on the terms and duration of any subsequent engagement. The respondent extended an offer of an eight-month contract via the memorandum of 3 May 2016. Under cross-examination, the applicant admitted that she neither formally accepted nor rejected this offer but simply continued to discharge her duties. In doing so, she became, in my considered view, a "holdover" employee operating under the implied conditions of the expired contract or the terms of the eight-month offer while any potential negotiations remained pending.
- 6.5 For the doctrine of legitimate expectation to be successfully invoked, there must be a clear, unambiguous and unqualified promise, undertaking or representation²⁴. The general memorandum on unbundling was a broad policy directive aimed at assuring staff that their employment status would not be prejudiced by the unbundling process. It did not, in my considered view, constitute a specific, personal and unambiguous representation to the applicant that her expired fixed-term contract would automatically be renewed for another three years. In the absence of an express undertaking by the Board, the applicant's expectation of a three-year renewal amounted to a subjective hope rather than a legally enforceable right. A legitimate expectation cannot override the express terms of a contract nor can it fetter the employer's freedom to offer a specific, revised term of renewal. Therefore, the applicant's claim that her contract was renewed for a three-year term fails and she is consequently not entitled to terminal benefits projected over such a period. I so find.

²⁴ *R v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; see also *Vijah Yadav t/a Steel Hardware & Mzuzu Re-powering Limited v. NBS Bank Ltd* Civil Cause No.26 of 2014 [unreported].

- *Whether the applicant's resignation from her position in the respondent corporation occurred under circumstances that amount in law to constructive dismissal, thereby entitling her to the reliefs she seeks.*

- 6.6 The gravamen of the applicant's constructive dismissal claim is that she was subjected to a hostile and unbearable working environment, purportedly stemming from intense pressure exerted upon her to authorize irregular and unverified procurement payments involving the substantial sum of MK4.6 billion. She argues that she was marginalized, excluded from Board meetings and verbally directed to circumvent established procurement controls.
- 6.7 While it is clear and undisputed on the facts in this matter that procurement procedures were egregiously flouted by the Procurement Department and that goods were received and issued without LPOs or proper contracts²⁵, this Court must objectively evaluate whether the respondent's conduct towards the applicant mounted to a fundamental breach or repudiation of her employment contract.
- 6.8 First, the applicant argues that the email dated 15 July 2016 from the respondent's CEO constituted an intimidating directive, forcing her to authorize payments under duress. However, during cross-examination, she made the critical concession that the CEO did not direct, instruct or demand payment, but rather framed his communication as a "request". Crucially, the applicant herself had written to the Director of Procurement on 14 July 2016 explicitly stipulating that she required the CEO's approval before any payment could be effected. When the CEO subsequently provided this requested written approval, the applicant cannot then pivot to characterize the very authorization she solicited as an act of intolerable pressure. The CEO's email was a direct response to her demand for management coverage and cannot, by any objective standard, constitute a breach of contract.
- 6.9 Secondly, this Court finds that the applicant comprehensively failed to exhaust internal grievance procedures. Under the respondent's Executive Grievance Procedure, the applicant, occupying a senior position within Executive Management, bore a clear duty and possessed an established channel to lodge a formal written complaint with the Board if she was being subjected to improper

²⁵ As documented in exhibit **BCM 6**.

pressure or a hostile environment by her superiors. She admitted under cross-examination that she lodged no such written complaint regarding Mrs. Mathanga's alleged actions or the purported pressure from the IPC Committee. By eschewing the formal grievance mechanism, she actively deprived the Board of the opportunity to investigate and remedy her concerns. A claim of constructive dismissal is unavailable to an employee who chooses to resign precipitately without allowing the employer's internal structures to address the grievance²⁶.

6.10 Thirdly, the chronological sequence of the applicant's resignation is highly instructive. On 26 July 2016, during a meeting with Mrs. Mathanga, she verbally articulated her insistence on a full Board resolution. She then tendered her final resignation on 27 July 2016 – a mere twenty-four hours later. Article 51 of the respondent's Articles of Association mandates up to 21 days' notice for a standard general meeting of directors. Even accounting for the possibility of an emergency meeting, expecting a major state-owned enterprise to convene a full Board, deliberate and formally pass a resolution within a 24-hour window is objectively unreasonable.

