



THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 274 OF 2026

In the dispute between:

HATCHSON RUSK MKWAPATIRA & 15 OTHERS.....APPLICANTS

-AND-

**MALAWI COMMUNICATIONS REGULATORY
AUTHORITY (MACRA).....RESPONDENT**

CORAM:	TAMANDA C. NYIMBA	: Acting Chairperson
	Khumbo Bonzoe Soko	: Counsel for the Applicants
	Dzimphonje & Kalima	: Counsel for the Respondent
	Mike Chipembere	: Court Clerk

RULING

1 PRELIMINARIES

- 1.1 Before this Court is a notice of motion filed by the applicants seeking the disposal of this matter on points of law pursuant to section 67(2) of the Labour Relations Act (as amended) as read with Rules 5A(1)(c), 16(1) and 25(4) of the Industrial Relations Court (Procedure) Rules.
- 1.2 The applicants move this Court to determine the following points of law: (a) whether, based on the totality of the uncontested facts in this case, the respondent can be said to have given the applicants valid reasons connected to their capacity or conduct of the employees or based on the operational requirements of the respondent before dismissing them; (b) whether based on the totality of the uncontested facts in this case, the respondent can be said to have afforded the applicants the opportunity to be heard before dismissing them; (c) whether in the circumstances of this case, the applicants were unfairly dismissed; and (d) whether, depending on the Court's answers to the foregoing questions, judgment should be

entered for the applicants on their claims with a trial only being limited to the question of the quantum of compensation under the different heads claimed.

1.3 According to the applicants' Amended Statement of Claim, the specific heads of claim are: (a) an order for compensation for unfair dismissal representing remuneration that the applicants would have earned up to the end of the retirement for unfair dismissal or such other amount as the Court shall deem just and equitable in the circumstances; (b) an order for compensation for violation of the applicants' rights under section 31 of the Constitution; (c) in the case of the 2nd applicant, an order compelling the respondent to offer him the vehicle that he was using for sale; (d) an order for payment of outstanding leave days (e) severance allowance; and (f) an order for costs on an indemnity scale.

1.4 The applicants' motion is supported by affidavits deposed to by Harry Champita (2nd applicant), Agnes Magawa (12th applicant) and Alli Sibanda (16th applicant). In opposition, the respondent filed an affidavit deposed to by Henry Macheso, its Head of Human Resources and Administration, accompanied by skeleton arguments. Both parties adopted their voluminous sworn papers and presented comprehensive oral arguments during a virtual hearing before me.

1.5 As a preliminary matter, the Court notes that on 1 July 2026, a Consent Order was filed amending the applicants' Statement of Claim to formally join Alli Sibanda as the 16th applicant. Furthermore, at the commencement of the hearing, Counsel for the applicants, Mr. Khumbo Bonzoe Soko, clarified that of the two motions pending on the record, the motion for urgent interim relief and the motion for disposal on points of law, the applicants elected to prioritize the substantive motion for summary disposal. Accordingly, I directed that the substantive motion be heard first, reserving the applicants' right to formally withdraw the interlocutory application for interim relief following the delivery of this ruling if the applicants so elect.

2 THE FACTUAL MATRIX

2.1 Under the summary procedure invoked by the applicants herein, it is a well-established principle that this Court must proceed upon uncontested facts; namely, those proven, admitted or otherwise agreed upon by the parties. Furthermore,

material facts, in this context, are those bearing directly upon the threshold question of liability as distinguished from collateral controversies or arithmetic details going strictly to issues of quantum or a remedy hearing.

