IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CASE NUMBER 3256 OF 2005

BETWEEN:

LENSON MWALWANDA……………………………………………….PLAINTIFF

- and -

STANBIC BANK LIMITED..……………………………………….DEFENDANT

CORAM: **HON KATSALA J,**

Chiphwanya, counsel for the plaintiff

Mumba, counsel for the defendant

Mchacha – official interpreter

Mrs L. Kasasi - typesetter

JUDGMENT

R. R. Mzikamanda J,

On 7th November 2005 the plaintiff commenced an action by way of a specially endorsed writ claiming against the defendant the payment of severance allowance to be assessed. Having filed an amended defence to the action, the defendant took out a summons for disposal of the case on point of law pursuant to Order 14A of the Rules of the Supreme Court. The said summons was heard before the Honourable Justice Katsala who had to leave the country for the United Kingdom to study before he prepared the judgment. The matter was thus placed on my table for the purpose of preparing the judgment. The learned Judge observed that the skeletal arguments on the summons were not skeletal arguments in the sense generally understood as they were long and detailed. The Plaintiff's were 33 pages long while the defendant's were 10 pages long. I agree with the observation of the Judge. Though the Judge had formed the opinion that these skeletal arguments amounted to full written submissions, he nonetheless allowed counsel to make oral submission during the hearing of the summons. In preparing this judgment I have fully and carefully considered both the skeletal arguments and the notes made by the Judge. It would not serve any useful purpose for me to reproduce the parties' submissions in detail. I will make reference to them as I prepare this judgment.

In the application to dispose of the action on point of law pursuant to Order 14A of the Rules of the Supreme Court the defendant seeks the court's determination on the following questions:-

1. Whether termination of employment by way of early retirement at the instance of the employee exercising his free will is not termination unilaterally by the employee?

2. Whether termination of employment by way of early retirement at the instance of the employee exercising his free will is not outside the provisions of Section 35(1) of the Employment Act No. 6 of 2000?

3. Whether the decision of Potani J in **The State vs The Attorney General (Minister of Labour & Vocational Training ex parte Mary Khawela & Others)** Misc Civil Cause No 7 of 2004 reverses all acts lawfully done under the

Employment Act (First Schedule) (Amendment) Order 2002 during the 2 years it was in force?

4. Whether the defendant is liable to pay the plaintiff severance allowance which was not playable to the plaintiff in accordance with the provisions of the Employment Act (First Schedule) Amendment Order 2002 which was in force at the time the plaintiff's employment was terminated by way of early retirement at his instance?

5. Whether the calculation of severance allowance payable to the plaintiff, if any, should start from the date when the Employment Act No 6 of 2000 came into force on 17th September 2000 or from the date when the plaintiff was employed in 1980?

6. Whether the provision of the Employment Act No 6 of 2000 have retrospective application by conferring benefits on employees and creating new obligations for employees for the years when the said Act was not in force?

7. Whether the plaintiff's lawyers are entitled to collect charges on the severance allowance claimed and to costs of this action when the Industrial Relations Court has jurisdiction?

8. Whether the plaintiff's claims for severance should not have exhausted the requirements of Section 35(8) of the Employment Act before being brought before the High Court.

The undisputed facts of the case show that the plaintiff was employed by the Commercial Bank of Malawi in 1980 as a sub-accountant. He continuously worked for a period of 24 years and rose to the position of Operations Manager for the Ginnery Corner Branch of his employers, who had now become Stanbic Bank. He was a member of the defendant's pension scheme. On 11th November, 2003 the plaintiff wrote his employers, the defendants, asking for an early retirement from his employment. The defendants responded on 30th December 2003 accepting

the plaintiff's offer to go on early retirement and also advised him that his last working day would be the 31st of January 2004. The plaintiff's retirement was duly processed and the plaintiff has been receiving his monthly pension as per the rules of the scheme.

There was a difference of opinion between the plaintiff and the defendants when the plaintiff demanded that he be paid severance allowance in terms of the Employment Act 2000. The defendants denied that he was entitled to severance allowance. The plaintiff then commenced this action claiming severance allowance, interest thereon and costs of this action. The pleadings were closed. The defendants took out the present summons under Order 14A seeking the determination of a number of questions as listed above whose responses the parties agree will effectively disperse of the matter.

At the hearing of the application my brother Judge Hon Justice Katsala heard both parties. There also had been filed before the hearing of the application skeletal arguments. As observed earlier the skeletal arguments themselves were long and detailed.

