IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 34 OF 2006
(Being High Court Civil Appeal No. 24 of 2004) and originally IRC Matter No. 375 of 2003

BETWEEN:

STANBIC BANK LIMITED…………………………………APPELLANT

\- AND –

RICHARD MTUKULA…………………………………….RESPONDENT

BEFORE: **HON. JUSTICE D.G. TAMBALA, SC, JA**
HON. JUSTICE I.J. MTAMBO, SC, JA
HON. JUSTICE A.K.TEMBO, SC, JA
Savjani, SC, Njobvu, Chilenga, Counsel for the Appellant
Kaphale, Counsel for the Respondent
Selemani, Official Interpreter
R.H. Singano, Typesetter

JUDGMENT

TAMBALA, SC, JA

The appellant is Stanbic Bank Limited. It has brought the present appeal against the decision of Twea, J., which was made on 28th March, 2007 in the Principal Registry at Blantyre. The learned judge, in his judgment, upheld the decision of Kishindo learned Assistant Registrar which held that the terms **wages** or **pay** which appear in the

Employment Act No. 6 of 2000 are sufficiently broad to cover allowances and other benefits such as official car allowance, garden allowance, electricity water and telephone allowances, a night guard and security alarm system. The appellant had argued and vigorously contended both before the learned Assistant Registrar and in the court below that upon a proper construction, the terms wages and pay are restricted to **basic salary** or **basic pay** only. The appellant is dissatisfied with the decision of the learned judge in the court below and decided to bring the present appeal.

The factual background of this appeal is briefly as follows–

On 1st August, 1985, the appellant employed the respondent as a bank manager. On 8th September, 2003, while he was working as a branch manager at the appellant's Lilongwe branch, the appellant terminated the respondent's employment under circumstances which led the Industrial Relations Court to hold that such termination was unfair. The Industrial Relations Court made an Order for the reinstatement of the respondent. The appellant refused to comply with the Order. They opted to appeal against the decision of the Industrial Relations Court. The appeal was heard by Chinangwa, J., in the Lower Court at Lilongwe District Registry. The appeal was unsuccessful. The learned judge, on 26th August, 2006, Ordered the appellant –

> "1. Under Section 63(5) to pay three months pay for each year of service up to the date of this judgment.
>
> 2. Under Section 63(6) 12 weeks salary.
>
> 3. Severance allowance of one month for each year of service up to the date of this judgment."

The appellant was still dissatisfied with the decision of the lower court and appealed further to this court. The

appeal was, once again, unsuccessful. It was totally dismissed.

The matter was subsequently brought before Assistant Registrar Kishindo to calculate the sums of money payable by the appellant to the respondent in terms of the Order made by Chinangwa, J. The learned Assistant Registrar construed the terms **salary** and **pay** in the context of the Employment Act and came to the conclusion that the respondent's salary or pay constituted **his basic salary** and **all the allowances and benefits** payable to him by the appellant, (emphasis supplied). He calculated the total amount due and payable to the respondent in terms of the learned judge's Order as amounting to **K9,893,960.80**. Stunned by the amount they were required to pay and dissatisfied with the approach taken by the Assistant Registrar in determining what constitutes salary or pay, the appellant appealed against the decision of the learned Assistant Registrar. But, once again, the appeal, in the Court below, was unsuccessful. Still discontented the appellant brings the present appeal to this Court against the decision of Twea, J., in the court below.

In determining the amount payable to the respondent in terms of the Order of Chinangwa, J., it became necessary to construe the terms **wages** and **pay**. The learned judge had awarded 3 months pay for each year of service as compensation in terms of **section 63-(4)** of the Employment Act. An Order made in terms of **section 63 – (6)** when an employer refuses to comply with a re-instatement order requires payment of 12 weeks wages. Then the 1st schedule to the Employment Act concerning severance allowances talks about wages. Therefore, there was need to construe the words **pay** and **wages**.

