FDH Bank Limited and Others v Eddie Kamanga

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Howard Pemba
Cause Number:	Civil Appeal No.26 of 2024 (Being Matter No. IRC 437 of 2022)
Date of Judgment:	October 13, 2025
Bar:	Mr Kaduya, on brief for Counsel for the Appellant Mr Kalua, Counsel for the Respondent

Introduction

1. This is the decision of the court on the present appeal by FDH Limited (hereinafter referred to as “the Appellant”). The appeal was made following its dissatisfaction with the decision of the Industrial Relations Court (IRC) in which it found the Appellant liable and awarded the Respondent a grand total of K174,716,505.66 as compensation for unfair dismissal plus severance allowance. The appellant brings this appeal against judgment on the finding of both liability as well as the subsequent award of Compensation.

2. The brief facts are that the Respondent was employed by Malawi Savings Bank (MSB) as a Branch Manager in 2009. The mentioned Bank was acquired by FDH Financial Holdings Ltd in July 2015, and this led to MSB merging with the Appellant. On the 27th of October 2016, the Appellant informed the Respondent that his position was declared redundant. The Respondent commenced the action in the Industrial Relations Court (herein also referred to as the lower court), claiming unfair dismissal, underpaid terminal benefits and severance allowance. It was the Respondent's claim that he was not forewarned or consulted before the meeting of October 2016, and therefore his redundancy amounted to an unfair dismissal.

3. After a full trial, the lower court, in its judgment dated 9th day of April 2024, found that the Appellant failed to consult the Respondent before confirming the redundancy and had thus unfairly dismissed the Respondent. The court consequently made an award of compensation to the Respondent with the sum of **K86, 632,951.65.**

4. It was further held that the Respondent was underpaid in his redundancy pay, and the court awarded the sum of **K12, 937,027.30.** The lower court also determined that the Respondent's redundancy pay included severance pay according to a clause in the Conditions of Service and that this was a distinct severance allowance under section 35 of the Employment Act. The court then awarded a total sum of **K8,158,747.49** as severance allowance. There was also a determination that the Respondent was entitled to the sum of **K3,748,945** as

mileage allowance for use of a personal motor vehicle.

5. Dissatisfied with the judgment from the lower court, the Appellant has come to this court to appeal against the said judgment on the following five grounds:

(i) The Deputy Chairperson erred in fact and law in finding that the Respondent had sufficiently proved his case on a balance of probabilities on the ground of his claim that he was not consulted about being made redundant.

(ii) The Deputy Chairperson erred in fact in deciding that the Respondent was unfairly dismissed because he was not consulted about the Redundancy, alleging that his redundancy letter was given whilst the Appellant had completed the redundancy process.

(ii) The Deputy Chairperson erred in fact and law when they deemed that the conduct of the Appellant in the matter warrants compensation and is above the minimum threshold.

(iv) The Deputy Chairperson erred in fact and law when they failed to provide good and clear enough reasons founded in law for the reason as to why the award was enhanced, rendering compensation over and above the minimum threshold.

(v) The Deputy Chairperson erred in fact and law when they distinguished the payment of severance allowance under the Employment Act from that under specific terms and conditions in contracts of employment and ordered further payment of severance allowance to be paid.

6. In this appeal, the Appellant seeks the reversal of the ruling from the lower court and a finding in the following manner:

a) That the Respondent was fairly made redundant.

b) The conduct of the parties in this matter does not warrant compensation over and above the minimum thresholds.

c) That the payment of severance allowance according to the Laws of Malawi is neither separate nor in addition to the payment of redundancy or retrenchment benefits payable under specific terms and conditions in contracts of employment.

d) A revaluation of the boost in effect of the award as ordered by the court.

7. The appeal is highly contested by the Respondent. I note that the matter herein was rich in evidence from the lower court, and I see it pertinent to discuss some of it before proceeding to make any further determinations on the issues raised in the appeal.

The Respondent's evidence

8. The Respondent was the sole witness and gave evidence as such in this matter from the lower court. He stated that his employment with the Appellant was regulated by the Terms and Conditions governing the permanent staff of the Bank. After the acquisition of MSB by the Appellant, on the 3rd of July 2015, the Chief Executive Officer of FDH, Dr. Thomson Mpinganjira released a memo informing all staff about the acquisition and in the memo, the said CEO

personally assured the staff that there was no risk of job losses to all employees within the FDH Group and also indicated that the two Banks would initially be run as separate banks subject to regulatory approvals from the Reserve Bank of Malawi.

