**IN THE HIGH COURT 0F MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 2652 OF 1999**

**BETWEEN**

**A N E SALAKA …….PLAINTIFF**

**AND**

**THE REGISTERED TRUSTEES**
**OF THE DESIGNATED SCHOOLS**
**BOARD …… …….DEFENDANT**

**CORAM : D F MWAUNGULU (JUDGE)**

**Tembenu, legal advocate, for the plaintiff**

**Defendant, absent and unrepresented**

**Chaika, the official court recorder**

**Mwaungulu, J**

**JUDGEMENT**

The Court heard this matter without the defendant. The defendant, served with the notice of hearing, never appeared at the hearing. The plaintiff's action bases on peculiar circumstances she encountered when the Designated School Board decided to revolve the school's operations. The Board, as it appear shortly, decided paying staff terminal benefits. The plaintiff claims, correctly in my judgement, that the Board implemented its resolution unfairly and therefore discriminated her against other employees. Essentially she claims the Board pay her as everybody in her category was and that this Court award her damages for discrimination for violation of her Constitutional rights. The facts are not complex and, in so far as they resolve the plaintiff's action, are as follows.

The Designated Schools Board employed the plaintiff, Miss A Salaka, as a bursar on 2nd

May, 1995. I should not restate her employment contract. The plaintiff bases her claim on the Board's decision of 3rd September, 1998. In that resolution the Board decided to revolve the school. Minute 7, the basis of the plaintiff's contention, covered staff relocation. I should reproduce, for reasons appearing shortly, the minute's substance:

"The Board discussed the issues surrounding the relocation of the Secretariat staff and the payment of terminal benefits. It was agreed that all contracts would be paid out in full so that the Board liabilities would not be carried forward when staff are transferred. All secretariat staff will therefore be paid terminal benefits and new contracts drawn up with the employing school."

At another meeting of 15th October, 1998 the Board resolved to pay Secretariat terminal benefits when any one of three events occur, the employees leave the Board's employment, the employees transfer to a school or when Government formally devolves the school.

The Board and Mr Shaw, the Executive Secretary, he also on contract terms with the Board, discussed Miss Salaka's terminal benefits before these two board decisions. On 28th May 1998 Mr Shaw recommended terminal benefits for other staff. About Miss Salaka, he wrote, ' Miss Salaka is a contract employee and therefore entitled to six months notice, but no severance pay.' On 1st July 1998 Mr Shaw wrote the Chairman of the Board about staff concerns about the terminal benefits the Board approved. About Miss Salaka, Mr Shaw recommended that Miss Salaka, a contract staff member, at a salary then of K30,000, should be paid then.

When implementing the resolution the Board, under the devolution, gave Mr Shaw, who like the plaintiff was on contract terms, six months salary and six months rentals. He never received severance pay. The Board paid these sums despite that under the normal conditions of employment the Board should have paid Mr Shaw three months salary, gratuity and accommodation. The Board paid pension staff differently: others receiving six moths salary, rentals and severance payments and others only some of these. Miss Salaka insisted that, on the Board's resolution, the Board should pay her what Mr Shaw received. The Board refused to pay her that way. Miss Salaka letter to the Board on 21st June 1999 contains the Board's reasons for treating her differently from Mr Shaw:

"I write to correct the information which you advised me was discussed during the Board meeting on the terminal benefits I claimed at the end of my normal service with the Designated Schools Board. If I got you right you said the decision of not paying me was based on two facts:

(a) that Mr PT Shaw was not paid six months pay but he was paid some money in lieu of his airfare and baggage allowance entitlement and that this money was less than his airfare and baggage allowance entitlement;

(b) there was concern from School Heads that if I am to be paid it means some contract staff from the schools would also claim the same."

Mr Tembenu argues two aspects o the Constitution for Mr Salaka. First he argues that the defendant's failure or refusal to pay the plaintiff is unfair discrimination under section 20 of the Constitution. He submits that the Board, in treating Miss Salaka less favourably than other employees, discriminated against her. To succeed on this aspect the plaintiff

must show that she belongs to a class that the Board treated less favourably than others in a manner that is discriminatory. The Board has then to show that the difference in treatment is, objectively justified, per LORD JUTICES SLYNN and NICHOLIS in Barry v Midland Bank PLC, http://www.parliament.the-stationery office.co.uk/pa/ld199899/ljudgment/jd990722/barry.htm31/10/01 following Stadt Lengerich v Helmig [1994] ECR 1-5727; Kowalska v Freie and Hansestadt Hamburg [1990] ECR 1-2591; and Bilka-Kaufhaus GmbH v Weber von Hartz [1986] ECR 1607.

