



THE MALAWI JUDICIARY

# IN THE INDUSTRIAL RELATIONS COURT

PRINCIPAL REGISTRY

MATTER NO. IRC 161 OF 2009

In the dispute between:

**SAM BETTERSON PHIRI.....APPLICANT**

**-AND-**

**UNITED GENERAL INSURANCE COMPANY**

**LIMITED (UGI).....RESPONDENT**

**CORAM:**     **TAMANDA C. NYIMBA**     : Acting Chairperson  
                 Sandra Machinjiri             : Counsel for the Applicant  
                 Lucy Mablekisi-Kusani         : Counsel for the Respondent  
                 Mike Chipembere                 : Court Clerk

## **JUDGMENT**

### **1 INTRODUCTION**

- 1.1 The applicant, a retired senior insurance professional, commenced this action against the respondent, United General Insurance Company Limited (UGI), alleging the unlawful withholding of his salary and the miscalculation of his terminal benefits following his retirement. According to his IRC Form 1, filed on 7 April 2009, the applicant seeks the recovery of the withheld salary and the payment of the shortfall in his terminal benefits.
- 1.2 The respondent resists the claim. In its Statement of Reply filed on 21 April 2009, the respondent avers that the applicant was not in its employ during a material period of secondment in Uganda and that it was not privy to the secondment agreement. The respondent further contends that the applicant's terminal benefits were correctly calculated and paid in full, predicated on the salary scale of a locally based Malawian manager.
- 1.3 The matter proceeded to full trial following the failure of the parties to amicably resolve the dispute during pre-hearing conference stage.

## 2 THE FACTUAL MATRIX

- 2.1 At the hearing, the applicant testified on his own behalf. Ms. Katija Mataya, the respondent's Human Resources and Administration Manager, testified for the respondent. From the totality of the oral and documentary evidence adduced, the material and largely undisputed facts underpinning this dispute are as follows:
- 2.2 The applicant was engaged by the respondent (then operating as Property & General Insurance Company Limited) on 1 October 1998 as a Finance Manager based in Blantyre. Upon his employment, he was enrolled into the voluntary contributory UGI Pension and Life Assurance Scheme, administered by NICO Life Insurance Company Limited. He served in this capacity until July 2002.
- 2.3 In July 2002, a vacancy arose for the position of General Manager at First Insurance Company Limited (hereinafter "FICO"), based in Kampala, Uganda. At all material times, both the respondent and FICO were sister subsidiaries of Zimre Holdings Limited (hereinafter "Zimre"), a parent holding company headquartered in Harare, Zimbabwe. Exercising its corporate oversight functions, Zimre identified the applicant as a suitable candidate for the executive post in Uganda. Consequently, the applicant was requested to proceed on secondment and a Secondment Contract dated 30 June 2002 was executed between him and Zimre. Although the formal contract was issued and executed by Zimre as "the Company", the evidence reveals that the applicant's deployment was facilitated, coordinated and implemented with the active involvement and direction of the respondent's local management.
- 2.4 Under the terms of the Secondment Contract, the applicant served as General Manager (and subsequently Chief Executive Officer) of FICO in Uganda from 1 July 2002 until 29 February 2008. The contract was renewed twice to cover this six-year period with the core terms and conditions remaining constant, save for the dates of commencement and expiry. Although FICO was responsible for remitting the applicant's monthly salary in Ugandan Shillings, Clause 9 of the Secondment Contract explicitly provided that he would continue to contribute to the UGI Pension Fund in Malawi. Any salary increments were to be communicated to the respondent to facilitate the commensurate adjustment of pension contributions. Further, Clause 11 stipulated that the applicant would remain a beneficiary under the UGI Group Life Cover.