9. Amid growing concerns among the staff regarding their job security, the abovementioned CEO, in September 2015, issued a second memo. The memo among others, announced the formation of an integration newsletter to act as a medium of exchange of information between management and staff, indicated that MSB and FDH would continue to trade as separate banks for at least 6 months, requested the staff to brace the integration with flexibility as “there was likely to be changes to existing roles, new roles may be created, some staff members may be re-assigned or relocated or their reporting lines may be changed”, and that there would be security of employment from middle management and below.

10. The newsletter (Ulalo) referred to in the second memo was later introduced. In its 4th edition, the newsletter of 30th November 2015, the management, in responding to staff queries on job security, assured and made a commitment that “workforce transition strategy will be applied; to be done consistently, transparently, professionally and through consultations (some posts may go but others will be added as well”. The 5th edition of the Ulalo Newsletter, issued in December 2015, continued to carry that same message.

11. The evidence continues that apart from the Ulalo Newsletter, the two banks formed an integration team called “Change Champions” to facilitate the integration process. The Respondent was part of that team, which kept assuring members of staff of the two banks what management had confirmed to them to communicate that the integration would not result in job losses. Things then started to change around April 2016 when the Appellant carried out some mass terminations of employment without warning the employees. The Respondent was not one of those whose contracts were terminated.

12. On the 27th of October 2016, the Respondent was met by officers from the Head Office who informed him that his position as Branch manager for the Lilongwe Branch was declared redundant and was then given a letter on the 7th of November 2016, confirming his redundancy. The Respondent averred that he was not consulted before the meeting of the 27th of October 2016.

The Appellant’s evidence

13. The Appellant’s evidence was through a witness by the name of Chisomo Chaduka, working as a Senior Manager, Human Resources and Administration. The witness confirmed that the Respondent was indeed made redundant in October 2016. There were several procedures and consultations that were conducted before the Respondent was finally made redundant. The procedure included informing the Ministry of Labour of the intention to implement redundancies on the Appellant’s employees, forming the ‘Change champions’ team with the mandate to provide information and updates regarding any changes occurring as a result of the integration process, establishing the Ulalo

Newsletter to keep updates on the integration process as well as make sure that the redundancy is transparent. In the Newsletter, the witness said, it was indicated that there will be redundancies.

14. In or around April 2016, there were meetings where the employees of both banks were informed of the intention to make some of them redundant. The employees were consulted on the redundancy procedure and further informed that the affected employees will be consulted individually. The Respondent was personally consulted in a meeting between himself and his boss. After the consultations, the Respondent was formally written the redundancy letter.

15. The evidence continues to say that upon being made redundant, the Respondent was paid his terminal benefits, including severance allowance. The terminal benefits were then recalculated when the Respondent argued that they were not properly calculated. On severance, the Respondent was paid one month for each completed year of service, which is higher than that provided in the Employment Act.

16. During cross-examination, the Appellant’s witness stated that he joined the bank on the 8th of May 2017. He was not a member of the Change Champions formed for the integration process. Regarding the April meetings mentioned above, the witness confirmed that they were a series of meetings, and he was told this at the Bank premises. He, however, did not have the specifics and neither did he know if the Respondent attended any of the meetings. Coming to the October 27th meeting between the Respondent and his boss, the witness

stated that he was not the Respondent's boss and did not know what exactly was discussed at that meeting. The confirming letter had directed that the Respondent should stop working right away.

The arguments

17. Both parties have filed submissions with lengthy arguments advancing their respective claims on this appeal. I will hereby summarise the arguments on each ground of appeal.

Ground 1: *The Deputy Chairperson erred in fact and law in finding that the Respondent had sufficiently proved his case on a balance of probabilities on the ground of his claim that he was not consulted about being made redundant.*

18. The Appellant starts by citing **First Merchant Bank v Mkaka and 13 Others**, MSCA Civil Appeal No. 53 of 2016 which held that an employer has an obligation to consult employees where there is a contractual obligation on the part of the employer to consult employees for retrenchment. They argue that the obligation to consult is contractual rather than statutory, and in the absence of any agreement to that effect, the lower court erred in law in holding that the Appellant was under a duty to consult. There is also an argument that where the employer seeks, at the time of notification, feedback from employees, such an employer cannot be said to have failed to consult.

19. The Appellant goes on to argue that the evidence shows that there was enough consultation spanning about two years, which included the Ulalo

Newsletter as well as the Change Champions team. To the Appellant, there was a flow of information and the Respondent, who was also part of the mentioned team, knew that there were going to be retrenchments in the integration. The essence of the Appellant's argument can safely be concluded in that it was an error to hold that the Bank had an obligation to consult its employees in the absence of an enforceable agreement, and that, on a balance of probabilities, the Respondent failed to prove that he was not consulted.