The first question therefore arising here is whether the Board treated Miss Salaka differently from other employees. From the plaintiff's perspective, the Board only singled out her in the employ to be treated on the basis of her contract of employment. The rest of the staff, including Mr Shaw, who was also on contract, received the benefits under the new arrangement. The Board's exclusion of the plaintiff from a scheme the Board designed to benefit all secretariat staff was discriminatory against the plaintiff. According to the plaintiff the Board maintained that Mr Shaw was treated under the contract and was not a beneficiary of the new scheme. The plaintiff demonstrated, satisfactorily in my judgment, that Mr Shaw benefited from the scheme. Moreover Mr Shaw, as we saw earlier, recommended similar terms for the plaintiff. The Board's fears that other contract employees would make similar claims to the Board is no basis for discriminating the plaintiff if, as was the case, the purpose was a way of revolving the Board. In saying so I am minding the words of LORD SLYNN in Barry v Midland Bank PLC:

"But the fairness of a general scheme may have to take into account the staff as a whole, and alternative schemes fair to Mrs Barry might have produced unfairness to other employees."

In furtherance of the overall purpose of revolving the Board, there was a duty, in my judgement, on the Board to design a scheme removing discrimination among employees. Certainly a scheme, unless justified, benefiting one or a class of employees would be discriminatory against the rest. This is plain from the statement of LORD NICHOLIS in Barry v Midland Bank PLC, Mr Tembenu cited before me:

"Thus, and this is the further point to be noted at the outset, in some instances a change in the method of calculating a payment may be achievable only by changing the purpose of the payment. The method of calculating and the purpose sought to be achieved may go hand in hand. When this is so, a crucial issue is likely to be whether the object sought to be achieved was objectively justified in all the circumstances."

In the instant case the purpose of the scheme was to devolve the Board. The scheme was to enable employees and the Board deal with the transition. The method of calculating, as far as one can judge, fitted the purpose and satisfied all except, of course, the plaintiff who was completely excluded from the scheme. The Board's reason that the plaintiff was on contract is untenable where other contract employees benefited and the Board actually intended to benefit secretariat staff.

Secondly, Mr. Tembenu argues that the Board's conduct was an unfair labour practice under section 31 of the Constitution. Conceptually discriminatory conduct could amount to unfair labour practice under section 31. Mr Tembenu relies on Blantyre Netting Co. Ltd v Chidzulo, MSCA Civ. App. No 17 of 1995, unreported, a Supreme Court decision. In that case a contract of employment provided the contract to terminate by paying one

month's salary in lieu of notice or giving three months' notice. The Supreme Court held the provision an unfair labour practice. The Supreme Court said, in a passage Mr Tembenu cites:

"If an employee wanted to leave employment, he would for lack of money, have no choice but to serve the three months period of notice and this would give the appellant sufficient time to find a replacement. But, when it suited the appellant, conveniently the appellant would go for the option of one months pay in lieu of notice …"

The principle of fairness is unclear from the statement. Fairness comports the practice is even handed between the employer and employee based on reasonableness. Obviously to an employee a provision allowing leaving on one month instead of three months salary in lieu of notice is reasonable and less burdensome. An employee who can pay a months salary may not have to serve the three months. On the other hand a practice treating one or a class of people different from others, unless there is justification, would be unfair and sour to section 31 of our Constitution.

Apart from the Constitution, the employer here would be liable to honour the agreement with the employees as to termination of the employment. Employers, apart from statute, enter such arrangements either when there is a takeover, merger or devolution on the employer. Courts accept and enforce such arrangements purely on the principles of contract. In Phoso v Wheels of Africa Civ. Cas. No. 1792 of 1995, unreported, this Court said:

"At common law an employment contract could provide for redundancy if a contract of employment is terminated. The common law recognised that such terms of employment could be agreed between the parties during or at any right before termination of the employment contract. For this reason, courts accept agreements for redundancy payments. Consequently courts will enforce contracts for redundancy payments, like the present, where parties agree subsequent to the initial contract on ways to terminate the employment… [C]ourts thinks that contracts which are genuine agreement to terminate the employment relationship in this way and are arrived at after considering possible imbalances between the employer and employee or threats from the employer will be respected. It is a question of construction of the agreement and circumstance around the agreement that determine whether courts will enforce the agreement."