- 2.2 The core undisputed material facts, as gleaned from the pleadings – specifically IRC Forms 1 and 2 as well as the sworn papers filed in relation to the present motion – are as follows:
- 2.3 Between 2023 and 2024, the respondent, a statutory corporation established under Section 4 of the Communications Act, publicly advertised various vacancies, conducted competitive interviews and formally recruited the 1st through 15th applicants. The 16th applicant (Alli Sibanda) was similarly recruited following a competitive process in July 2025. All the applicants received formal offer letters, accepted their appointments and entered into continuous service.
- 2.4 All the applicants, save for the 12th applicant (Agnes Magawa) and 16th applicant, successfully completed their initial probationary periods and were formally confirmed in their appointments. They discharged their duties faithfully and the respondent accepted and remunerated their services without complaint regarding their conduct or work performance.
- 2.5 From 6 to 10 January 2026, the respondent, with the approval of the Comptroller of Statutory Corporations, conducted an internal Human Resources Audit to review historical staffing levels and recruitment procedures across its establishment. On 4 March 2026, at its 6th Extraordinary Meeting held virtually, the Board of the respondent deliberated upon the HR Audit Report and passed a formal resolution¹ resolving to terminate the employment of specific staff categories. Specifically, the Board resolved to terminate employees who lacked requisite formal qualifications at recruitment as well as those who were offered employment despite not having ranked first in interview results without written justification.
- 2.6 On 24 March 2026, the applicants were called to individual sessions with respondent's Human Resource Officers. Immediately thereafter, the respondent

¹ Exhibit HM 4.

issued individual summary termination letters to all applicants². The sole reasons assigned in the termination letters were “irregular recruitment” specifically alleging that the applicants either lacked formal qualifications at entry or were offered jobs without having ranked first in interviews.

- 2.7 It is common cause that at no point prior to issuing the termination letters did the respondent formulate formal disciplinary charges, issue disciplinary case complaint forms³ under clause 14 of the respondent’s Terms and Conditions of Service or convene an *ad hoc* Disciplinary Committee. It is similarly common cause that no applicant was terminated for poor job performance, incompetence or post-appointment misconduct.
- 2.8 This concludes the factual background material to the determination of the present motion.

3 THE PARTIES’ ARGUMENTS AND SUBMISSIONS

- 3.1 To avoid redundancy, Counsel’s material submissions will be addressed progressively as they arise within the legal analysis of the issues calling for determination. However, I must take a moment to express my gratitude to learned Counsel on both sides for the remarkable depth, eloquence and erudition displayed in their written submissions and oral arguments. Their industry has greatly aided the preparation of this ruling. I assure the parties that I have meticulously considered all material facts, arguments and legal authorities canvassed before me. Therefore, the mere absence of an express reference to a particular submission within the body of this ruling should by no means be construed as a failure by this Court to take it into account.

4 ISSUES FOR DETERMINATION

- 4.1 I am acutely alive to the specific questions of law put forward by the applicants for this Court’s resolution. However, this Court is by no means constrained to frame the issues exclusively as drafted by the parties; rather, it is duty-bound to determine the matter based on its own factual, evidential and legal appreciation of the dispute. It is often the case that the true questions for resolution crystallize only after the

² Exhibits HC 15–26 and HM 5.

³ Form 11.

evidence is fully evaluated and arguments exhaustively made. Accordingly, having thoroughly reviewed the pleadings, affidavits, oral and written submissions, I find that the central questions of law requiring this Court's determination are as follows:

- (a) Whether this matter is suitable to be disposed of on points or questions of law;*
- (b) Whether an employer can lawfully terminate employment under Section 57(1) of the Employment Act on grounds of "irregular recruitment" and whether pre-employment recruitment procedures fall within the statutory concept of "capacity";*
- (c) What is the legal effect of section 4(2)(a) of the Communications Act (perpetual succession) and the indoor management rule (Turquand case) on the respondent's attempt to impeach its own recruitment process;*
- (d) Whether based on the material uncontroverted facts, the applicants were unfairly dismissed by reason of not being afforded an opportunity to be heard in accordance with statutory and contractual mandates, that is, section 57(2) of the Employment Act, section 43 of the Constitution and Clause 14 of the respondent's Conditions of Service;*
- (e) What are the legal rights of probationary employees (12th and 16th applicants) under section 26 of the Employment Act;*
- (f) Whether the respondent should be condemned in costs on an indemnity scale under section 72(2) of the Labour Relations Act.*

5 THE APPLICABLE LAW

5.1 This being a civil action, the burden of proof is on the party who asserts the affirmative,⁴ namely the applicant. As regards the standard of proof in civil cases, the same is on a balance of probabilities.

⁴*Chipiliro Banda v Southern Bottlers Ltd* [2012] MLR 53 (HC).