20. From the Respondent, it is argued that there is no dispute that the Appellant made assurances that there would be no job losses on account of the Purchase of MSB and that there would be consultations in the event of redundancies. The Appellant was thus under an obligation to consult its employees. It is also argued that the Appellant never consulted the Respondent.

21. This court has been asked to observe that the assertion that the Respondent was consulted, together with other employees, is negated by the letter to the Ministry of Labour, where it was stated that the Appellant had carried out one-on-one individual redundancy consultation meetings with the impacted employees. The Respondent was not on the list of names impacted by that process.

22. The Respondent further argues that the meeting held on the 27th of October was not at all any consultation but rather merely informative of the redundancy that was declared against him. The Appellant's witness has no way to tell what was actually discussed in that meeting and can therefore not be relied upon. Argues the Respondent.

Ground 2: *The Deputy Chairperson erred in fact in deciding that the Respondent was unfairly dismissed because he was not consulted of the Redundancy alleging that his redundancy letter was given whilst the Appellant had completed the redundancy process*.

23. On this ground, the Appellant continues to stress the fact that the Respondent was part of the Change Champions team whose role included cascading information throughout the integration process and acting as a feedback mechanism, as such, he was aware of every step being carried out during the integration and that he was at the centre of the consultations. Citing **Stanley Nampuluma and 14 others v Garda World**, Matter No IRC 728 of 2021, it is stated that it would be bad practice for the employer to be engaging each employee personally and informing them of their impending retrenchment. Accordingly, the argument is that it was an error to hold that the Respondent was not consulted because the letter was given to him after the retrenchment process was concluded.

24. From the Respondent, the same arguments on ground 1 are applied to this ground.

Ground 3:*The Deputy Chairperson erred in fact and law when they deemed that the conduct of the Appellant in the matter warrants compensation and is above the minimum threshold.*

25. Relying on section 63(4) of the Employment Act, the Appellant argues that for an unfair dismissal, the court awards an amount that is just and equitable in the given circumstances by only considering how the employer attributed to the loss suffered by the employee due to the dismissal. The principle of just and equitable can only be invoked where there are good reasons well-founded in law, such is the argument by the Appellant. It is then said that the lower court was only bound to consider this principle if the Respondent had proved by way of evidence that the conduct of the Appellant towards him warranted it.

26. The Appellant argues that the only basis upon which the lower court found that the Respondent deserved compensation above the minimum threshold was because he was made a Change Champion, and it appeared to the court that the Appellant had no real intention of keeping him as an employee. It is then argued that there is nothing in the totality of the evidence to suggest that the Appellant assured that the Change Champions would not be retrenched.

27. On the other hand, the Respondent argues that the reasons relied upon by the lower court to make an award above the minimum threshold were clear and legally justifiable. The lower court took into account aggravating factors that include the following:

a) the fact that the Respondent's name was not included on the list of those who were to be made redundant that was sent to the Ministry of Labour.

b) The fact that the Respondent was made a Change Champion Member and was spreading messages of change in the FDH Group, including the message that the acquisition of MSB would not result in job losses.

c) The Appellant had created a legitimate expectation in the Respondent that he would not lose his job through redundancy after it issued a communication in September 2016 that the redundancy exercise was virtually over.

d) That the Respondent was not at fault at all for his dismissal and that he did not contribute to his unfair dismissal.

28. The arguments for the third ground are the same for the fourth ground.

Ground 5:*The Deputy Chairperson erred in fact and law when they distinguished the payment of severance allowance under the Employment Act from that under specific terms and conditions in contracts of employment and ordered further payment of severance allowance to be paid*.

29. Coming to this last ground, the Appellant first reproduces Clause 6.4 of the Respondent's Conditions of service which stipulates that when an employee is affected by a declaration of redundancies, he is entitled to severance pay of one full month's salary for each completed year of service provided that the same is not less than that stipulated by the **Wages and Conditions of Employment Act** (Severance Pay Order 1976). The Appellant argues that the severance pay referred to in the mentioned clause is the same as that provided in the Employment Act. Accordingly, the Appellant submits that the lower court's finding that "the Respondent was entitled to both severance pay under the Act, and 'redundancy benefits' disguised as terminal benefits agreed under the Conditions of service, when the said conditions had referred to severance pay, had no legal or factual basis and must be set aside.

30. From the Respondent's side, they argue that the Appellant did not have in mind the provisions of the current Employment Act when developing its Conditions of Service. By the fact that the conditions referred to a repealed **Wages and Conditions of Employment Act**, the Respondent argues that they were made outside of section 35 of the Employment Act, to the effect that the redundancy benefits were purely contractual.