The first and the second questions can conveniently be dealt with together as they are inter-related and pertain to the same issue of early retirement and the interpretation of Section 35(1) of the Employment Act 2000. Section 35(1) of the Employment Act 2000 provides as follows –

> *"On termination of contract, by mutual agreement with the employer or unilaterally by the employer 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 the First Schedule.*

According to the plaintiff his early retirement was termination of contract of employment by mutual agreement between the defendants and himself. He submitted that in terms of the rules governing the defendants' pension scheme he could only retire early with the consent of the defendants and not otherwise. The defendants disagree. They submitted that they only allowed the plaintiff's wish to go on early retirement as expressed in his letter of 11th November 2003.

According to the defendants, in so allowing the plaintiff they did not suggest there was an agreement whether expressed or implied that the plaintiff's contract be terminated. The defendant submitted that the termination of the plaintiff's contract of employment was unilateral hence he is not entitled to severance allowance.

The plaintiff's letter of offer to go on early retirement was in the following terms in part –

> *"<u>Early Retirement"</u>*
>
> *As year end is coming I would like to enquire whether there is still chance of voluntary retirement programme. I have enquired because I feel it is time I have to retire.*
>
> …………
>
> *In view of my age, I think I would be unable to cope with such situations and I would not fully contribute to the smooth running of the bank hence my request for an honourable early retirement.*
>
> *Lenson Mwalwanda*
HEAD SERVICE SUPPORT

Again the response of the defendants was as follows in part –

> *<u>"Early Retirement"</u>*
>
> *I write with reference to your letter dated 11th November but which was received by us on 15th December 2003 regarding the above subject.*

I wish to confirm that the Bank will allow you to proceed on retirement, the full details of which will be communicated to you as soon as the Actuary has been determined the total amount applicable to you.

For purposes of calculating the terminal benefits we have determined that your last day of work will be January 31st 2003.

…………….

Yours sincerely,

Dyzie G. Magela
HEAD OF HUMAN RESOURCES

The response was dated 30th December 2003 and it is apparent that the last day of work was incorrectly put at January 31st, 2003 instead of January 31st, 2004. All subsequent correspondents quoting date of retirement refer to 2004 and not 2003. Be that as it may, the two letters show that the two parties agreed that the plaintiff should go on early retirement. The plaintiff made his offer to retire early at the time he wanted to find out if the voluntary retirement programme was still available. The response of the defendants indicates an acceptance of the early retirement when they allowed the plaintiff to go on early retirement. It was the defendants who gave the last working day, at first as January 31st, 2004 and later at 28th February 2004. This was termination of contract of employment by mutual agreement with the employer as such it falls into the provisions of Section 35(1) of the Employment Act No 6 of 2000. The termination of employment contract was of early retirement was not unilateral on the part of the plaintiff. It was by mutual agreement with the employers. The defendant's own Pension Scheme Rules are to the effect that the plaintiff could only go on early retirement with the defendant's consent. The granting of such consent coupled with the defendant's determining of the plaintiff's date of retirement go to confirm that the early retirement by the plaintiff was on the basis of a mutual agreement between the plaintiff and his employers, the defendants.

The third and the fourth questions will also be dealt with together, the reasons advance in connection with questions (1) and (2). Both questions related to an inquiry whether under the Employment Act there is a legal basis for the plaintiff to receive severance allowance from the defendants. Severance allowance under the Employment Act No 6 of 2000 is calculated in accordance with the First Schedule to the Act. Section 35(2) of the said Act provides that the Minister may in consultation with organizations of employers and organisations of employees by notice published in the Gazette, amend the First Schedule. On 31st January 2002 by the Employment Act (First Schedule) Amendment) Order 2002, the Minister of Labour and Vocational Training revoked and replaced the First Schedule with a new Schedule. That new Schedule introduced not only a formula for calculating severance allowance but also circumstances where no severance allowance shall be paid and tended to limit severance allowance to employees not entitled to pension gratuity or any other terminal benefits. According to the new Schedule, no severance allowance would be payable where and employee is entitled to pension gratuity and other terminal benefits which exceed the severance allowance payable under the Order. In the case of the **State vs Attorney General (Minister of Labour and Vocational Training) ex parte Khawela and Others,** Misc Civil Cause No 7 of 2004 unreported the Act Employment Act (First Schedule) (Amendment) Order 2002 was challenged as being invalid. Potani J found that in making the challenged Order the Minister of Labour and Vocational Training exceeded her authority by introducing concepts that were never envisaged by Section 35(1) and Section 35 (2) of the Employment Act. The judge proceeded to quash the Order on the ground that it was made in excess of the Minister’s powers under Section 35 of the Employment Act and Section 58(1) of the Constitution. Judge Potani’s ruling was apparently delivered on 5th November 2004. Before the Judge delivered his ruling the Minister of Labour and Vocational Training promulgated another amendment called the Employment Act (First Schedule)(Amendment) Order 2004 made on 3rd February 2004.