- 5.2 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.
- 5.3 In *Charles Nsaliwa v. Malawi Communications Regulatory Authority*⁵, 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*⁶, 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.
- 5.4 These principles were applied by this Court in *Alex Malikebu & 3281 Others v ADMARC Limited*⁷, *Flora Jelenje Makata v South Atlantic Asset Management*⁸ and *Gladson Msyali v Malawi Housing Corporation*⁹. What these cases establish is that summary disposal is proper where the material facts establishing liability are admitted, leaving non-material collateral controversies or quantum details to the subsequent remedy hearing.
- 5.5 Section 57(1) of the Employment Act mandates that an employee's employment shall not be terminated unless there is a valid reason connected with capacity or conduct while section 57(2) strictly prohibits termination for conduct or capacity before providing the employee an opportunity to defend himself. Sections 31(1) and 43 of the Constitution guarantee every person the right to fair labour practices and procedurally fair administrative action respectively.
- 5.6 Section 4(2)(a) of the Communications Act provides that the respondent is a body corporate with perpetual succession.

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

⁶ Civil Appeal Number 12 of 2016 (Being IRC Matter No. 195 of 2014) [Unreported].

⁷ IRC Matter No. 554 of 2023.

⁸ IRC Matter No. 619 of 2023.

⁹ IRC Matter No. 99 of 2024.

5.7 Concerning costs, section 72(2) of the Labour Relations Act provides that the Industrial Relations Court may make an order as to costs where a party fails to attend, without good cause, any conciliation meeting convened under the Act or where the matter is vexatious or frivolous.

5.8 In the interests of brevity, I undertake to cite, where relevant, the rest of the applicable statutory or case law in appropriate places in the “*Analysis and Disposal*” segment of this ruling.

6 ANALYSIS AND DISPOSAL

6.1 This Court consistently avoids placing litigants in “gratuitous suspense” regarding its ultimate decisions. For the detailed reasons set out below, it is my considered determination that the applicants’ motion succeeds in its entirety.

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

6.2 Counsel Soko argued that a trial is a judicial mechanism designed exclusively to reconstruct contested past facts. He submitted that where the facts establishing liability are admitted or documented beyond dispute, subjecting litigants to a full trial imposes unnecessary financial expense and anxiety. Relying on the cases of ***Charles Nsaliwa***¹⁰ and ***Council of the University of Malawi***¹¹, Counsel submitted that the disposal of a matter on a point of law is mandated where the dispositive facts are uncontested.

6.3 Counsel Soko pointed out that all the core liability facts (namely: recruitment, the issuance of offer letters, continuous service, the HR audit, the Board resolution to terminate and the summary termination letters citing “irregular recruitment”) are uncontested by the respondent. He urged this Court to hold that the respondent’s attempt to resist summary disposal by raising collateral arguments regarding interview scorecards or qualification submission protocols is a red herring that cannot bar the disposal of this matter on points of law.

¹⁰ n.5 above.

¹¹ n.6 above.

- 6.4 Conversely, Counsel Dzimphonje and Counsel Kalima vehemently contended that the disposal of a case on a point of law is strictly barred whenever any factual dispute exists on the record. Also citing *Charles Nsaliwa*¹², Counsel submitted that there are extensive factual disagreements requiring cross-examination at trial. Specifically, Counsel enumerated a number of purported factual disputes, including: whether the individual sessions with the applicants on 24 March 2026 constituted the applicants being heard; whether the Board applied a differentiated and considered approach to the affected employees depending on the specific nature and category of the irregularity identified in each case; and whether the probationary employees were on extended probation and had failed to exhaust internal grievance machinery.
- 6.5 In resolving this issue, this Court must scrupulously distinguish between genuine disputes of material fact bearing on liability and non-material or collateral controversies. As held in *Council of the University of Malawi*¹³ and by this Court in *Gladson Msyali*¹⁴ and *Timothy Siyado and Others v HLB Reliance Consulting Limited Malawi and Another*¹⁵, a factual dispute is only “material” if it has a bearing on the elements of the point(s) of law invoked by the moving party. Put another way, if the disputed fact has no bearing on the elements of the moving party’s claim, the dispute is not material and disposal of the matter on a point of law remains appropriate.
- 6.6 It is therefore necessary to rigorously test the purported material factual disputes advanced by the respondent to determine whether any of them truly bear on liability.
- 6.7 First, regarding the respondent’s averment that lower-ranked candidates or those lacking the requisite qualifications were appointed, the reality remains that even if the respondent were to prove these assertions conclusively at trial, they would provide absolutely no legal defence under section 57(1) of the Employment Act. Plainly, pre-employment administrative errors committed by an employer do not constitute “capacity or conduct” issues attributable to the employee. Furthermore,

¹² n.5 above.