The legal issues for determination

31. Given the foregoing facts, evidence and grounds for this appeal, I, at this stage, must pick out the issues that the court is to determine. For the first ground and the second, I choose to address them as one ground, and the same goes for the third and fourth grounds. Accordingly, the following issues are in question:

i) Whether the lower court erred in holding that the Respondent was not consulted on his position being declared redundant, such that he was unfairly dismissed.

ii) Whether the lower court erred in awarding compensation for unfair dismissal with an amount over and above the minimum threshold.

iii) Whether the lower court erred in its determination that severance pay under the Employment Act was separate from severance pay which is part of the Respondent's redundancy benefits in his Conditions of Service.

The law and analysis of the facts

Appeals from the Industrial Relations Court

32. By **Section 65** of the Labour Relations Act, a decision of the IRC is final and binding. However, such decisions may be appealed to the High Court on a question of law and fact or jurisdiction. The appeal is by way of rehearing, which entails the reviewing of all the evidence and the court's decision to determine whether the lower court arrived at a correct position. See **Thompson and others v Telekom Networks Malawi, Civil Appeal Number 9 of 2023.**

33. **Section 22** of the Courts Act gives the High Court general powers to dismiss an appeal, confirm or reverse a judgment on appeal, refer the matter back for retrial, settle the matter and render a final determination, or call for additional evidence (see also **Humphreys Malola vs Alice Malola , Civil appeal No 48 of 2016 (unreported)** and **AHL Group PLC vs Symon K Chirwa, Civil appeal No. 1 of 2018(unreported)(Being IRC Matter No. MZ14 of 2017).**

Burden and standard of proof

34. In determining the appeal, this Court reiterates that the burden of proof in civil matters lies upon the party that substantially asserts the affirmative of the issue. Lord Maugham in **Constantine Line Limited vs Imperial Smelting Corporation (1942) A.C. 154 @ 174** expounded this notion in the following words:

"The burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is Ei qui affimat non ei quit negatin cumbit probatio [i.e. the burden of proof lies upon him who affirms,

not him who denies]. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons" (See also **Tembo and others vs Shire Bus lines Ltd (2004) MLR 405 @406**)

35. This rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things a negative is more difficult to establish that an affirmative.

36. The standard of proof required in civil matters is generally expressed as a proof on the balance of probabilities. The balance of probability standard means that a court is satisfied that an event occurred if the court considered that on the evidence, the occurrence of the event was more likely than not. It is trite that in such proof, the facts must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say 'we think it is more probable than not' the burden is discharged but if the probabilities are equal, it is not (see **Bonnington Castings Ltd vs Wardlaw [1956] 1 613, 620**, and **Miller vs Minister of Pensions (1947) 2 All ER 372-374)**

37. In the case of **Securicor (Mw) Ltd vs Central Poultry Ltd [1995] 1 MLR 250** Ntegha, J buttressed the point when he stated as follows:

"I am aware that this is a civil case, and the burden of proof is on the one who alleges. He must prove the allegation to the requisite standard, and that is proof on a preponderance of probabilities...." See also **Msachi vs Attorney General**

[1991] 14 MLR 287, at 290, where Tambala J (as he then was) stated that '[t]his is a civil action and the duty of the plaintiff, in a civil case, is to prove his case on a balance of probabilities"

whether the lower court erred in holding that the Respondent was not consulted on his position being declared redundant, such that he was unfairly dismissed

38. It is unfortunate that to date, there is no final position on whether consultations are obligatory during retrenchments or redundancies. Our courts seem to have mixed views on the issue. In **Section 57(1)** of the Employment Act, there are three reasons for terminating an employee's contract. These are reasons connected to the employee's capacity, conduct, or based on the employer's operational requirements. In the first two (conduct and capacity), the law obligates employers to accord their employees an opportunity to be heard on all allegations made against them. There is no mention of the employee being given the same opportunity when it comes to operational requirements-related reasons, such as redundancies. That is where the debate on consultation comes in.

39. From the Supreme Court of Appeal, it was decided in **Merchant Bank vs Mkaka [2014] MLR 105(Mkaka one)** that consultations before redundancy are obligatory only where the same is provided for under the Terms and Conditions of Service. Several High court decisions also follow this reasoning. An example is **Kanyanda and others vs Carlsberg Malawi Ltd and another**, where the court, bound by **Mkaka one**, reasoned that the right of employees to

consultation before redundancies was removed by **Section 57** of the Employment Act. The gist of these two decisions and many others that follow this line of reasoning seems to be that the requirement to consult employees as contained in **Article 14** of the ILO Convention 158, is no longer applicable by the reason that **Section 57(2)** of the Employment Act provides otherwise by not requiring any consultation on termination based on operational requirements. Behind this pronouncement is **Section 211(2)** of the Constitution, providing that international agreements entered into by Malawi before the Constitution remain binding unless otherwise provided by an Act of Parliament.

