



THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 494 OF 2021

In the dispute between:

HARVEY MTENGERENJI.....APPLICANT

-AND-

ATTORNEY GENERAL.....1ST RESPONDENT

BLANTYRE DISTRICT COUNCIL.....2ND RESPONDENT

CORAM:	TAMANDA C. NYIMBA	: Acting Chairperson
	Ndhlovu	: Counsel for the Applicant
	Dausi & Mmora	: Counsel for the Respondent
	M. Chipembere	: Court Clerk

RULING

1 PRELIMINARIES

- 1.1 Before this Court is the applicant's notice of motion seeking the disposal of this matter on a point of law pursuant to section 67(3) of the Labour Relations Act (as amended by the Labour Relations (Amendment) Act 2021) read with Rule 5A(1)(c) and Rule 16 of the Industrial Relations Court (Procedure) Rules.
- 1.2 The points of law the applicant has moved this Court to determine are: (a) whether the respondents had an obligation to summon the applicant to a disciplinary hearing prior to reaching a decision to withhold his salary; (b) whether the applicant is entitled to the payment of his withheld salary and allowances; and (c) whether the applicant is entitled to compensation for unfair labour practices.
- 1.3 As per the IRC Form 1, the applicant seeks the following relief: (a) payment of his withheld salary from September 2017 to the date of this ruling; (b) payment of accrued allowances from September 2017 to the date of this ruling; and (c) damages for unfair labour practices.

- 1.4 In support of the motion, the applicant relies on an affidavit deposed to by himself. The motion is opposed by the respondents through an affidavit in opposition deposed to by Clement Maulidi, Principal State Advocate in the Attorney General's Chambers. Through their respective Counsel, the parties also filed comprehensive skeleton arguments outlining their legal positions.
- 1.5 The parties' processes were formally adopted at the hearing of the motion during which Counsel expanded upon their written submissions with cogent oral arguments. The Court commends Counsel for their industry and comprehensive submissions. 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 in no way be construed as a failure by this Court to have applied its mind to it.

2 THE FACTUAL MATRIX

- 2.1 Given the procedural mechanism invoked by the applicant, it is a well-established principle that this Court must proceed on the basis of the uncontested facts, namely, those proved, admitted or otherwise agreed upon by the parties. Crucially, such facts must be 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 a civil servant who was employed in 2008 as a driver under the Ministry of Gender, Children and Disability, designated to serve at the Blantyre District Council Offices. The 2nd respondent paid the applicant his salary up to August 2017, after which all salary payments abruptly and completely ceased.
- 2.3 In September 2017, while at the Blantyre District Council Offices, Mrs. Chikhosi, the Human Resources Officer of the 2nd respondent, verbally informed the applicant in a corridor that his salary would be withheld. At no point prior to, or at the time of, the unilateral cessation of the applicant's remuneration in September 2017 did either respondent issue a formal written notice, formulate disciplinary charges or convene a disciplinary panel.
- 2.4 Aggrieved by the ongoing prejudice, the applicant instituted these proceedings in May 2021. It was only after the commencement of this suit, specifically on 11 May

2021, that the 2nd respondent issued a letter summoning the applicant to attend a disciplinary hearing regarding allegations of abscondment and insubordination.