The applicants argue that the decision of Potani quashing the Employment Act (First Schedule) (Amendment) Order 2002 did not decide the question what happens to the transaction that took place when the quashed amendment was in force for about two years. The applicants concede that there is no case authority on this aspect even from other jurisdictions. The

applicants then drew an analogy between the law declared invalid and repealed laws under Section 14(2)(b) and (c) of the General Interpretations Act Cap 1:01 of the Laws of Malawi. The applicants argue that a repeal does not affect the previous operation of any written law or anything duly done or suffered under any written law so repealed, the quashing of a law on ground of invalidity does not affect all the transactions or judgments undertaken on the basis of the invalid law. Thus the transactions cannot be reversed. The respondents on the other hand argue that the natural meaning of the decision of Potani J in quashing the amendment to the First Schedule was that the amendment was of no effect, as if had never been made because the Minister had no power to amend the First Schedule so as to take away a benefit that the parent Act had expressly conferred. According to Section 58(1) of the Constitution, Parliament has authority to delegate to the Executive power to make subsidiary legislation only within the specification and for the purposes laid out in the parent Act. U*ltra vires* subsidiary legislation is void of legal effect and not binding. It is void *ab initio.* The respondents referred to Section 21(b) of the General Interpretation Act which provides that no subsidiary legislation shall be inconsistent with the provision of any Act and any such legislation shall be of no effect to the extent of such inconsistency. They argue that whatever was done under the miscarried amendment cannot be claimed to have been lawful, and cannot stand in the way of the plaintiff to block him from claiming his well-deserved severance allowance. The purported amendment was still borne and that we did not need **Khawela's** case to invalidate the ill-conceived amendment. The law is settled that subsidiary legislation must conform strictly to the enabling provisions of the main Act. Any subsidiary legislation made in excess of what is permissible under the enabling provisions of the main Act is *ultra vires* and invalid to the extent of the inconsistency with the main Act (see the case of **Press (Produce) Limited vs A.H. B. Enterprises** 12 MLR 1). I have not had the benefit of reading the full opinion of Potani J in **State vs Attorney General (Minister of Labour and Vocational Training) ex parte Khawela and Others,** Misc Civil Cause No 7 of 2004. I have not found a copy of that opinion on this file or anywhere else. However, from my reading of the submissions by counsel it appears to me that Potani J was faced with a situation similar to the one Mtegha J, as he then was, was faced with in January 1987 in **Press (Produce) Limited vs A.H. B. Enterprises** 12 MLR 1). In that case the main question was whether the Courts Act (Schedule)(Replacement) Notice pursuant to which the Sheriff of Malawi had recovered fees from the applicants was *ultra vires* in that the Chief Justice

had acted in excess of the powers conferred on him to make subsidiary legislation. The applicants in fact argued that the Notice was invalid for being *ultra vires* and that in recovering the fees on the basis of it the Sheriff of Malawi had acted illegally. The applicants wanted the fees returned to them.

Mtegha J, as then he was, put the question thus –

*"It would probably be proper in order clearly to understand the issues, if I say a little about the legislation which I am required to construe. The Courts Act (Cap 3:02) came into force on August 1st 1958. Under Section 32(2) of the Act the Chief Justice was given power with the approval of the Minister ……(to) revoke, replace or amend the Schedule….' Which was there when the Act came into force. The Schedule – to be specific, Item 23 of the Schedule – prescribes fees, poundage, allowance etc for the Sheriff…acting under the powers conferred upon him by Section 32(2), the Chief Justice with the approval of the Minister revoked the Schedule. This was done by the Courts Act (Schedule)(Replacement) Notice 1972, which fixed the Sheriff's fees at 10% of the value appearing on the warrant. In 1968, the Sheriffs Act was enacted and Section 47 empowered the Chief Justice only and not with the approval of the Minister to make rules prescribing, **inter alia**, fees poundage and allowances which the Sheriff might wish to levy. No rules have been made so far and as a result, the Sheriff, in demanding fees which he receives in the process of execution has relied on the Schedule to the Courts Act as replaced in 1977, i.e. 10% of the value shown on the warrant."*

Having examined the import of Section 21(a) of the General Interpretation Act and the dictum of Skinner CJ in **Maunde vs National Bank of Malawi** 10 MLR 392, with which dictum the Judge disagreed had this to say:

*"The old Schedule has not been repealed or amended, the purported amendment in the Schedule under Item 23 of the Courts Act, is clearly inconsistent with Section 48 of the Sheriffs Act. I therefore agree with Mr Dholakia that the fees collected by the Sheriff were **ultra vires** and must be refunded, less Sheriff's entitlement and I so order."*

Mr Dholakia had in fact submitted that the Courts Act (Schedule) Replacement Notice 1977 made in relation to Item 23 of the said Schedule made under Section 32(2) of the Act was *ultra vires* and repugnant to the Sheriffs Act Cap 3:05. The reasoning of Mtegha J would find application in the present case. Potani J having declared the Employment Act (First Schedule) Amendment) Order 2002,*ultra vires* and invalid in the **Khawela** case it follows that whatever was done under it was of no legal effect, regardless of how many times it was so done. It is not a matter of expediency but a matter of legal position. In **Press (Produce) Limited vs A.H. B. Enterprises** (supra) Mtegha J reserved the act of collecting Sheriff fees done and ordered a refund of the Sheriff fees, less that which the Sheriff was lawfully entitled to. Applying this reasoning to the case at hand the answers to the third and fourth questions must be in the affirmative. The issue of a law being invalid cannot be treated in the same way as a repealed law.

As Kapanda J observed in **E. K. Thomson vs Leyland DAF (Malawi) Ltd** Civil Cause No. 919 of 2003, the Employment Act (First Schedule) Amendment) Order 2002 cannot be relied upon in arguing that severance allowance is not payable. I agree with Kapanda J that neither can the Employment Act (First Schedule) Amendment) Order 2004 be relied upon in support of that argument. The Minister promulgated the 2004 Order just before Potani J delivered his ruling. That was strange because the Minister well knew that the Employment Act (First Schedule) Amendment) Order 2002 was being challenged in court. In fact the Employment Act (First Schedule) Amendment) Order 2004 is not very much different in its impart from the Employment Act (First Schedule) Amendment) Order 2002. Apart from introducing a middle band of calculating severance allowance payable for a length of service exceeding five years but not exceeding ten years as being three weeks wages for each completed year the 2004 Order adds a fifth paragraph which states that for the purposes of paragraph 3, pension does not include personal contribution by the employee to any pension scheme. To a large measure therefore the 2004 Order is similar to the 2002 Order and yet it was promulgated at the time the 2002 Order was, to the knowledge of the Minister being challenged in court. To the extend that the 2004 Order repeats the things of the invalid 2002 Order and to the extent that it introduces matters that

are *ultra vires* the enabling provision being Section 35 of the Employment Act it must also be invalid and cannot be relied upon by the applicants.

The question whether the calculation of severance allowance payable to the plaintiff if any, should start from the date when the Employment Act No 6 of 2000 came into force on 1st September 2000 or from the date when the plaintiff was employed in 1980 can be dealt with together with the question whether the Employment Act No 6 of 2000 has retrospective application conferring benefits on employees and creating new obligations for employers for the years when the said Act was not in force. The applicants have forcefully argued the Employment Act which came into force on 1st September 2002 does not have retrospective application and that it stands to apply from the date it came into force. They have quoted the case of **Hyhten Lemani Munyoni vs The Registered Trustees of Development of Malawi Traders Trust** (DEMATT) Civil Cause No 686 of 2001 in support. They have also referred to Section 69(1) of the Employment Act which deals with transitional matters and provides that "*Every contract of employment entered into prior to the coming into force of this Act shall …….continue to have effect until the expiry of three months from coming into force of this Act*" They argue that this section implies that after the expiry of three months from 1st September 2000, all prior contracts came to an end. It is the applicant's submission that if Section 35 which governs severance allowance, is read together with Section 69(1) it becomes apparent that the right to severance allowance starts to accrue to an employee at most three months from the date when the Act came into force from which date the calculation of severance allowance can only be done. As a fundamental rule of law, no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication (see **Maxwell on the Interpretation of Statutes, Bennion Statutory Interpretation 2nd edn page 215** and **Carson vs Carson**[1964] 1 WLR 511 at p16). It was also submitted that prior to the Employment Act 2000 coming into force there was a regime governing severance pay which was limited to employees earning an annual salary of K2000 and above (the Wages and Conditions of Employment (Severance Pay) Order made under the repealed Regulation of Minimum Wages and Conditions of Employment Act (Cap 55:01 of the Laws of Malawi) That should be the regime to apply for the period prior to the Employment Act. It would be against the spirit of the law and it would increase the cost of labour if

employees earning over K2000 now have to be paid severance allowance even for years when severance allowance was not payable. The case of **Japan International Cooperation Agency vs Verity Jere** Civil Appeal No 25 of 2002, which held that severance pay provisions have retrospective application did not consider Section 69(1) of the Employment Act had the High Court, Lilongwe District Registry considered it, the court might have arrived at a different result. The decision ought to be distinguished.