¹³ n.6 above.

¹⁴ n.9 above.

¹⁵ Matter Number IRC 353 of 2023.

under the indoor management rule espoused in *Royal British Bank v Turquand*¹⁶, the respondent is legally estopped from exploiting its own internal recruitment lapses to the detriment of innocent employees.

- 6.8 Second, regarding the respondent’s claim that the one-on-one sessions on 24 March 2026 were interactive, I find this dispute to be legally immaterial. The respondent’s Board had already passed a binding resolution to terminate the applicants three weeks earlier, on 4 March 2026, rendering any subsequent sessions a predetermined formality.
- 6.9 Third, addressing the respondent’s argument that the Board applied a differentiated and considered approach by categorizing the terminations based on gravity, I note that categorizing unlawful terminations does not transmute an invalid termination into a valid statutory dismissal under section 57 of the Employment Act.
- 6.10 Fourth, concerning the respondent’s argument regarding probationary extensions, the law is very clear. Whether an employee is on probation or confirmed, arbitrary dismissal without valid reasons and procedural justice is proscribed. It is a settled position in employment law that, while an employee on probation may be terminated without notice, they nonetheless retain the right to know the reason for their dismissal or the employer’s refusal to confirm them in employment¹⁷.
- 6.11 Thus, the material facts bearing on the dispositive questions of liability are entirely undisputed. The respondent herein recruited the applicants, issued offer letters, confirmed them or retained them on probation, received their continuous services and summarily terminated them citing “irregular recruitment”, all without formulating misconduct charges under clause 14 of the respondent’s Terms and Conditions of Service. Because no amount of oral evidence at trial will alter the legal conclusion that “irregular recruitment” is not a lawful ground for dismissal under section 57 of the Employment Act in the circumstances of this case, this matter is wholly ripe for summary disposal on points of law. I so hold.

(2) Whether an employer can lawfully terminate employment under section 57(1) of the Employment Act on grounds of “irregular recruitment” and

¹⁶ (1856) 6 E & B 327.

¹⁷ *Sheha v Malawi Revenue Authority*, Matter IRC 113 of 2002.

whether pre-employment recruitment procedures fall within the statutory concept of “capacity”;

6.12 Counsel Soko submitted that under section 57(1) of the Employment Act, employment shall not be terminated unless there is a valid reason connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking. Counsel pointed out that the respondent’s termination letters explicitly cited “irregular recruitment” resulting from an internal HR audit as the sole reason for dismissal. Counsel argued that “irregular recruitment” in the circumstances of this matter is an administrative defect attributable solely to the employer and does not constitute a reason connected with the capacity or conduct of the employee nor is it based on operational requirements under section 57(1). In response to the respondent’s argument that recruitment ranking touches on “capacity”, Counsel Soko submitted that capacity is a term of art referring strictly to job performance, health and skill competency post-appointment, citing ***Ben Wanda Wanda v Standard Bank***¹⁸.

6.13 On behalf of the respondent, Counsel Dzimphonje, responding to a direct inquiry from this Court, contended that the dismissals herein fit squarely within the statutory concept of “capacity” under section 57(1) of the Employment Act. Counsel argued that where an employee fails to produce a degree certificate during recruitment or where a candidate scores lower than others on an interview scorecard, that candidate lacks the requisite “capacity” to hold the office. He submitted that “capacity” must be interpreted broadly to encompass pre-employment qualification verification and interview ranking performance.

6.14 This Court emphatically rejects Counsel Dzimphonje’s proposition as legally fallacious and unsupported by statutory authority. Section 57(1) of the Employment Act strictly limits valid reasons for termination to three exhaustive categories: (a) the capacity of the employee; (b) the conduct of the employee; or (c) the operational requirements of the undertaking. In ***Ben Wanda Wanda***¹⁹, the Court, citing ***Cosmas Banda v Nkhatabay Development Trust***²⁰, stated that

¹⁸ IRC No. 752 of 2020.

¹⁹ n.18 above.