The consideration from both is the foregoing of certain rights accruing to them under previous arrangements. On these principles, the Board could not treat Miss Salaka on the original contract of employment. The new arrangements, to all intents and purposes, superseded the prior contract.

The plaintiff is therefore entitled to six months salary, six months gratuity and six months house allowance totalling to 455,853.40. Mr Tembenu argues the Board pay interest on this money because the money should have been paid way back. He contends the delay entitles the plaintiff to interest. He relies on the Supreme Court's decision in Gwembere v Malawi Railways Limited, (1978-80) 9 MLR 369. Mr Tembenu submits the Supreme Court in the Gwembere case decided that a court had a discretion to award interest to a party to whom money was due and is driven to litigation to recover the money owed. The Supreme Court laid no such general rule. At common law, as Skinner, C.J., states, interest could only be claimed under a contract.

“Mr Mhango places great reliance on the passage from the judgment of Lord Denning, M.R. in Harbutt’s “Plasticine” Ltd v Wayne Tank and Pump Co. Ltd. (2) ([1970]1 Q.B. at 468):

“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.”

What Lord Denning was discussing in that case was the exercise of the discretion under the Law Reform (Miscellaneous Provisions) Act 1934, and the principle which laid down in the passage relates to the award of interest under that statute. That Act, which was applied to this country, was repealed in its entirety by the Statute Law (Miscellaneous Provisions) Act (cap. 5:01). Consequently, it is necessary to ascertain whether the High Court has now a discretionary power to award interest in any proceedings for debt. Interest, of course, is recoverable as a debt in cases where it is payable under a contract, express or implied, or under a statute which fixed the rate at which it is payable, but there was no contract either express or implied in the instant case as to interest and it was not pleaded or suggested that there was a statute which governed the payment of interest. Sections 11 of the Courts Act (cap. 3:02) confers certain additional jurisdiction on the High Court.”

Skinner, CJ., continued as follows:

“It is not s. 11 which gives the court jurisdiction to try an action for interest. In our judgment sub-para. (v) does not provide that interest can be claimed as of right. It allows of a discretion in the court to direct the payment of interest but only in the case of debt as distinct from damage.”

The High Court has no general powers to award interest generally except in the circumstances mentioned and under statute. Under the Courts Act this Court can only award interests on debts. It cannot award interest on damages or compensation. The plaintiff’s claims redounding in damages or compensation, this Court cannot award interest.

The plaintiff claims compensation for breach of her rights under the Constitution. This Court in Marinho v SGS (Blantyre) Pvt Limited, Civ. Cau. No. 508 of 1996, unreported suggested the matters going to compensation for discrimination:

“The rights under this provision are intended to apply between citizens. Where there has been a violation of them, the court is supposed to give an effective remedy (section 40(3) of the Constitution). …The Constitution itself provides for compensation for violation of these rights. Compensation should be according to principles which apply in torts (Ministry of Defence v Cannock [1994] IRLR 509). In matters of this nature the court has to take into account injury to feelings. Injury is a necessary and foreseeable consequence of any segregation. Resignation, revulsion and rejection are the usual feelings of a man who has been discriminated. The law should therefore take injury to feelings as a component of the damages awarded. It must also be born in mind that any type of discrimination is forbidden. Its practice must really have been detested by framers of the Constitution that right in the constitution they provided for two things that underline the

attitude that this court must have when faced with this sort of matter. First, the constitution makes the right non-derogable. Secondly, the Constitution allows affirmative action by legislators to punish violators and to pass laws that promote respect for equality."

The discrimination here was incidental. It was not calculated. The Board genuinely feared for the worse should the plaintiff have received the payments she now has been awarded. I award K9,000. The discrimination here compares less to the one that Mrs Selemani suffered in Selemani v Price Waters House, Civ. Cau. No. 1480 of 1992, unreported. I do not think this is where I should award exemplary damages. Courts have settled principles on which courts make such awards. The plaintiff's case does not fall in any categories Lord Devlin suggests in Rookes v Bernard, [1984] 1 ALL ER 367, adopted by the Malawi Supreme Court in Dangwe v Banda, MSCA Civ. App. No. 8 of 1993, unreported.

The plaintiff will have the cost of the action.

Made in open court this 13th Day of January 2003

**D F Mwaungulu**

**JUDGE**