The respondent agree that it is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Where on a weighing of factors it seems that some retrospective effect was intended, the general presumption against retrospectivity must be kept to as narrow a compass as will accord with the legislature intention. As **Carson vs Carson** 1964 1 ALL ER 681 held the rule against retrospectivity of statutes is not a rigid or inflexible rule but one to be applied always in the light of the language of the statute and the subject matter with which the statute is dealing (see also **Barber vs Pidgeon** [1937] 1 ALL ER): **Director of Public Prosecutions vs Lamb** et al [1941] 2 ALL ER 499); **Sunshine Porcelain Potteries Property Ltd vs Nash** [1961] 3 ALL ER 203; **Secretary of State for Social Security and Another vs Tunnicliff** [1991] 2 ALL ER 712). A relevant quote in **Director of Public Prosecutions vs Lamb** is that –

> *"……where a statute alters rights of persons or creates fresh liabilities in regard to persons, or creates or imposes obligations upon persons and thereby alters the law such a statute ought not to be held to be retroactive in its operation unless the words are clear precise and quite free from ambiguity".*

It was further argued that a statute is not unacceptably retrospective if it merely confers a benefit the quantum of which is assessable by taking into account facts antecedent to the coming into force of the statute as in **Master Ladies Tailor Organisation and Another vs Minister of Labour and National Services** [1950] 2 ALL ER 525. The respondent quoted extensively a paragraph in **Japan International Cooperation Agency vs Verity Jere** Civil Appeal No 25 of 2002 in which Nyirenda J dealt with the retrospectivity of Section 35(1) of the Employment Act

on severance allowance and in particular the question on the starting point in counting the completed years of continuous service in relation to old contracts or contracts entered into way before the coming into force of the Employment Act 2000 and move especially in relation to contracts where severance pay was not payable. The relevant part of the quote is as follows –

> *"Section 35(1) in effect compels employers to recognise the commitment and valuable contribution which employees make to the work they do. Clearly the provision protects employees from being told to go with one month's pay after working for an employer for a considerable number of years. In the spirit of Section 31(1) of the Constitution, Section 35(1) of the Employment Act 2000 is meant to protect employees who have long served their masters and puts a stop to exploitation. It is in this spirit that in my judgment, Section 35(1) was meant to take on board all the committed employees and all that they have toiled for in the years past and present. In fact the case for retrospective application of Section 35(1) is made clear by looking at the wording of Section 63(4) and 63(5) which refers to past employment in using the expression* ***"an employee who has served on the compensation formulae. To this extent I am of the clear view that Section 35 of the Employment Act 2000 must operate retrospectively and reward those that have been faithful to their employers".***

It was therefore argued that severance pay for the respondent ought to be calculated from the time he got employed in 1980 and not from 1st September 2000 when the Employment Act 2000 came into force.

In dealing with the question whether the provisions of the Employment Act No 6 of 2000 have retrospective effect – I observe that there are two decisions of the High Court which are seemingly at a variance with each other. My handicap is that I have not been favoured with the full opinions of these decisions. The decisions in question are **Hyhten Lemani Munyoni vs The Registered Trustees of Development of Malawi Traders Trust** (DEMATT) Civil Cause No 686 of 2001 (unreported) which the applicants cited as authority for the proposition that the Employment Act does not have retrospective application and it starts to apply from the date it came into force. The other case is the **Japan International Cooperation Agency vs Verity Jere**