40. From the Supreme Court again, we have **First Merchant Bank vs Mkaka SCA Civil Appeal Number 19 of 2017 (Mkaka Two)** with a holding that consultation constitutes equity and fairness as required under **Section 61 (2)** of the Employment Act which posits that in addition to proving that an employee was dismissed for reasons stated in **Section 57(1)** (and this includes reasons connected with redundancies), an employer must show that he or she acted with justice and equity in dismissing the employee. This is a Supreme Court decision suggesting that consultation ought to be mandatory.

41. From the High Court, **Thompson and others vs Telekom Networks Malawi, Civil Appeal Number 9 of 2023**, the High Court could not follow **Mkaka one** on the footing that it was decided per incuriam. In detail, the court reasoned that 'consultation' during termination based on operational requirements constitutes part of the right to fair labour practices as provided in Section 31 of the Constitution. The court also reasoned that employers might use a dismissal based on operational requirements as a disguise for an actual

dismissal based on either conduct or capacity, hence the need to examine such a dismissal more closely. The court went further to say that consultation might constitute part of the obligation to show fairness and equity in dismissing an employee under **Section 61(2)** of the Employment Act. Finally, the court was of the view that **Mkaka One** should have given effect to Article 14 of the ILO Convention, as it gives guidance on what fair labour practices are.

42. Here we are; two separate views from this court and even the Supreme Court. There is a need that the position should be made clear and one. In the absence of that, this court should take the path of **Mkaka two** and the reasoning in **Thompson and others v Telekom Networks Malawi.**

43. An employer should be, and is under an obligation by law to consult employees before redundancies. Consultation in such an event is not just a formality, but a fundamental matter of fairness, transparency, and respect for workers' rights. The fact that **Section 57(2)** of the Employment Act did not specifically provide consultation does not make it right that an employer can dismiss an employee based on operational requirements without any due process to ensure fairness is accorded. **Section 57(2)**'s silence on the need for a hearing, or as we are putting it, 'consultations', in operational requirements, could not mean that courts should be allowed to read in words that consultation is not required and then conclude that this provides otherwise in line with **Section 211(2)** of the Constitution.

44. This obligation to consult should not be dependent on the terms and conditions of employment contracts. I fear that if such should be the case, we are going back to a common law employment regime where employees' welfare was heavily dependent on the contract, and we have at times held that the same was not fair. Our current labour law regime advocates for fair labour practices, and one should think that consultations prior to the confirmation of redundancies are a fair labour practice.

45. Even more, it would also seem to me that where an employer commits that there will be consultations before effecting a redundancy, they must be held to their word. One thing I should get from **Mkaka One** is that we should never allow an employer to repudiate such commitments. I can only add that, contrary to the Appellant's argument, such a commitment will still stand even though it cannot be said to be a contract in the proper sense. The Appellant's argument seems to suggest that where such a commitment is available, it must follow all rules of contract from offer to acceptance, and the intention to be bound. I find this argument unattractive.

46. Thus far, I should hold that the Appellant was under a duty, by law, to consult the Respondent being confirming his redundancy. This was independent of any undertaking to consult on the part of the Appellant. Also, the Appellant committed to consult its employees if redundancies were affected. This was evidenced by the Ulalo Newsletter, which was meant to be a medium of information. We have to hold the Appellant to that word.

47. In **Chikadya vs Sunbird Tourism Ltd and another**, IRC Matter No. 141 of 2001), the court actually adopted the position enunciated in **Freud vs Bentall Ltd** {1982} IRLR 443 EAT, which I find persuading, which held that *'consultation is one of the foundation stones of modern industrial relations practice. In the particular sphere of redundancy, good industrial relations practice in the ordinary case requires consultation with the redundant employees so that the employer may find out whether the needs of the business can be met in some other way than by dismissal, and if not, what other steps the employer can take to ameliorate the blow to the employee'.*

48. With that being said, I find no fault in the lower court's holding that the Appellant was under an obligation to consult affected employees before effecting redundancies.

49. Having so found, the next question I must consider is whether the Appellant duly consulted the Respondent before confirming his position as redundant. I would think that this involves asking a further question, as to what amounts to 'consultation? I have no legal definition for the word 'consultation'. The law only requires consultation before dismissal and that the said consultation must entail genuine engagement of the employees. It should not merely be a purported attempt at effecting a unilateral notification from the employer to employees in a manner which does not at the same time seek feedback from the employees. See **Malawi Telecommunications Ltd vs Makande and Another**, [2008] MLLR 35 as well as **Chikadya vs Sunbird Tourism Ltd and another** (cited above). I take it that this means it is not enough to merely inform an employee that there will be redundancies. There ought to be a meaningful engagement.