- 2.5 The foregoing constitutes the entirety of the material undisputed facts bearing upon the threshold question of liability.
- 2.6 However, it is imperative to note that several background factual assertions remain contested. The applicant deposes that following a posting instruction to the Nsanje District Council in 2013, he engaged in administrative consultations with the Transport Officer, Mr. Chamba, and his successor, Mrs. Ajawa, regarding family hardship. He avers that he was advised to remain at the Blantyre District Council pending prospective re-postings to Thyolo, Chiradzulu or Ntcheu. He further details a temporary mutual swap arranged with a driver named Mr. Sekani at the Chiradzulu District Council, subsequent interactions with the District Social Welfare Officer, Mr. John Thaulo, between 2013 and 2016 and his eventual return to the Blantyre District Council where he remained present until his remuneration was halted.
- 2.7 Conversely, the 1st respondent, through the affidavit of Clement Maulidi, contends that posting instructions¹ were formally issued in September 2013 deploying the applicant to the Nsanje District Council to fill an existing vacancy. The 1st respondent asserts that the applicant failed to comply with these instructions, absconded from duty for four years (2013 to 2017) and drew a government salary without rendering services while his whereabouts remained unknown. Consequently, the respondents argue that it could not reasonably be expected of the employer to accord him a hearing before halting his pay and that the applicant is, in fact, liable to refund the salary drawn between 2013 and 2017.
- 2.8 As I shall 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. These contested issues are immaterial to the disposition of this matter on points of law.

3 ISSUES FOR DETERMINATION

¹ Exhibit CM 1.

- 3.1 Having carefully considered the motion and the accompanying affidavits in support and in opposition, the issues this Court is called upon to determine are as follows:

(1) Whether this matter is suitable for disposal on a point of law;

(2) Whether the respondents were legally entitled to unilaterally withhold the applicant's salary based on allegations of abscondment without first conducting a disciplinary hearing; and

(3) Whether the conduct of the respondents amounts to an unfair labour practice, and whether the applicant is entitled to the relief sought.

4 THE APPLICABLE LAW

- 4.1 Rule 16 of the Industrial Relations Court (Procedure) Rules provides the procedure for applications or motions not expressly covered by the Rules. Furthermore, section 67(2) of the Labour Relations Act (as amended in 2021) vests this Court with the jurisdiction to determine matters of both law and fact while Rule 5A(1)(c) of the Procedure Rules expressly provides for the disposal of a matter on a point of law.
- 4.2 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 oral evidence. In *Council of the University of Malawi v. Benjamin Chirwa and Others*³, it was 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 where a legal determination will finally dispose of the matter.
- 4.3 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(1) of the Employment Act empowers an employer to take reasonable disciplinary action short of dismissal while section 56(3) explicitly prohibits an employer from imposing a fine or monetary penalty on an employee. Although the proviso to

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].

section 56(3) permits the non-payment of wages for periods of unauthorized absence without reasonable excuse and section 59(1)(e) classifies unauthorized absence as misconduct, the fundamental rules of natural justice dictate that such statutory provisions cannot be invoked to penalize an employee absent a prior hearing.

- 4.4 To maintain brevity, any further applicable statutory provisions and case authorities will be set out 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 decisions. Consequently, for the reasons set out below, the applicant’s motion must succeed.

(1) Whether this matter is suitable for disposal on a point of law;

- 5.2 The respondents have vehemently argued that because there are profound factual disagreements regarding the applicant’s reporting history between 2013 and 2017 (specifically, whether he absconded from duty and whether he drew public funds without working), this matter is unsuitable for summary disposition and must proceed to a full trial. The respondents submit that the minutes of the pre-hearing conference held on 4 September 2023 reveal heavily contested factual disputes.
- 5.3 Having regard to the circumstances of the instant motion, I remain unpersuaded by the respondents’ contentions. It is my considered view that the respondents fail to appreciate the critical distinction between a dispute of material fact regarding liability and a dispute pertaining merely to quantum or historical reckoning. For a matter to be barred from disposal on a point of law under the *Charles Nsaliwa*⁴ 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 a public officer’s salary based on

⁴ Civil Appeal No. 30 of 2015 [Unreported] at pp. 5-6.

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 2nd respondent stopped paying the applicant's salary in September 2017 following an informal verbal exchange; (b) the sole justification for this cessation was alleged abscondment; and (c) no formal disciplinary hearing was convened prior to, or at the time of, the cessation of his salary.