²⁰ Matter No. IRC 75 of 2010 (Mz) (Unreported).

termination on grounds of capacity relates to an employee's inability to perform and deliver on the duties demanded of a position for which the employee represents they possess the necessary qualifications, skillsets and experience. Clearly, such an evaluation can only occur subsequent to the employee assuming office. Indeed, "capacity" assesses how an employee actually performs the duties assigned to them under their contract of employment. In the circumstances of the matter under consideration, capacity does NOT encompass pre-employment interview ranking scorecards, internal HR requisition forms or administrative recruitment procedures conducted by the employer prior to appointment.

- 6.15 In my considered view, it is legally untenable that, having hired an employee who subsequently performs their assigned duties satisfactorily and receives confirmation from management, an employer can belatedly pivot years later, conduct an internal audit and declare that the employee lacks "capacity" merely because interview scores were not strictly adhered to or because the candidate allegedly failed to file requisite certificates at the time of recruitment. It is not in dispute that no applicant was terminated for poor job performance, incompetence or medical incapacity. Thus, attempting to stretch "capacity" to cover administrative recruitment errors is an unsustainable contortion of section 57(1) of the Employment Act. Because "irregular recruitment" in the circumstances of this matter is not a valid ground under section 57(1), the summary termination of all sixteen applicants herein was substantively unfair and unlawful *ab initio*.

(3) *What is the legal effect of section 4(2)(a) of the Communications Act (perpetual succession) and the indoor management rule (Turquand case) on the respondent's attempt to impeach its own recruitment process;*

- 6.16 Counsel Soko submitted that the respondent is a body corporate created by statute under section 4(2)(a) of the Communications Act endowed with perpetual succession and an independent legal personality. Citing ***Southern Foundries v Shirlaw***²¹, ***Lennard's Carrying Co.***²² and ***British Thomson-Houston***²³, Counsel argued that changes in Board members, Ministers or Directors General do not alter the respondent's legal identity or liabilities. Furthermore, Counsel relied on the

²¹ [1940] AC 701.

²² [1915] AC 705.

²³ [1932] 2 KB 176.

time-honoured indoor management rule formulated in *Turquand*²⁴. He argued that prospective employees dealing with executive management in good faith are entitled to assume that all internal recruitment requisitions, Board approvals and ranking protocols were fully satisfied. Consequently, the respondent cannot disown its own employment contracts or declare them void *ab initio* due to internal administrative irregularities.

- 6.17 In contrast, Counsel for the respondent submitted that the respondent was legally justified in terminating the applicants because the recruitments were tainted by administrative irregularities committed by former management. Counsel argued that where an executive management team bypasses internal recruitment policies or Board requisitions, the resulting contracts of employment are unlawful, void *ab initio* and unenforceable. The respondent argued that a statutory body must be allowed to purge its payroll of irregularly appointed staff in the public interest.
- 6.18 Section 4(2)(a) of the Communications Act is clear that the respondent is a body corporate with perpetual succession. It possesses a legal identity that is distinct and continuous, unaffected by changes in its Board or executive management. As Counsel Soko aptly put it, the respondent cannot suffer from corporate amnesia nor can it disown legal obligations validly created by prior management simply because a new Board or executive team has assumed office.
- 6.19 Furthermore, the indoor management rule in *Turquand* is a foundational pillar of corporate and public law. External third parties, including job applicants responding to public advertisements, who deal with a corporate entity in good faith are entitled to assume that internal administrative protocols, organograms, Board authorizations and scoring procedures were properly complied with. The applicants herein, at the time they were mere job applicants, were total strangers to the respondent's internal Board minutes and interview mark-sheets.
- 6.20 It follows that an employer cannot exploit its own internal administrative irregularities to prejudice innocent employees who accepted formal job offers in good faith, who perhaps resigned from previous employment and who thereafter rendered satisfactory service. The respondent issued formal appointment letters,

²⁴ n.16 above.

received the applicants' labour, remunerated them and confirmed them in their positions. In these circumstances, the respondent is firmly estopped in law from asserting that its own contracts were void *ab initio*. Put differently, where the employee is innocent, unaware of any irregularities, or the fault lies predominantly with the employer, the employer cannot use their own wrongdoing as a shield to defeat the employee's claims for unfair dismissal²⁵. The contracts of employment were valid and binding and the respondent remained strictly bound by the substantive and procedural safeguards of the Employment Act when electing to terminate them. I so hold.