50. In the present case, the Appellant argued that it would be bad practice for the employer to engage each employee personally and inform them of their impending retrenchment. I do not agree. Of course, it would be a tedious and cumbersome exercise but not a bad practice. The emphasis here is that there has to be an engagement. Where the number of employees to be engaged is huge, say 20, the employer has the option of engaging the affected employees in groups or through a representative. This would be a collective consultation. In the absence of such collective consultation, it is good practice to allow employees, during individual consultations, the opportunity to express their views on any issues that may impact the risk of their dismissal or its consequences, whether these issues are unique to them or common to the affected workforce. See **De Banks Haycocks vs ADP RPO UK Ltd [2024] EWCA Civ 1291.**

51. It is also a good practice, and a genuine engagement, if consultations are conducted at a formative stage. This is a stage where the consultation can make a difference to the outcomes of the redundancy process **(De Banks Haycoks vs ADP RPO supra).** It makes no sense to conduct consultations when a decision to make a position redundant has already been confirmed. In the same line, holding a meeting with an employee to inform him or her that the position has been made redundant cannot be held to be a genuine and meaningful consultation. Further, it is also a good practice to give the employee a chance to comment and question the selection criteria used in coming up with the decisions to declare a position redundant. These are some of the factors that would constitute a genuine and meaningful consultation.

52. In the matter at hand, I note that the lower court had given effect to the letter the Appellant wrote to the Ministry of Labour, which contained the procedure the Appellant was going to use in the redundancy process. The procedure indeed included a one by one individual redundancy consultation meetings with the affected employees. The list of names attached to the letter did not include the Respondent's. The lower court used this to find that the Respondent was not consulted at that stage. I must agree. The fact that the mentioned list was the final number of staff that were to be impacted means that the Respondent was not part of the consultation meetings. There is no evidence to suggest otherwise.

53. Coming to the dismissed meeting on the 27th of October 2016, I must also side with the lower court in holding that the said meeting was merely informative of the redundancy carried out on the Respondent's position. There was no way to tell what was discussed in that meeting. The Appellant produced a witness who was not even part of that meeting. In light of that, the only credible version would be the Respondent's, whose first-hand information is to be trusted more. Having said that, I indeed doubt that the meeting was meant to be a consultation.

54. It hereby seems to me that there was no meaningful and genuine consultation between the Appellant and the Respondent before confirming the redundancy. It is on that footing that I find no fault in the lower court's determination that the Respondent was unfairly dismissed. The lower court's

finding of unfair dismissal was proper and justified. The appeal on this ground therefore fails.

Whether the lower court erred in awarding compensation for unfair dismissal with an amount over and above the minimum threshold.

55. **Section 63(4)** of the Employment Act provides:

An award of compensation shall be such amount as the Court considers just and equitable in the circumstances, having regard to the loss sustained by the employee in consequence of the dismissal in so far as the loss is attributable to action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.

56. **Section 63(4)** above should be read together with **Section 63(5)** which is couched in the following terms:

The amount to be awarded under subsection (4) shall not be less than—

(a) one week's pay for each year of service for an employee who has served for not more than five years; (b) two weeks' pay for each year of service for an employee who has served for more than five years but not more than ten years;

(c) three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years; and

(d) one month's pay for each year of service for an employee who has served for more than fifteen years, and an additional amount may be awarded where dismissal was based on any of the reasons set out in section 57 (3).

57. What should come out clear is that **Section 63(5)** provides for the minimum amount an unfairly dismissed employee is entitled to as compensation. By operation of **Section 63(4**), subject to the court's discretion, such an amount may and may not increase. Under **Section 63(4)**, the court has a latitude of discretion as to whether and how the amount payable as compensation can be over and above the minimum amount the employee is entitled to under **Section 63(5)**. As far as the parties' arguments herein are concerned, this is not in dispute.

58. I should further agree with the Appellant that the discretion under **Section 63(4)** cannot be exercised willy-nilly lest we make compensation for unfair dismissal more lucrative than the actual employment itself. The court has to be guided by valid reasons grounded in the facts and evidence presented to it. The court is saddled with the duty to give clear reasons so that the employee, employer and where applicable, the appeal or review court can appreciate why the award was enhanced. See the Supreme Court's decision in **Southern Bottlers Ltd vs Gracian Katengo** [2013] MLR 343. This point is also appreciated by both parties herein. It therefore seems to me that this Court should decide whether the lower court exercised its discretion guided by valid reasons.

59. Another factor that comes from **Section 53(5)** is that the number of years that an employee has served matters when deciding how to enhance an amount for the award of compensation for unfair dismissal.