Civil Appeal No 25 of 2002 in which the High Court held that severance pay provision have retrospective application. The applicants have also cited Section 69(1) of the Employment Act 2000 in support of their contention of non-retrospectivity of the Employment Act 2000. I will be alluding to these authorities in due course. I must say that the law is indeed settled that a statute shall not be construed to have retrospective operation unless such construction appears very clearly in the terms of the statute or it arises by necessary and distinct implication. The rule against retrospectivity of statutes or laws is fundamental rule of law but one that is not rigid or inflexible. This means therefore that there will be situations where a law or a statute may be construed to have retrospective operation. That a statute or a law may have retrospective effect is not a rule but an exception to the general rule. Being an exception to the general rule therefore there must be clear terms on retrospectivity or it must arise by necessary or distinct implication. The question whether in the Employment Act of 2000 there appear clear terms on retrospective operation of the Act or that such arises by necessary or distinct implication appears to have answered in the negative in the **Hyhten Lemani Munyoni vs The Registered Trustees of Development of Malawi Traders Trust** (DEMATT) Civil Cause No 686 of 2001 (supra). I observe that the Employment Act 2000 was passed in Parliament on the twenty-ninth day of March 2000 assented to by the President on 14th May 2000 and published in the Gazette on 19th May 2000. Under the Act it is provided that it shall come into operation on such date as the Minister shall appoint by Notice published in the Gazette. I have not seen the Gazette in which the Minister published the operative date of the Act. It has been suggested to me that the date is 1st September 2000. Be that as it may, it is to be noted that the Act repeals on the Second Schedule five previous Acts relating to employment including the Regulation of Minimum Wages and Conditions of Employment Act Cap 55:01 which was cited by the applicants. The effect of repealing these laws is that with effect from the date the new Act came into the operation all the repealed laws would not be operational. It is not for nothing that Section 68(2) provides that –

> *"Any subsidiary legislation made under the Acts repealed by subsection (1), in force immediately before the commencement of this Act.*

(a) *shall remain in force unless in conflict with this Act and shall be deemed to be subsidiary legislature under this Act; and*

(b) *may be replaced amended or repealed by subsidiary legislature made under this Act.*

This means that any provision in the subsidiary legislature save which is inconsistent with the new Act would not have application anymore.

The applicants have cited section 69(1) which is a transitional Provision. That section provides –

> *"Every contract of employment entered into prior to the coming into force of this Act shall notwithstanding that its terms are not in conformity with this Act, continue to have effect until the expiry of three months from coming into force of this Act".*

The applicant's interpretation that all contracts made before 1st September 2000 ceased to have effect after three months of the Act coming into force cannot be correct. It is also not correct to say that after three months new contract came into existence. This is not what Section 69(1) of Employment Act was intended for. This becomes clear when Section 69(i) of the Act is read together with section 69(2) and Section 69(3) of the same Act. These provide as follows –

"(2) *An employer who is a party to a contract of employment to which subsection (1) applies shall, be responsible for causing the contract to comply with this Act."*

"(3) *After the expiration of three months from the coming into force of this Act, an employer who is a party to a contract of employment to which sub-section (1) applies shall not have any rights thereunder until sub-section (2) is complied with.*

The first thing to notice here is that Section 69 of the Employment Act concerns itself with the actual contracts of employment and not the law which applies to those contracts of employment. The section does nothing to revive the ghosts of the repealed laws. The second thing is that Section 69 of the Act in fact recognises the continuation of existing contracts of employment whether such contracts have terms consistent with the new Act or not. Thirdly, the three months period in Section 69 is there to give the employer an opportunity to do something to bring the terms of the employment contract which were inconsistent with the new Act into conformity with the new Act. During that period of the three months the employer retains rights on the contracts and after three months the employer would not have any rights under a contract whose terms remain inconsistent with the new law until the employer complies with the new Act. Note that it is the employer only who will not have rights. By necessary implication the employee continues to enjoy the rights under the contract including those conferred under the new Act. The onus to bring the existing contract of employment into conformity with the new law was by Section 69 of the Act placed squarely on the employer.

Thus Section 69 is not about the termination of old contracts and the creation of new ones. It is about terms of contract being aligned to the provisions of the new law. The section therefore cannot be relied upon as one limiting retrospective application of the provisions of the Employment Act 2000.

Nyirenda J, did consider the decision in **Hyhten Lemani Munyoni vs The Registered Trustees of Development of Malawi Traders Trust** (DEMATT (supra) at the time he delivered judgment in **Japan International Cooperation Agency vs Verity Jere** (supra). His Lordship looked at old contracts of employment terminated after the commencement date of the new Employment Act. He had this to say:

> *"Supposing the implication in the Employment Act 2000, is that the counting of the years starts from September 2000, it means that those employees, who were entitled to severance pay before the Act would lose out irrespective of their length of services with their employers. The opposite scenario is that if the counting of the years of employment starts from the actual point of an employee's employment, then even those employees who*

were not previously entitled to severance pay would receive severance pay for all their past years employment. This obviously places a heavy and retrospective burden on employers.