5.5 The factual disputes regarding whether the applicant followed oral directions from Mr. Chamba and Mrs. Ajawa, whether his presence at the Chiradzulu or Blantyre District Councils constituted valid service between 2013 and 2017 and the exact monetary set-offs or refunds claimed by the State, are entirely immaterial to this threshold legal question. These are quintessential disputes of quantum, arithmetic or accounting that can be properly and adequately resolved during a subsequent assessment of applicable remedies.

5.6 Therefore, since the material facts concerning liability are admitted and agreed upon, the question of liability is unequivocally ripe for disposition on a point of law. To subject the parties to a full trial on liability in these circumstances would occasion unwarranted delay and offend the interests of justice. The first issue is accordingly resolved in the affirmative.

(2) Whether the respondents were legally entitled to unilaterally withhold the applicant's salary based on allegations of abscondment without conducting a disciplinary hearing;

5.7 On the second issue, which raises a substantive question of law, this Court finds unequivocally that the respondents' conduct flagrantly contravened the clear and unambiguous provisions of the Employment Act and the Constitution of the Republic. The respondents argue that because the applicant allegedly absconded for four years and his whereabouts were unknown, it could not reasonably be expected of the employer to accord him a hearing before halting his salary under the proviso to section 56(3) of the Employment Act. They further contend that summoning him to a disciplinary hearing in May 2021 satisfied any procedural justice requirement.

- 5.8 This Court firmly rejects that argument. The legal issues raised in this matter are on all fours with the principles enunciated by this Court in *Flora Jelenje Makata v. South Atlantic Asset Management Limited*⁵. In *Makata*⁶, as in the present case, an employer sought to justify the unilateral suspension of pay on grounds of unproven abscondment without a prior disciplinary hearing. I reaffirm the established jurisprudence in these terms: while an employee's unauthorized absence constitutes serious misconduct under section 59(1)(e) of the Employment Act, an employer cannot unilaterally impose the severe monetary sanction of withholding a salary.
- 5.9 Section 56(3) of the Employment Act expressly provides that: “[...] *no employer shall impose a fine or other monetary penalty on an employee.*” By unilaterally halting the applicant's salary in September 2017 while maintaining him on the civil service roster, the respondents levied an unlawful and indefinite monetary penalty. If the respondents genuinely believed the applicant had absconded, the law dictates a mandatory and statutorily prescribed procedure: formulating charges, summoning the officer to a disciplinary hearing, according him the right to be heard and, if culpability is established, imposing a sanction under section 56(2) or summarily dismissing him under section 59(1)(e). What the employer cannot do, and what this Court will never condone, is bypass all due process to unilaterally deprive an employee of contractually guaranteed remuneration.
- 5.10 Admittedly, the proviso to section 56(3) permits an employer to withhold wages for the specific period an employee is absent without permission and without reasonable excuse. However, as this Court held in *Makata*⁷, this statutory concession is strictly conditional upon the objective fact of unauthorized absence being established through due process. Where the factual circumstances of an employee's absence are disputed (as they are here, where the applicant asserts he was acting under verbal instructions from Ministry headquarters), an employer cannot unilaterally invoke the proviso in section 56(3) to suspend remuneration indefinitely without first subjecting the employee to a formal disciplinary hearing.
- 5.11 Section 43 of the Constitution serves as the bedrock of this analysis. It guarantees the right to lawful and procedurally fair administrative action. As established in

⁵ IRC Matter No. 619 of 2023.

⁶ As above.

⁷ As above n.5.

*Jawadu v. Malawi Revenue Authority*⁸, *Chawani v. Attorney General*⁹ and *Zodetsa v. Council of the University of Malawi*¹⁰, an administrative body or public employer cannot act as a judge in its own cause regarding disputed allegations of misconduct. To allow the State to unilaterally declare an officer an absconder and halt his remuneration without a hearing reduces constitutional procedural fairness to a nullity. It would permit public institutions to wield the section 56(3) proviso as an instrument of arbitrary economic coercion.