6.11 By resigning with such immediacy, the applicant afforded the Board no reasonable time or statutory²⁷ opportunity to convene and pass the resolution she had demanded. This precipitous action bears the hallmarks of a calculated, premeditated exit rather than a frantic flight from an intolerable situation. In law, the applicant's immediate resignation fundamentally severed the causative chain required to establish constructive dismissal. As this Court previously held in *Steve Chitsamba v. Builders Base*²⁸, a period of mere days (and *a fortiori*, a single day) is manifestly insufficient to allow an employer to resolve complex, multi-billion Kwacha corporate disputes. In this Court's considered opinion, the applicant's hasty departure was both legally and practically unjustifiable.

6.12 Fourthly, the applicant's post-resignation objection to the Board resolution of 18 August 2016 is devoid of legal merit. She refused to act on the resolution on the basis that it was rendered as a loose minute devoid of a corporate "red seal". However, pursuant to section 42(1) of the Companies Act 2013, a corporate seal is not a mandatory prerequisite for the execution of corporate documents or the

²⁶ *Chisomo Blessings Kalulu v. Malawi Housing Corporation* Matter No. IRC 546 of 2020 (PR).

²⁷ In keeping with the respondent's Articles of Association.

²⁸ Matter No. IRC 542 of 2020 (PR).

validity of Board resolutions. The resolution passed by the full Board was legally robust, valid and entirely sufficient to authorize the payments and shield the applicant from liability. Her insistence on a physical seal was legally erroneous and presents as an *ex post facto* rationalization utilized to justify her premature departure.

6.13 Finally, this Court must apply the correct legal gloss to the procurement context itself. While internal procurement procedures were undeniably flouted, the fact remains that ESCOM had received, accepted and consumed the supplied goods. Under the “indoor management rule”²⁹ and established principles of corporate liability, ESCOM was legally bound to remunerate the third-party supplier as third parties are not obligated to inquire into the regularity of a corporation’s internal governance procedures. Such third parties are shielded by the evidential maxim *omnia praesumuntur rite et solemniter esse acta* – all things are presumed to have been done rightly, duly and with due formality. The respondent’s suppliers were therefore not required to concern themselves with the respondent’s internal administrative irregularities.

6.14 Against this backdrop, it is evident that the respondent’s Board was attempting to navigate an invidious position by regularizing payments for goods already consumed thereby mitigating the risk of costly commercial litigation. The applicant was not being directed to commit an illegal act but rather to implement a Board resolution aimed at discharging a contractually binding corporate debt. Her subjective apprehension of political fallout, while perhaps understandable within the context of a public corporation, does not objectively satisfy the high threshold required to establish that the respondent repudiated the employment contract or rendered continued employment intolerable. Her resignation was a voluntary election, not a coerced necessity. Hers is clearly not an unanswerable claim for constructive dismissal. On the totality of the facts and the applicable law, I am satisfied, and so find, that the respondent committed no act amounting to a fundamental breach of contract that would justify the applicant terminating her employment. Constructive dismissal is therefore unavailable to the applicant as a cause of action.

7 CONCLUSION

²⁹ *Royal British Bank v Turquand* (1856) 6 E & B 327.

- 7.1 In the final analysis, applying the requisite legal principles to the factual matrix as determined herein, this Court concludes that there existed no objective basis for the applicant to consider herself constructively dismissed or otherwise discharged of her contractual obligations to the respondent. The applicant was not coerced into her resignation; rather, she elected to resign of her own volition. Consequently, she cannot be said to have been unfairly dismissed. Accordingly, all claims brought by the applicant in this action fail and are hereby dismissed in their entirety.
- 7.2 As this Court sits as a court of first instance in this matter, any party aggrieved by this final judgment may exercise their right of appeal to the High Court in accordance with the dictates of section 65(2) of the Labour Relations Act.
- 7.3 It is so ordered.

Pronounced this 25th day of September 2026 at IRC, **PRINCIPAL REGISTRY**



Tamanda Chris Nyimba
ACTING CHAIRPERSON