Which way therefore the construction of the new severance pay provisions are bound to cause unfairness on one party or the other to old employment agreements"

I cannot agree more with these sentiments. I think that in that regard the new Employment Act has some serious problems which need to be addressed by the Legislature at the earliest opportunity. The heavy burden that would be placed on the employer has the potential of raising the cost of labour and create a disincentive for investment. As the law stands at the moment I agree with the reasoning of Nyirenda J, and his conclusions that Section 35(1) of the Employment Act 2000 has retrospective operation. Even if Nyirenda had taken into account Section 69(1) of the Act he would in my view come to the same and inevitable conclusion that Section 35(1) of the Act has retrospective application for the reasons I have explained above when I discussed Section 69. Again the problems of the Employment Act including the problems of Section 35(1) of the Act require legislature intervention, not at Ministerial level but at the level of the Legislature itself. The question five and six under discussion will be amended by saying that severance allowance payable to the respondent should start from the date of his employment and not from the date the Employment Act No 6 of 2000 came into operation as the provision under which it is payable being Section 35(1) of the Act has retrospective application. Let me hasten to add that I would hesitate to make a sweeping statement that the whole of the Employment Act of 2000 has retrospective application. There are provisions in the Act which may clearly not have retrospective application.

The next question I must consider is whether the plaintiff's claim for severance allowance should have exhausted the requirements of Section 35(8) of the Employment Act before being brought to the High Court. That section provides that –

"A complaint that a severance allowance has not bee paid may be presented to a District Labour Officer within three months of its being due and if the District Labour Officer

fails to settle the matter within one month of its presentation, it may be referred to the court in accordance with Section 64(2) or 64(3) which, if the complaint has been proved shall order payment of the amount".

According to the applicants the respondent did not comply with this provision and the complaint ought to be dismissed. They cited the dictum of Chimasula Phiri J, in **R. Solankhwazi vs The Sugar Corporation of Malawi Ltd** Civil Cause No 3204 of 2003 which is in the following words

> *"Even if I could find that the plaintiff was fairly dismissed, which is not the case here, I would have nonetheless exercised my discretion to refuse such relief on the ground that the provisions of Section 35(8) above quoted were not complied with. I appreciate that the High Court has unlimited original jurisdiction on any legal matters but where the law has specifically created institutions and procedures to deal with specific rights everyone must adhere to such law. There is no evidence here that the plaintiff complained to the District Labour Officer or further appealed to the Industrial Relations Court apart from rushing to this court. I dismiss the claim for severance allowance."*

The respondents argue that the complaint cannot be dismissed merely because the respondent did not comply with the procedural requirements of Section 35(8) of the Act. It was argued that Section 35(8) of the Act is directory in nature and not mandatory. The broad policy of it was to speedily assist employees who are in a quandary following termination of their services. Failure to speedily approach the District Labour Officer does not disentitle the respondent from claiming through the court. The respondent cited the case of **Blantyre Sports Club vs R. K. Banda and E. M. Kangala** Civil Cause No 61 of 2003 where the same issue was raised with the consequence that the successful parties were ordered to pay their own costs since the likelihood was there that, if that matter was taken to a Labour Officer it have could been resolved there.

The first point to be noted is that Section 35(8) of the Act employs the word **"may"** in relation to the laying of the complaint for severance allowance and employs **"shall"** in relation to the Order the court makes. The term **"may"** ordinarily entails permissiveness and **"shall"** entails mandatory. There are also times when "**may"** means **"shall"** depending on use and context. In the present case I do not have the impression that in section 35(8) of the Act **"may"** was used to mean "**shall"**. In fact I am of the distinct view that the use of **"may"** in Section 35(8) of the Employment Act connotes permissiveness. This comes out clearly when the first part uses **"may"** in relation to the lodging of a complaint for severance allowance and **"shall"** in relation to the making of the Order by the court for payment. In fact for the most part of Section 35 the term **"shall"** is used. This must connote the mandatory nature of the provision. It is clear that wherever **"may"** is used in Section 35 it connotes permissiveness. I would agree that Section 35(8) of the Act is directory and not mandatory in so far as the laying of the complaint for severance allowance is concerned. I agree with Chimasula Phiri J, that where the law specifically created institutions and procedures to deal with specific rights everyone must adhere to such law. I would however, qualify this by saying that where a procedural requirement is only directory and not mandatory failure to comply with it does not invariably result in the dismissal of the complaint or matter. I am also of the view that one of the reasons why Section 35(8) is in the Act is to facilitate speedy assistance to the employee claiming severance allowance and not to create a hurdle which when not complied with defeats the claim for severance allowance. A claim for severance allowance should not be allowed to be frustrated by a mere procedural irregularity on a procedure that is merely permissive. This is not to suggest that employees should by-pass the District Labour Officer at will. In appropriate cases the court should be in a position to order that the complaint be made to the District Labour Officer before it is brought to court and indeed the Employment Act is clear on the definition of court as being the Industrial Relations Court established under Section110(2) of the Constitution. This court would entertain the matter being a court with unlimited original jurisdiction although as a matter of practice it would refer labour matters to the Industrial Relations Court in appropriate cases. In the present case I refuse to dismiss the claim for severance allowance merely because the respondent did not comply with the directory procedural requirement of first lodging the complaint with the District Labour Officer.