- 5.12 Furthermore, the respondents' attempt to cure this illegality by issuing a disciplinary hearing summons on 11 May 2021 (nearly four years after stopping his salary and only after the applicant had instituted court action) is legally ineffective. An *ex post facto* summons issued under the shadow of litigation cannot retroactively validate an administrative act that was void *ab initio* for lack of procedural fairness. The defence raised under the section 56(3) proviso is legally incompetent as a threshold defence to liability.
- 5.13 During oral submissions, Counsel for the respondents suggested that the Blantyre District Council was not the proper party, asserting that the Nsanje District Council ought to have been sued. That argument is devoid of merit. The uncontroverted record demonstrates that the verbal decision to halt the applicant's salary was executed by Mrs. Chikhosi, the Human Resources Officer of the Blantyre District Council and the post-litigation hearing summons was authored by the Blantyre District Council. As a government agency whose administrative actions are directly challenged, the Blantyre District Council is properly joined as a respondent alongside the Attorney General, who acts as the principal legal advisor to the State.
- 5.14 That said, the respondents are not precluded from raising the applicant's actual work attendance during assessment proceedings. At that stage, the respondents remain at liberty to adduce evidence regarding specific periods of unauthorized absence between 2013 and 2017 and any substantiated set-off or deduction may be considered by the Court in computing the final monetary award.

⁸ IRC Matter No. 90 of 2008.

⁹ [2000-2001] MLR 213.

¹⁰ IRC Matter No. 436 of 2005.

5.15 Accordingly, the respondents possessed no legal authority to unilaterally withhold the applicant's salary without a prior hearing and the second issue is, thus, resolved in favour of the applicant.

(3) Whether the conduct of the respondents amounts to an unfair labour practice, and whether the applicant is entitled to the relief sought.

5.16 This issue must also be answered in the affirmative. The arbitrary, unilateral and unprocedural cessation of a civil servant's remuneration by a public institution for nearly four years 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 relations¹¹. The respondents' conduct fails every element of this standard and constitutes an egregious unfair labour practice in direct violation of section 31(1) of the Constitution.

5.17 It follows, ineluctably, that the applicant is entitled to all the relief sought as set out in IRC Form 1. He is also entitled to damages for the unfair labour practices¹² to which he was subjected.

6 CONCLUSION

6.1 In light of the material undisputed facts, the applicable law and the foregoing analysis, the applicant's motion carries the day. Judgment on liability is hereby entered in favour of the applicant and against the respondents. The respondents are ordered to pay the applicant his unlawfully withheld salary and allowances as pleaded, as well as damages for unfair labour practices.

6.2 Regarding the assessment of the specific quantum of relief, this Court notes that while the applicant thoroughly addressed the subject of quantum of damages for unfair labour practices in his written submissions, the respondents did not. Furthermore, neither party specifically addressed the Court during oral arguments or in their written submissions on the exact computations of the withheld salary

¹¹ *Kalinda v Limbe Leaf tobacco Ltd* Civil Cause No. 542 of 1995 [Unreported].

¹² See section 31(1) as read with sections 46(2)(a) and 46(4) of the Constitution of the Republic of Malawi.

and allowances, nor the specific set-off figures regarding the 2013–2017 period. 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 relief without allowing them the opportunity to adduce evidence or make detailed submissions on the same. Accordingly, I shall defer the assessment of relief and, in the interim, I direct as follows:

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

(b) Failing such agreement, this Court shall preside over a remedy hearing to assess the relief 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 The 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*¹³, this decision is inchoate for purposes of appeal. It may only be appealed to the High Court once this Court renders its final order on the assessment of relief or if the parties settle the quantum as directed. For the avoidance of doubt, while the right of appeal subsists under section 65(2) of the Labour Relations Act, it is currently stayed pending the conclusion of the assessment proceedings or the parties reaching a mutual agreement on the same.

6.4 It is so ordered.

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



Tamanda Chris Nyimba
ACTING CHAIRPERSON

¹³ MSCA Civil Appeal No. 52 of 2016 [unreported].