- 2.5 During his secondment, the applicant's remuneration underwent several upward adjustments. On 24 August 2005, the applicant notified the respondent's local management that his salary at FICO had been revised to the equivalent of MK500,000.00 per month, effective 1 January 2005, and requested that NICO Life be engaged to ensure accurate pension remittances<sup>1</sup>. In response, by a letter dated 5 September 2005, the respondent's then Managing Director formally advised NICO Life of the increase in the applicant's annual salary to MK6,000,000.00<sup>2</sup>. By the expiration of the secondment in February 2008, the applicant's final monthly remuneration at FICO stood at the equivalent of MK1,200,010.00.
- 2.6 Upon the expiration of his secondment on 29 February 2008, the applicant returned to Malawi and reported for duty at the respondent's premises on 1 March 2008. He found that his substantive position of Finance Manager was occupied by a Zimbabwean expatriate, Mr. W. Mhonde, who had been seconded to the respondent during the applicant's absence. The applicant was allocated office space and instructed by the respondent's Managing Director to await the processing of a new portfolio. During this interim period, the respondent advanced the applicant a settling-in loan of MK1,000,000.00.
- 2.7 Subsequently, the parties mutually agreed that the applicant would proceed on early retirement, effective 30 September 2008. On 16 September 2008, the respondent's Managing Director wrote to the applicant<sup>3</sup> outlining the terms of the retirement. In this correspondence, the Managing Director expressly acknowledged that the applicant had reported back to the respondent on 1 March 2008, that his employment had reverted to the respondent prior to his retirement and that his severance allowance would be calculated on the basis of ten years of continuous employment (1 October 1998 to 30 September 2008). The respondent, however, maintained that the applicant's salary upon his return to Malawi was MK271,000.00 and proceeded to calculate his terminal benefits based on a gross monthly remuneration of MK478,750.00.
- 2.8 The applicant formally objected to these computations via a letter dated 19 September 2008<sup>4</sup>. He asserted that Clause 3 of the Secondment Contract guaranteed

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<sup>1</sup> Exhibit **SBP 6**.

<sup>2</sup> Exhibit **SBP 7**.

<sup>3</sup> Exhibit **SBP 8**.

<sup>4</sup> Exhibit **SBP 9**.

his reversion to the respondent's employ without loss of status to his "current grade", which, in his submission, ought to reflect his final salary drawn in Uganda. Furthermore, he highlighted that the respondent's calculations omitted his accrued leave days for the period of March to September 2008 as well as his entitlement to a Long Service Award for completing ten years of continuous service. While the respondent subsequently issued revised calculations on 23 September 2008<sup>5</sup> incorporating 15 days of leave pay and a one-month Long Service Award of MK271,000.00, it resolutely declined to calculate the terminal benefits using the final secondment salary.

2.9 On 3 October 2008, the respondent remitted two cheques to the applicant totalling MK2,245,897.86 as a purported final settlement. This sum comprised basic salary from March to September 2008 (calculated at a basic monthly rate of MK271,000.00 and a gross of MK478,750.00), 15 days' leave pay, three months' notice pay amounting to MK1,436,250.00 and a Long Service Award of MK271,000.00 less applicable statutory tax deductions and the recovery of the settling-in loan. Thereafter, on 9 October 2008, the respondent dispatched further correspondence to the applicant enclosing a cheque for MK3,300,000.00, representing his severance pay<sup>6</sup>. Significantly, the evidence demonstrates that the respondent funded this severance payment by effecting a direct deduction of the said MK3,300,000.00 from the applicant's accumulated pension fund managed by NICO Life.

2.10 The foregoing constitutes the factual matrix upon which the present claims are founded.

### **3 THE PARTIES' ARGUMENTS AND SUBMISSIONS**

3.1 The Court expresses its gratitude to learned Counsel for both parties for their comprehensive and well-researched written submissions which have been of immense assistance in the preparation of this judgment.

3.2 For the applicant, learned Counsel Ms. Sandra Machinjiri submits that the respondent remained the primary employer throughout the applicant's secondment to Uganda. She contends that at no material time was the applicant's contract of

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<sup>5</sup> Exhibit **SBP 10**.

<sup>6</sup> Exhibit **SBP 13**.

employment with the respondent terminated nor did he ever resign. Counsel relies heavily on the undisputed fact that the applicant remained a registered member of the respondent's Pension Scheme and Group Life Cover – benefits which, under the respondent's own Conditions of Service, are strictly reserved for active, permanent employees. She further posits that Zimre executed the Secondment Agreement merely in an agency capacity, facilitating the arrangement on behalf of its subsidiaries, FICO and the respondent.

- 3.3 Interpreting Clause 3 of the Secondment Agreement, which guarantees reversion “without loss of status to current grade”, Counsel argues that the applicant was entitled to return to the respondent at an executive grade with remuneration commensurate with his final secondment salary of MK1,200,010.00. Finally, she submits that the respondent's deduction of the applicant's severance pay directly from his pension fund was unlawful.
- 3.4 On the other hand, learned Counsel for the respondent, Ms. Lucy Mablekisi-Kusani, argues that the respondent was not privy to the Secondment Agreement which was executed strictly between the applicant and Zimre. Invoking the doctrine of privity of contract, Counsel contends that the respondent cannot be bound by an agreement to which it is a stranger and that any action seeking to enforce Clause 3 ought properly to have been instituted against Zimre. She further asserts that the applicant's employment was transferred to Zimre during the secondment, pointing to the fact that the respondent ceased paying his salary, which was instead borne by FICO.
- 3.5 Regarding Clause 3, the respondent submits that the phrase “current grade” denotes the position the applicant held in 2002 prior to his deployment to Uganda, namely, that of Finance Manager. The respondent maintains that upon his return, the applicant was correctly remunerated at the prevailing salary of the respondent's Finance Manager (MK271,000.00) and therefore suffered no loss of status. Crucially, the respondent highlights the applicant's failure to adduce documentary evidence substantiating that his Ugandan salary was equivalent to MK1,200,000.00. Lastly, the respondent submits that the applicant is strictly bound by his pleadings (IRC Form 1) wherein he claimed MK15,402,427.00 and cannot subsequently seek MK129,884,919.97 without formally amending his pleadings.