(4) Whether based on the material uncontroverted facts, the applicants were unfairly dismissed by reason of not being afforded an opportunity to be heard in accordance with statutory and contractual mandates, that is, section 57(2) of the Employment Act, section 43 of the Constitution and Clause 14 of the respondent's Conditions of Service;

6.21 Counsel Soko submitted that section 57(2) of the Employment Act and section 43 of the Constitution guarantee every employee the fundamental right to a hearing prior to termination. Citing ***Ernest Mtingwi v MRA***²⁶ and ***Khoswe v National Bank of Malawi***²⁷, Counsel argued that procedural justice requires specific written charges, adequate time to prepare and a hearing before an impartial panel. Furthermore, Counsel pointed out that clause 14 of the respondent's Terms and Conditions of Service lays down a mandatory disciplinary procedure requiring written charges, seven days to respond and a formal panel hearing. Counsel submitted that general inquiries during an HR audit do not constitute a hearing and that the one-on-one sessions on 24 March 2026 were a predetermined *fait accompli* because the Board had already resolved to terminate the applicants on 4 March 2026.

6.22 Counsel for the respondent argued that the respondent complied with procedural justice because the applicants participated in the HR audit sessions in January 2026, where they were interviewed regarding their recruitment backgrounds.

²⁵Over and above *Turquand* see also, *Shrewsbury & Telford Hospital NHS Trust v Lairikyengbam* [2009] UKEAT 0014_09_2108; *Eastbourne Borough Council v Foster* [2002] ICR 234 (Court of Appeal) and *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551 (Court of Appeal).

²⁶ Civil Cause No. 312 of 2003.

²⁷ IRC Matter No. 420 of 2012.

Furthermore, Counsel pointed out that on 24 March 2026, the applicants were called to individual sessions with HR officers where the audit findings were explained to them before the termination letters were delivered. The respondent contended that these interactions satisfied the requirements of procedural or natural justice.

- 6.23 I begin my analysis of this issue with section 57(2) of the Employment Act. This provision explicitly mandates that employment shall not be terminated for reasons connected with capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made. Furthermore, section 43 of the Constitution guarantees the right to lawful, reasonable and procedurally fair administrative action.
- 6.24 In the present matter, the HR audit conducted by the respondent was an information-gathering exercise, entirely distinct from a disciplinary hearing. General question-and-answer sessions during an administrative audit do not, in my considered opinion, satisfy the stringent requirements of section 57(2). Furthermore, the respondent completely bypassed clause 14 of its own Terms and Conditions of Service which strictly requires formal written charges, seven days to respond and a disciplinary panel hearing.
- 6.25 Most conclusively, the documentary evidence reveals that the respondent's Board passed a resolution on 4 March 2026 directing the immediate summary termination of the applicants. When the applicants were summoned to one-on-one sessions three weeks later, on 24 March 2026, their termination letters had already been printed and signed. I entirely agree with learned Counsel Soko that summoning an employee merely to receive a predetermined decision letter is a *fait accompli* and a procedural sham. I therefore rule, ineluctably, that the terminations effected by the respondent on the applicants were egregiously procedurally unfair.

(5) What are the legal rights of probationary employees (12th and 16th applicants) under section 26 of the Employment Act;

- 6.26 Counsel Soko submitted that under section 26 of the Employment Act and established case authorities²⁸, probationary employees enjoy full statutory protection under section 57 of the Employment Act and cannot be dismissed arbitrarily. Regarding Agnes Magawa, the 12th applicant in this matter, Counsel pointed out that her six-month probation expired on 25 September 2025 with a “very good” appraisal. Relying on *Y.S. Sumaili v Malawi College of Healthy Sciences*²⁹, Counsel submitted that an employer cannot unilaterally extend a probation period without the consent of the employee. Therefore, an employee whose probation expires with a satisfactory appraisal is confirmed by implication or operation of law. It follows that the respondent’s delayed attempt on 12 January 2026 to extend her probation by three months was an invalid afterthought. Regarding Alli Sibanda, the 16th applicant, Counsel submitted that terminating his probation devoid of any performance-related grounds violated section 57 of the Employment Act and section 31 of the Constitution.
- 6.27 Counsel for the respondent countered that probationary employees do not enjoy security of tenure. The respondent’s contention is effectively that, under section 26 of the Employment Act, an employer retains absolute discretion to extend probation or terminate employment during or at the conclusion of probation if recruitment irregularities are discovered.
- 6.28 In determining this issue, it must be stated first and foremost that while section 26 of the Employment Act provides for probationary periods, it does NOT create a license for arbitrary dismissal. In *Sheha v Malawi Revenue Authority*³⁰, it was decisively established that probationary employees are protected by the substantive safeguards of section 57 of the Employment Act. They can only be terminated for valid reasons connected with performance or conduct and only after the observance of due process.
- 6.29 Regarding Agnes Magawa, the 12th applicant, it is undisputed that her six-month probation expired on 25 September 2025 and that the respondent appraised her performance as “very good”. As held in *Mary Mbwana v Blantyre Sports Club*³¹,