The position taken by the appellant is that the terms pay and wages may be used interchangeably, but may not be equated with the term **remuneration.** It is the appellant's argument that from the definition of

remuneration and wages contained in the Employment Act, it is clear that **remuneration** includes **wages, salaries and benefits** such as allowances and other benefits while the term **wage** is narrower and excludes allowances and other benefits. According to the appellant wages would essentially comprise the basic salary or basic wage only. The appellant is however prepared to accept that the terms wages, salary and pay mean essentially one and the same thing. The respondent on the other hand contends that the respondent's **wages** or **salary** or **pay** included the **basic salary and all the allowances and benefits whether in cash or kind** which he regularly received from his employers.

The learned Assistant Registrar and the learned judge, in the court below, were called upon to determine the meaning of **wages or pay**. They had to decide upon the meaning of these terms bearing in mind also the facts of the case before them. However, the appellant added a third term, namely **remuneration** and called upon the learned judge in the court below and this court to also construe its meaning for the purpose of, probably, restricting the meaning of the terms **wages** or **pay.** The appellant submitted repeatedly that since remuneration is defined as including wages, salary plus allowances and other benefits, it would follow that the term remuneration is broader than wages or salary and that the latter words would not include within their definition allowances or other benefits. The approach suggested by the appellant places much emphasis on a comparison between the word **remuneration** on the one hand and **wages** and **salary** on the other. It places less emphasis or importance on the actual words used. We think that the approach preferred by the appellant is erroneous as it ignores the importance of the words actually used by the drafter of the statute and we take the position that that approach is likely to lead to an erroneous result.

The meaning of the words **wages** or **salary** or **pay** is not as easy as a simple comparison between the words

remuneration and **wages** or **salary** would seem to suggest. There are some case authorities which tend to shed some light on the terms in issue.

In the case of **Bayley v. Bailey [1922] 2 KB 227**, the respondent an army officer was in receipt of £292 per annum as **regimental pay.** He was also entitled to 5s per day as **command pay**. When it was contended, that the command pay was a mere allowance and therefore not calculable as the salary or pay of the respondent, Mc Cardie, J., stated –

> "I find myself unable to agree. It is true that command pay is only receivable by an officer in command. It is equally true that command pay is given because of the added social and other responsibilities falling on the officer in command…….In my opinion command pay is distinct in substance and fact from mere allowances. It is pay in the true sense. It is a definite remuneration for discharging the duties of a definite rank."

In our view, this command pay could as well have been called command allowance and still qualify to be included in the definition of the term pay. It must also be noted here that Mc Cardie, J., uses the term **remuneration** to mean payment or compensation, clearly suggesting the interchangeability of the terms **remuneration, pay or salary**. It is probably academic to urge for a clear demarcation in the meaning of these terms.

In the Canadian case of **Pay Less Gas Co. (1972) Limited v. Director of Employment Standards 1991 Can L11 1922 (BC S.C.)** Mr. Justice Hood stated –

> "However, there are numerous decisions of arbitrators in labour cases, wherein the specific provisions of collective agreements were interpreted in their context and terms such as earnings, gross earnings and total wages have been interpreted as including vacation pay."

The learned Judge continued to state –

> "*In my opinion, the words "total wages for the year" included vacation pay paid to the employee during that year. I am satisfied that vacation pay*

> *falls within the definition of "wages" contained in both s – ss (a) and (b). Like salaries and commission it constitutes compensation paid or payable by an employer to an employee for services or labour."*

It would seem that case law and in particular statutory law have no difficulty in regarding **vacation pay** or what is called in our jurisdiction **holiday grant** or **leave pay** as wages. This is clearly a payment which is made to an employee when he is not actually working; it is a payment made to an employee who is taking a rest from work. It can be said that it is a payment which is so unrelated to the actual work done or actual service rendered as allowance for night guard, security alarm system and water. Therefore, allowances and certain benefits may be included in the definition of **wages** or **salary.**

In also another Canadian case **George, Re (In Bankruptcy), 2002 SK QB 99 (Can L11), quoting** Cruickshank J., it is observed that –

> "Wages do not necessarily relate to work actually performed and may reflect on certain circumstances and under certain legislation, other remuneration or employee benefit."