I must now address the question whether the respondent is entitled to collection charges of this action. On this matter, we have the authoritative decisions of the Malawi Supreme Court of Appeal in **J .L. Kankwangwa and Others vs Liquidator Import and Export MW Limited** M.S.C.A. Civil Appeal No 4 of 2003. This was an appeal against the decision of Kapanda J, in **Liquidator Import and Export MW Limited vs J .L. Kankwangwa and Others** Civil Appeal No 52 of 2003. Kapanda J, dealt in considerable detail with the issue of legal collection charges. Reversing the award of collection charges made by the Chairman of Industrial Relations Court, Kapanda J, observed that it was not correct to say that collection charges are not costs and therefore not taxable. He also observed that the costs that are not payable in Section 72 of the Labour Relations Act include legal collection charges. Again by the legal practitioners (scale and minimum charges)(Amendment) Rules in particular table 6 of the First Schedule with effect from 13th March 2002, legal collection charges are payable by the collecting party and not the paying party. Further still by the amendment where proceedings are commenced legal practitioners may only charge solicitor and own client charges in addition to party and party costs. The Malawi Supreme Court of Appeal upheld the judgment of Kapanda J, in its entirety, observing among other things that legal collection charges cease to be payable immediately after commencement of an action and that what is payable after commencement of a legal action are solicitor and own clients costs and party costs. I would do no better in applying the Malawi Supreme Court of Appeal decision here and answering the question on the negative, that is to say the respondent cannot claim collection charges after the action has been commenced in this court.

On the question whether the respondents can claim costs in this action, the answer is plain in Section 72(1) of the Labour Relations Act. The present matter is no doubt a Labour Relations matter and had the matter been commenced in the Industrial Relations Court no costs would have been claimable in view of Section 72(1) of the Labour Relations Act. The Malawi Supreme Court of Appeal said **J .L. Kankwangwa and Others vs Liquidator Import and Export MW Limited** (supra) said **–**

> **"***The law is very clear that the Industrial Relations Court is precluded from making an Order regarding cost: see Section 72(1) of Labour Relations Act. Clearly, the purpose of*

> *this statutory provision is to make proceedings in the Industrial Relations Court inexpensive and thereby access to the court".*

Indeed Kapanda J, observed earlier that a party is not entitled to party and party costs in the Industrial Relations Court by virtue of Section 72(1) of the Labour Relations Court. The present matter would very have been commenced in the Industrial Relations Act and that court would not have awarded costs. This court would therefore not award costs because that would be defeating the spirit of Section 72(1) of the Labour Relations Act. In this case costs are not awardable.

The respondents argued that he was entitled to interest of the severance allowance he is entitled to. The pleadings do not claim interest and severance allowance and it was not one of the questions to be determined under Order 14A Rules of the Supreme Court. For all it is worth the matter has been put to rest by **J .L. Kankwangwa and Others vs Liquidator Import and Export MW Limited** (supra) the Malawi Supreme Court of Appeal said **–**

> *"We are unable to accept Chipeta J's, view that a delay in the payment of severance allowance amounts to a breach of Section 31 of the Constitution relative to the right fair and safe labour practices. We do not also agree that any delay in the payment of severance allowance attracts an award of interest at the lending rate of commercial banks."*

Having noted that interest is awardable as a matter of law when it is payable pursuant to an express or implied term of a contract or where there is a statutory requirement or in the exercise of the courts equitable jurisdiction, the Malawi Supreme Court of Appeal found that the Industrial Relations Court erred in awarding interest as none of the above conditions were satisfied. In the present case there is nothing to show that any of the conditions are satisfied. There can therefore be no award of interest on the severance allowance payable.

Thus on the present matter severance allowance is payable from the date the respondent started employment but without interest on it. There would be no collection charges or costs claimed from the applicants.

Each party will bear own costs.

MADE at Blantyre this 23rd day of March 2007

pp R. R. Mzikamanda

JUDGE