3.6 The parties are assured that this Court has carefully considered the entirety of their arguments and the authorities cited. The absence of a specific reference to any particular submission herein should not be construed as an omission of its consideration by this Court.

#### 4 ISSUES FOR DETERMINATION

4.1 As formulated in the pre-hearing conference minutes dated 5 June 2023, the principal issues for this Court's determination are:

- *Whether the respondent was a party to the Secondment Agreement and thereby bound by its terms;*
- *Whether the applicant remained in the respondent's employ during the period of secondment;*
- *The true construction and interpretation of Clause 3 of the Secondment Agreement which provides that "on termination of this contract, the employee shall revert to the employment of the Company without loss of status to current grade"; and*
- *Whether the applicant is entitled to the reliefs sought.*

#### 5 THE APPLICABLE LAW

5.1 This being a civil action the burden of proof is on the party who asserts the affirmative,<sup>7</sup> namely the applicant. As regards the standard of proof in civil cases, the same is on a balance of probabilities. As to meaning of "balance of probabilities", this is best exemplified by interrogating the difference between succeeding on the balance of probabilities and failing on the balance of probabilities. In *Miller v. Minister of Pensions*<sup>8</sup> Denning J said:

*"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."*

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<sup>7</sup>*Chipiliro Banda v. Southern Bottlers Ltd* [2012] MLR 53 (HC).

<sup>8</sup>[1947] 2 All ER 372.

- 5.2 To distill this principle, the law requires that the tribunal be satisfied that the applicant's account is more likely true than not. If the scales of probability tip, however slightly, in favour of the applicant's assertions, the burden is discharged. If the scales remain evenly balanced, the claim must fail.
- 5.3 This Court notes section 41 of the Employment Act which provides a strong statutory presumption of continuous employment from the first day an employee begins work up to the date of termination. This Court is also guided by section 52 of the Employment Act which prohibits employers from making unauthorized deductions or performing any acts that deprive an employee of their remuneration as well as section 35 of the Employment Act regarding the payment of severance allowance.
- 5.4 Additional statutory provisions and case authorities will be cited and applied where relevant in the "*Analysis and Determination*" segment of this judgment.

## **6 ANALYSIS AND DISPOSAL**

- 6.1 It is a salutary practice of this Court to state its dispositive conclusion at the outset, rather than subjecting the parties to gratuitous suspense. Accordingly, for the detailed reasons set out below, it is the judgment of this Court that the applicant has proved his claim on a balance of probabilities and therefore succeeds on liability. The Court's reasoning is as follows:
- *Whether the respondent was a party to the Secondment Agreement and therefore bound by its terms, and whether the applicant remained in the respondent's employment during the secondment period;*
- 6.2 I shall address the first two issues concurrently as they are inextricably linked. The respondent advances a defence anchored on the doctrine of privity of contract asserting that the Secondment Agreement was strictly between the applicant and Zimre. It contends that because the respondent was not a signatory to the two Secondment Agreements<sup>9</sup>, it cannot be bound by their terms. I must respectfully disagree. This is a quintessential instance of a corporate parent acting as an agent

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<sup>9</sup> Exhibits **SBP 4** and **SBP 5**.

and facilitator for its subsidiaries compounded by the fact that the subsidiary subsequently ratified the agreement through its own conduct.