That, clearly, explains why items such as vacation pay and command pay would be regarded as pay or the equivalent of wages. Again the above observation shows the overlap in the meaning of the terms **wages** and **remuneration.** Then the same case accepts the definition of the term wages as –

> *"that which is payable by an employer to an employee. It arises from a contract of service."*

The allowances relating to night guard, security alarm system, water, electricity and telephone were payable by the appellant as employer to the respondent their employee; the payments arose from a contract of service. We would observe that case authorities from England and Canada,

being Commonwealth countries, have strong persuasive effect upon this Court.

The view held by Twea, J., in the court below was that the terms **wages, salary, pay and remuneration** are normally used interchangeably. We agree. The definitions of the relevant terms strongly support that view. Again, we have already noted that case authorities strongly lean towards the view that the meaning of these terms overlap and they may be used interchangeably.

The **Shorter Oxford English Dictionary** defines the word pay as money paid for labour or service. The term includes **wages, salary and hire**. The same dictionary defines the term **salary** as a fixed payment made periodically to a person as compensation for regular work. It is also defined as –

> “Remuneration for services rendered, fee, honorarium, reward, recompense.”

Again the same dictionary defines the word remunerate as –

> “To reward a person, to pay a person for services rendered or for work done.”

Remuneration is defined as -

> “*Reward, recompense, payment, pay.”*

Then wage is defined as –

> *“a payment to a person for service rendered.”*

It would seem that the appellant would have no difficulty with the view that the words, wages, salary and pay mean more or less the same thing. From the definitions contained in the **Shorter Oxford English Dictionary** it can be seen that the word **salary** is defined as **remuneration** for

services rendered; then the word **remuneration** is defined as **payment or pay**. A close examination of the definitions of the relevant terms would support the view taken by the learned Twea, J., in the court below, that ordinarily the terms **remuneration, wages, salary and pay** are used interchangeably. We find no valid reason to fault the learned judge for his opinion on the meaning of the relevant words.

After the hearing of the appeal the appellant has shifted ground. Both in the court below and in this court the appellant's position was that to determine the meaning of **wage** or **pay** one is only required to consider the meaning of **remuneration** defined in section 3 of the Employment Act and immediately preceding the term wage. The appellant insisted that remuneration means basic salary or wage plus allowances and benefits while wage or salary would mean basic wage or salary only. Now the appellant says –

> *"What constitutes the employees remuneration or wages in a particular case will always be a question of fact to be answered on the facts of a particular case."*

Then the appellant submits –

> "To answer the question what were the respondent's wages/salary/earnings in the present case, the answer will be found by looking at the items on which he paid P.A.Y.E."

Then appellant is prepared to accept that the respondent's **wages or salary** included **car allowance and gardener allowance**, because the employer paid these allowances together with the respondent's basic salary. Clearly, what the appellant, in their changed position are really saying is that, well **allowances or other benefits** can constitute part of an employee's **wages or salary** at the choice of the employer when he decides to pay the allowance or benefit together with the salary or wage and the taxman or taxwoman intervenes to include the allowance or benefit as

one of the taxable items in the hands of the employee.