²⁸ *Sheha v Malawi Revenue Authority*, Matter IRC 113 of 2002.

²⁹ Civil Cause 371 of 2007.

³⁰ Matter IRC 113 of 2002.

³¹ Civil Cause 1430 of 2009.

where an employer retains a probationary officer after the probation period expires without expressing dissatisfaction, the officer is confirmed by implication. The respondent's attempt three months later, on 12 January 2026, to unilaterally extend her probation was a legal nullity.

- 6.30 Concerning Alli Sibanda, the 16th applicant, the termination of his probation on grounds of “irregular recruitment” without any poor performance charges, plainly violated section 57 of the Employment Act and constituted an unfair labour practice under section 31 of the Constitution. Consequently, the 12th and 16th applicants are equally entitled to full judgment on liability.

(6) Whether the respondent should be condemned in costs on an indemnity scale under section 72(2) of the Labour Relations Act.

- 6.31 On the issue of costs, Counsel Soko forcefully urged the Court to condemn the respondent in costs on an indemnity scale pursuant to section 72(2) of the Labour Relations Act and the authority of *Chithila v CEAR*³². Counsel argued that the respondent's defence (namely, attempting to fit irregular recruitment into “capacity”, disowning its corporate identity contrary to the *Turquand* rule and manufacturing artificial factual disputes) was frivolous, vexatious and an abuse of process designed to delay justice.

- 6.32 Counsel for the respondent submitted that under section 72(2) of the Labour Relations Act, costs orders in this Court are strictly exceptional and restricted to the instances expressly set out therein. It was contended that the respondent raised genuine legal defences regarding the legality of the recruitment and that indemnity costs should not be utilized as a punishment against a statutory body defending public interest decisions.

- 6.33 The critical question of costs is covered under section 72(2) of the Labour Relations Act, which provides:

³² Miscellaneous Civil Application Number 53 of 2023.

“The Industrial Relations Court may make an order as to costs where a party fails to attend, without good cause, any conciliation meeting convened under this Act, or where the matter is vexatious or frivolous.”

- 6.34 An indifferent reading of section 72(2) may lead one to the erroneous impression that cost orders in this Court are strictly confined to situations where an applicant files a groundless claim or that unreasonable litigation conduct by an employer is beyond the reach of section 72(2). This Court firmly rejects that narrow interpretation as textually untenable and legally unsustainable.
- 6.35 First, Parliament deliberately deployed the broad term “*matter*” in the phrase “*where the matter is vexatious or frivolous*”. In judicial proceedings, a “*matter*” encompasses the entire trade dispute, cause and legal contest before the Court which necessarily includes the defence mounted by a respondent. To hold that only an applicant’s statement of claim can render a matter frivolous or vexatious, while an employer’s defence enjoys immunity from such characterization, would flagrantly violate the constitutional right to equality before the law.
- 6.36 In jurisprudence, the phrase “frivolous or vexatious” denotes a position, claim or defence that is obviously unsustainable, groundless, artificial or a sham³³. As Counsel Soko brilliantly argued, if a claimant who files an obviously unsustainable claim can be penalized with costs, then by equal measure, an employer who mounts an obviously unsustainable, artificial and legally hopeless defence – forcing innocent employees to institute litigation and expend scarce resources to vindicate clear statutory rights – renders the defence and the continued litigation “frivolous or vexatious” within the true meaning of section 72(2) of the Labour Relations Act.
- 6.37 I agree with Counsel Soko that when the respondent’s defence is rigorously scrutinized, it falls squarely within this statutory definition. The respondent sought to justify summary terminations by artificially forcing “irregular recruitment” into the statutory pigeonhole of “capacity” under section 57(1), a position unarguable in law given the impeccable reasoning in *Ben Wanda Wanda*³⁴. The respondent pleaded that the recruitments were void *ab initio*, conveniently ignoring section

³³ *Att.-Gen. of Duchy of Lancaster v. L. & N. W. Ry* [1892] 3 Ch. 274 and *Day v. William Hill (Park Lane) Ltd* [1949] 1 K.B. 632.