- 6.3 Under our employment jurisprudence, a secondment constitutes a temporary transfer of an employee which does not sever or terminate the primary contract of employment. As was enunciated in *Phoso v. Wheels of Africa (Malawi) Limited*<sup>10</sup>, a secondment transfer from one company to another does not vitiate the contract of employment with the primary employer; the primary contract subsists uninterrupted. Indeed, the respondent's Human Resources and Administration Manager, Ms. Katija Mataya, explicitly conceded under cross-examination that the applicant was neither dismissed nor did he resign during his tenure in Uganda.
- 6.4 This concession is fortified by the respondent's own internal policies. Ms. Mataya confirmed that, pursuant to the respondent's Conditions of Service, eligibility for the UGI Pension Scheme and Group Life Cover is strictly restricted to active, permanent employees. It is common cause that throughout his six-year deployment in Uganda, the applicant maintained his membership in both the UGI Pension Scheme and Group Life Cover. Had his employment with the respondent been severed and transferred to Zimre, his pension contributions would invariably have been transferred to the Zimre Pension Scheme as was the procedure adopted for the expatriate, Mr. W. Mhonde<sup>11</sup>.
- 6.5 Furthermore, the respondent is precluded by its own conduct from disclaiming this employment relationship. In correspondence dated 16 September 2008<sup>12</sup>, authored by the respondent's then Managing Director, the respondent unequivocally acknowledged that the applicant reported back to work on 1 March 2008 and that his employment had "reverted back" to UGI. Crucially, the Managing Director directed that the calculation of severance pay be premised upon a "continuity of employment with the Respondent from 1 October 1998 to the date of retirement." Consistent with this directive, the respondent paid the applicant a Long Service Award for completing ten years of continuous service – a benefit exclusively reserved under UGI's Conditions of Service for unbroken service. Having willingly treated the applicant as its continuous employee and having reaped the benefits of

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<sup>10</sup> Civil Cause No. 1792 of 1995 [unreported].

<sup>11</sup> Exhibit **KM 7**.

<sup>12</sup> Exhibit **SBP 8**.

his secondment to a sister subsidiary, the respondent cannot now be permitted to approbate and reprobate by denying privity of contract. The respondent is firmly bound by the legal consequences of its own conduct.

- *The true construction and interpretation of Clause 3 of the Secondment Agreement which states that ‘on termination of this contract, the employee shall revert to the employment of the Company without loss of status to current grade.*

6.6 Having established that the respondent is bound by the Secondment Agreement, I turn to the construction of Clause 3, which states:

*“On termination of this contract, the employee shall revert to the employment of the Company without loss of status to current grade.”*

6.7 The respondent maintains that “current grade” refers rigidly to the grade and salary of Finance Manager in Malawi as it stood in 2002 (MK271,000.00). In contrast, the applicant contends that the phrase contemplates his final executive grade and salary upon the conclusion of his secondment (MK1,200,000.00).

6.8 To construe “current grade” as effectively freezing the applicant’s status and remuneration at 2002 levels, notwithstanding six years of successful executive service in Uganda, yields a commercially absurd result. Such an interpretation fundamentally defeats the protective object of the secondment clause. The objective commercial purpose of such a clause is to ensure that an employee deployed abroad for the benefit of the corporate group is not professionally or financially prejudiced upon their return. In *Celtec Ltd v. Astley*<sup>13</sup>, the House of Lords affirmed that continuity of employment must operate to preserve, rather than erode, service-related entitlements.

6.9 Furthermore, the documentary evidence demonstrates the respondent’s active recognition of the applicant’s salary progression. In September 2005<sup>14</sup>, the respondent’s Managing Director formally advised NICO Life of the applicant’s salary increment to MK500,000.00 thereby adopting his upward salary trajectory.

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<sup>13</sup> [2006] UKHL 29.

<sup>14</sup> Exhibit **SBP 7**.

To posit that the applicant, upon his return, must regress to a fraction of his international remuneration constitutes a clear breach of Clause 3. This Court accordingly holds that the phrase “without loss of status to current grade” entitled the applicant to revert to the respondent at an executive grade with a salary commensurate with his final secondment remuneration of MK1,200,000.00. The respondent’s unilateral decision to impose a reduced salary was a breach of contract.

- *Whether the applicant is entitled to the reliefs sought.*

- 6.10 Turning to the reliefs, the respondent has mounted a robust procedural objection. It contends that because the applicant claimed a specific sum of MK15,402,427.00 in his IRC Form 1, he is strictly bound by his pleadings and is precluded from claiming MK129,884,919.97 at trial absent a formal amendment. Relying on *Banja La Mtsogolo v. Harriet Chiomba*<sup>15</sup> and *Mandala Ltd v. Soche Tours and Travel Ltd*<sup>16</sup>, the respondent invokes the established principle that a court cannot award a remedy that was not pleaded – often colloquially expressed in our jurisprudence as the prohibition against “giving a litigant an orange when they asked for a mango.”
- 6.11 While this Court acknowledges the force of the respondent’s submission, the present matter is entirely distinguishable from the factual matrix in *Harriet Chiomba*<sup>17</sup>. In that case, the applicant completely failed to plead unfair dismissal, relying instead on common law wrongful dismissal which rendered the court’s award of severance pay an entirely different remedy from that which was sought. In the instant case, the applicant has explicitly pleaded in his IRC Form 1 the correct heads of claim, namely, withheld salary, severance pay, gratuity, notice pay and unpaid leave days. He has, to maintain the metaphor, asked for the correct fruit.
- 6.12 The reliefs sought are statutory and contractual entitlements, the quantum of which is dictated by strict mathematical variables, primarily the employee’s correct rate of pay and length of service. It is evident to this Court that the figure of MK15,402,427.00 initially pleaded represents a mathematical miscalculation of these entitlements rather than a distinct substantive claim. To deny a retired