60. The first reason given by the lower court was that the Respondent's name was not included on the list of employees that were to be made redundant, sent to the Ministry of Labour. The court found that the Respondent was not consulted in the initial stages, whereas the other affected employees were consulted. Without further ado, I find this not to be a good reason for enhancing compensation. Even though this was a correct finding of the lower court, the same was just but a reason for finding it to be an unfair dismissal. It would in deed seem to me that the Respondent was deprived of the opportunity for individual consultations, unlike those other employees who were listed in the letter. However, this was not a right consideration to enhance the minimum compensation.

61. The second factor considered by the lower court was that the Respondent was made a Change Champion and was one of the persons spreading messages on changes in the FDH Group. It appeared to the lower court that the Appellant did not have any real intention of keeping the Respondent as its employee and that he was merely used by the Appellant to advance its agenda at the time they were identifying members who would be dismissed due to retrenchments. I must also, in the absence of evidence, be slow to agree with the lower court on this point. The Appellant's position would appear to be right; there is nothing in the totality of the evidence to suggest that the Change Champions were immune from retrenchments. The lower court's finding that the Appellant was merely using the Respondent would seem to me to be a sweeping and hasty pronouncement.

62. The third factor was that when the Respondent was spared during the April 2016 retrenchments, the Appellant issued a circular in September 2016 communicating that the redundancy exercise was virtually over. To the lower court, this created a legitimate expectation in the Respondent that he was spared of the retrenchment only for the Appellant to turn around a month later. The Respondent attached the mentioned circular marked as **EK8a**, which indeed confirmed that the redundancy exercise was virtually over. The last paragraph of the circular urged those who were not affected by the redundancy to focus their efforts and channel their energy to serving the Appellant's customers to the best of their ability and deliver growth for the merged bank. Indeed, this created a legitimate expectation that the Respondent was spared and for the Appellant to turn around a month later, this this was betrayal. Nevertheless, though I find this to be grounded in the facts and evidence, I fail to come to the understanding on how it becomes a factor to enhance the compensation.

63. The final factor considered by the lower court cannot be faulted at all. It was established that the Respondent was not at fault, leading to his dismissal. This consideration is even encouraged by **Section 63(4).** The Respondent did not contribute to the dismissal and it was proper for the lower court to take that into consideration as it did.

64. The Respondent had served for seven complete years. At a minimum, he was entitled to two weeks' pay for each year of service. However, the lower court enhanced the award and awarded three months' pay for each year of service. I should first say that it would appear to me that the lower court's discretion was largely guided by factors that did not necessarily necessitate enhancement of

the minimum compensation. Most, of them necessitated a finding of unfair dismissal which the lower court rightly found. As observed above, the only plausible factor to consider in an award of compensation especially as to whether the minimum should be enhanced or maintained was that the Respondent did not contribute to the dismissal.

65. With that in my mind, I would rather make a pronouncement that the Respondent should only be entitled to one month's pay for each completed year of service. This is in consideration of the fact that I have negated some reasons for enhancement, and also considering the fact that the Appellant had a valid reason for termination of the Respondent’s contract of employment and the unfair dismissal came in by only not following the proper procedure in effecting the said reason. Considering all these, the lower court’s award seems to be unfair to the Appellant. The appeal is therefore allowed on this ground.

66. As the evidence reveals, the Respondent was entitled to K4,125,378.65 monthly wage. With the finding that he is entitled to a compensation award of his monthly pay for each completed year of service, having served for 7 years, the Respondent is therefore entitled to the sum of **K28,877,650.65** as compensation for his unfair dismissal.

Whether the lower court erred in its determination that severance pay under the Employment Act was separate from severance pay which is part of the Respondent’s redundancy benefits in his Conditions of Service.

67. *“On the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstance, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with Part I of the First Schedule.”* That is the law as posed under **Section 35** of the Employment.

68. It is not in dispute in this matter that where an employee is unfairly dismissed, he or she is entitled to a severance allowance under the mentioned Act. What is in contention, however, is whether severance pay under the Act should be construed as separate from that which may be provided under an employee’s Conditions of Service as part of redundancy benefits, such that the dismissed employee would be entitled to be paid severance under both the conditions of Service and the Employment Act.

69. One thing is clear from the authorities: the payment of redundancy benefits such as pension, gratuity or other terminal benefits is not the same as the payment of severance allowance. See **The state and Another ex parte Khawela & others** [2008] MLLR 283. The question becomes: when the redundancy benefits include the payment of severance allowance, should it mean that such severance is different from that provided under the Employment Act?