³⁴ n.18 above.

4(2)(a) of the Communications Act and the indoor management rule espoused in *Turquand*. In my considered view, mounting a defence that is unarguable in law, coupled with the manufacturing of artificial factual controversies, renders the respondent’s defence manifestly frivolous and vexatious.

6.38 Having established that section 72(2) of the Labour Relations Act empowers this Court to award costs in these circumstances, the scale of such costs remains within this Court’s discretion³⁵. While costs are ordinarily assessed on a standard party-and-party basis, courts retain the equitable discretion to award costs on an indemnity scale where a party’s conduct takes the case “out of the norm”³⁶.

6.39 In our jurisprudence, as held by the High Court Commercial Division in *Rombani Londwa v Standard Bank*³⁷ and *Mpinganjira v Registrar of Financial Institutions*³⁸, where a party’s conduct in litigation or in the underlying actions takes the case “out of the norm” and displays high-handedness or unreasonable obstinacy, the Court will exercise its discretion to condemn that party in costs on an indemnity scale. In the present matter, the respondent, a statutory regulator funded by public resources, acted with egregious heavy-handedness. It abruptly terminated sixteen employees, bypassed the procedural safeguards of section 57 of the Employment Act and clause 14 of its own Conditions of Service and compelled the applicants into needless litigation on the back of a legally hopeless defence. To ensure the applicants receive full indemnity for the legal expenses incurred in defeating this unarguable defence, costs are hereby awarded to the applicants on an indemnity scale.

7 CONCLUSION

7.1 On an overall conspectus of the agreed facts, statutory provisions and authoritative precedents, I find that the applicants’ motion for the disposal of this case on points of law is unanswerable. There are no genuine issues of material fact requiring a trial on liability. To sum up and avoid potential ambiguity, this Court orders as follows:

³⁵ *Chithila v CEAR* Miscellaneous Civil Application Number 53 of 2023.

³⁶ *Excelsior Commercial Holdings Ltd v Salisbury Hammer Aspden* [2002] EWCA Civ 879; *Three Rivers District Council v Bank of England* [2004] UKHL 48; *Kiam v MGN (No. 2)* [2002] 1 WLR 2810.

³⁷ Commercial Case No 32 of 2022.

³⁸ Civil Appeal No. 1 of 2022.

- (1) *The applicants' motion for disposal of a matter on points of law is hereby granted in its entirety;*
- (2) *Judgment on liability is hereby entered in favour of all sixteen applicants against the respondent on all their claims.*
- (3) *The parties are at liberty to amicably agree on quantum of the reliefs as earlier set out;*
- (4) *Failing such agreement, this Court shall convene a remedy hearing on a date and at a time to be fixed following the filing of the requisite assessment papers by both parties and a notice of hearing by the applicants.*
- (5) *The respondent is condemned in the costs of these proceedings on an indemnity scale to be agreed upon by the parties or taxed by the Registrar of this Court.*

7.2 The determination of the liability question concludes the first phase of the applicants' suit. Under the authority of *JTI Leaf (Malawi) Limited v. Kad Kapachika*³⁹, this decision remains inchoate for appeal purposes. It may only be appealed to the High Court once this Court has rendered its order on the assessment of remedies or upon the parties registering a consent order settling the same. For the avoidance of doubt, while the right of appeal under section 65(2) of the Labour Relations Act subsists, it is effectively stayed pending the conclusion of the remedies phase or the parties reaching a mutually binding agreement on the quantum of the reliefs.

7.3 It is so ordered.

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



Tamanda Chris Nyimba
ACTING CHAIRPERSON

³⁹ MSCA Civil Appeal No. 52 of 2016 [unreported].