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<sup>15</sup> MSCA Civil Appeal No. 33 of 2008.

<sup>16</sup> [1991] 14 MLR 210 (HC).

<sup>17</sup> n.15 above.

employee their rightful statutory and contractual benefits merely due to an initial miscalculation in the pleadings would occasion a grave miscarriage of justice. This Court's primary mandate at this juncture is to determine liability and establish the correct parameters for computation. As determined above, the correct salary for computation purposes is MK1,200,000.00 and the period of service is continuous from 1 October 1998 to 30 September 2008.

6.13 Consequently, the final mathematical reckoning of the exact quantum of these reliefs must be conducted in accordance with these established variables. The assessment of quantum is properly deferred to a separate remedy hearing, affording the parties an opportunity to either reach an amicable settlement based on these findings or, failing that, to file written submissions supported by precise computations for this Court's final assessment.

6.14 Finally, regarding severance pay, the respondent's act of deducting MK3,300,000.00 from the applicant's accumulated pension fund to satisfy its severance obligations is unlawful. Severance allowance is a distinct statutory obligation imposed upon the employer by section 35 of the Employment Act and cannot be offset by impermissibly dipping into an employee's pension entitlements. The authorities of *Chimpeni and others v Chibuku Products*<sup>18</sup> and *Auction Holdings Ltd v Noel Kabvala*<sup>19</sup> state unequivocally that pension benefits and severance pay are distinct entitlements; one cannot be cannibalized to fund the other. The respondent's reliance on the First Deed of Variation as a defence is legally untenable as private contractual deeds cannot override express statutory protections. The respondent is therefore ordered to refund the unlawfully deducted sum of MK3,300,000.00 to the applicant.

## 7 CONCLUSION

7.1 For the reasons extensively articulated above, I reiterate my initial pronouncement: the applicant's claims for the payment of withheld salary, gratuity, severance pay, unpaid leave days and three months' notice pay are well-founded and accordingly succeed.

7.2 Regarding the computation of remedies, neither party has yet had the opportunity to address this Court on the precise quantum based upon the

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<sup>18</sup> Civil Cause No. 3225 of 2002.

<sup>19</sup> [2009] MLR 6.

findings on liability made herein. To ensure that both parties are afforded their fundamental right to be heard and to avert any prejudice, the final assessment of the reliefs is hereby deferred. In the interim, I issue the following directions:

- (a) The parties are at liberty to compute and amicably agree upon the exact quantum of the reliefs (comprising the withheld salary, gratuity, severance pay, unpaid leave days and three months' notice pay) predicated on a monthly salary of MK1,200,000.00 and a continuous service period from 1 October 1998 to 30 September 2008 within fourteen (14) days from the date hereof.*
- (b) The respondent is hereby ordered to refund the unlawfully deducted pension sum of MK3,300,000.00 to the applicant within seven (7) days from the date hereof.*
- (c) Failing an agreement on quantum under direction (a), this Court shall proceed to assess and determine the reliefs. Such assessment shall be based upon written submissions on quantum to be filed by the parties or, if deemed absolutely necessary, an assessment hearing to be conducted on a date to be fixed following the filing of the requisite assessment papers and a notice of hearing by the applicant.*

7.3 This having been a bifurcated trial, the present determination of liability concludes the first phase. Pursuant to the authority of *JTI Leaf (Malawi) Limited v. Kad Kapachika*<sup>20</sup>, this decision remains inchoate for the purposes of appeal. Accordingly, any right of appeal to the High Court is stayed pending the conclusion of the assessment proceedings or the filing of a consent order on quantum as directed.

7.4 It is so ordered.

**Pronounced** this 25<sup>th</sup> day of September 2026 at IRC, **PRINCIPAL REGISTRY**

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<sup>20</sup> MSCA Civil Appeal No. 52 of 2016 [unreported].



*Tamanda Chris Nyimba*  
**ACTING CHAIRPERSON**