70. I should first agree with the Appellant's contention that the use of different words in a legal term is meant to denote different things. Likewise, the use of the same word should be understood to mean one thing. Severance pay is severance pay regardless of where it is mentioned. I must therefore agree that severance pay under Conditions of Service should be deemed as the same as that provided under the Employment Act. It would be an erroneous position to allow employees to be paid double yet the circumstances under which it becomes payable are similar. That will be unfair on the part of the employer and an unjust enrichment on the part of the employee and not in the spirit of **Section 35** and other prevailing employment laws. I am not ready to believe that a drafter of conditions of service intends it that an employee should be paid double allowance, one from the contract and one under the Employment Act. I would be shocked by any pronunciation to that effect.

71. Severance pay under Conditions of Service ought to be the same as provided under the Act, as long as the former is made consistent with the computations provided under the Act. It should then follow that where redundancy benefits under an employee's Conditions of Service refer to severance allowance, it should not be construed as different and separate from severance pay under **Section 35** of the Employment Act. What we must be concerned with is that where an employment contract provides for a severance allowance as part of redundancy benefits, the same should be computed following **Section 35** of the Employment Act. That is my next step.

72. **Clause 6.4,** which is in question in the matter herein, was drafted in the following terms:

"From time to time, the Bank may be forced by circumstances beyond its control to declare redundancies and thereby terminate the services of the affected employees. When such an unfortunate event occurs, all the affected employees shall be entitled to:

i. Two months' notice or two months' pay in lieu of notice;

ii. All annual leave or pay in lieu of leave;

iii. Severance pay of one full month's salary for each completed year of service, provided this is not less than that stipulated by the Wages and Conditions of Employment Act(Severance Pay Order 1976). (emphasis is provided)

73. From my reading of the clause, I find that it was intended that severance pay under it was to be the same as that stipulated by the law. Even though severance pay is being included in the umbrella of "redundancy benefits", in my mind, that severance pay on its own must be understood in line with what is stipulated by the law which was in force. The clause makes reference to the Wages and Conditions of Employment Act (Severance Pay Order 1976), which was the law in force when the Conditions of Service were promulgated. It seems this is where the problem arises.

74. I believe the problem here could simply be avoided by aligning the Conditions of Service with the provisions of the Employment Act. It is no doubt that the Wages and Conditions of Employment Act (Severance Pay Order 1976) no longer has legal force in our labour law. To my mind, it is unjust to let someone benefit

from it as well as benefit from the Employment Act on a single claim simply because the contract of employment was made pursuant to the repealed Act. By way of a reminder, the intention of clause 6.4 was that severance pay under it would be in accordance with the stipulation of the law, which, as we can see, the law which was referred to has no longer legal force. It is only right that the severance pay should be understood in accordance with the stipulations of the current law, which is **Section 35** of the Employment Act.

75. It is upon good authority founded in impeccable reasoning of the High Court that **Section 35** of the Employment Act has a retrospective application as was discussed in **Lenson Mwalwanda vs Stanbic Bank Ltd** [2007] MLR 198. On that note, I find it fairer that the Respondent's severance allowance under clause 6.4 should have been understood in line with the severance allowance under **Section 35.** Accordingly, I agree with the Appellant that the lower court errored by awarding the Respondent what he was already paid under the Conditions of service. The appeal therefore succeeds on this ground.

76. The issue of boosting the award has also exercised my mind. It is noted that the lower court boosted the award by 50%. How the lower court arrived at that, it has not been stated. The lower court just cited two cases where the awards were boosted by 25% and 80% respectively. In the cases cited, it is noted that the court gave reasons for so boosting yet in the present case, no reason was furnished by the lower court to arrive at 50%. The slippage of our currency and devaluation of the kwacha were not the justification to arrive at 50%. In view of this, I find that there was reason for the so-called boosting and is accordingly set aside.

Conclusion

77. On account of the foregoing analysis of the grounds of appeal in light of the applicable law, I would allow this appeal in part with regard to severance allowance and the quantum for compensation for unfair dismissal. The lower court's finding of unfair dismissal was rightly justified and I have no reasons to depart from it. However, the minimum amount of compensation to be awarded to the Respondent was highly enhanced based on factors that did not necessarily warrant enhancement. The appropriate award should be one month's wage for each of the 7 years of his service with the Appellant. This translates to **K28,877,650.65** payable to the Respondent as compensation. Severance allowance was wrongly awarded by the lower court since the same was already included in the redundancy pay which he got. This was therefore not payable to the Respondent. This court has also found no justification with the so called 50% boosting and the same is set aside.

78. Costs normally follow events subject to the discretion of the court. Since it was no fault of either party and considering that the appeal has been successful in one part and not successful in another part, it would be wrong to order either party to bear the costs. Rather, I will exercise my discretion by ordering that each party should bear its own costs. It is so ordered.

Made in open court, this 13th October, 2025 at High Court, Lilongwe