Clearly what the appellant's changed argument means is that if it pleased the appellant to pay all the allowances such as night guard allowance, security alarm system allowance and allowances for electricity, water, telephone, car and gardener as part of the respondent's salary and the tax authority taxed them as the income of the respondent, then the respondent's salary would be the basic salary plus the allowances and benefits. If, in the alternative, the appellant chose to pay all the allowances and benefits separately and paid tax on them on the appellant's behalf, then the respondent's salary would consist only of the basic wage or salary. We find it totally unacceptable that what constitutes an employee's **wages or salary** would solely depend on the caprice of the employer and the taxman's intervention to tax the asset in the hands of the employee. We reject the approach suggested by the appellant. We are, therefore, in total agreement with the following submission made by the respondent-

> "*The bottom line is, why does the employee qualify to get the facility or benefit. Is it not because he is working? Would the employer keep on paying the sum or giving the benefit if the employee stopped working? Obviously not. In which case, the employee "earns" every sum or allowance or benefit, in cash or kind that he receives as consideration for work done be it payable to him directly on the pay slip or payable on his behalf by the employer. Any such sum or benefit then, is part of the wage within the meaning of the employment Act. It is an earning. This is so regardless of the tax regime to which the earning will fall.*"

The word **wage** is defined in section 3 of the Employment Act which, contrary to the normal drafting

practice of defining relevant words in the second section, defines the rest of the words required to be given a meaning by the statute. **Wage i**s defined as follows –

> "Wage" means all earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law, which are payable by virtue of a written or unwritten contract of employment by an employer to an employee for work done or to be done or for service rendered or to be rendered."

In construing the words **wages** the learned Assistant Registrar stated –

> *"My reading of the two provisions leads me to the conclusion that wages include benefits (either in cash or kind). The benefits and allowances were paid to the respondent for services rendered to the appellant. These benefits were fixed and paid out at fixed intervals. In other words, the benefits were "earnings" as they could only be paid out in exchange for the respondent's services. It was up to the employer to pay the allowances either in cash or kind."*

Earnings are defined by the **Shorter Oxford English Dictionary** as –

> "1. That which is earned by labour, or invested capita.
> *2. The fact of deserving. What one deserves."*

It would be correct to say that the respondent earned the allowances and benefits which he received from the appellant by his labour. He deserved them by his position as Branch Manager and the services which he rendered as such Branch Manager. Surely the appellant is not saying that the respondent received most of the allowances and benefits as gifts. Could the appellant withdraw payment of these allowances and benefits at will, with impunity? We do not think so. Our view is that these allowances and benefits constituted earnings payable by the appellant to the

respondent by virtue of a contract for service made by the parties. All allowances and benefits payable to the respondent in the present appeal fell within the definition of **wage** contained in section 3 the Employment Act. In our view, the learned Assistant Registrar correctly construed the term **wage** in section 3 of the Employment Act.

The decision of the learned Assistant Registrar is amply supported by **Black's Law Dictionary, Abridged Sixth Edition** which defines the word wages as –

> "A compensation given to a hired person for his or her services. Compensation paid to employees based on time worked or output production. Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips , and any other similar advantage received from the individual's employer or directly with respect to work for him. Term should be broadly defined and includes not only periodic monetary earnings but all compensation for services rendered without regard to manner in which such compensation is computed."

Clearly, the words **wages, salary** and **pay** are broad enough to cover payments such as allowances and other benefits made either in cash or kind. The learned judge in the court below properly and rightly upheld the decision made by the learned Assistant Registrar. We are also constrained to uphold it.

We shall now briefly deal with the respondent's application for variation of the judgment of the court below. We are unable to follow the learned judge when he says that Orders of compensation under S.63 – (5) of the Employment Act are not payable beyond the date of termination of employment. Our understanding is that what the employee who has suffered unfair dismissal loses is assessable by considering the period beyond the date of termination, otherwise we are unable to see the loss of such employee up to the date of termination. Regarding severance allowance, the relevant **schedule** restricts payment to the number of

years actually served. Therefore, the relevant period cannot go beyond the date of termination. We think that the issue, here, is the construction of the Order made by Chinangwa, J.

The learned Chinangwa, J., ordered –

(1) Under section 63 (5) to pay three months pay for each year of service up to the date of this judgment.

We think that the key words relating to the period during which the respondent must receive payment are **three months pay for each year of service**. In his judgment the learned judge stated –

> "At the time of dismissal he had served 19 years. (see, page 2 of the judgment)."

We, therefore, think that for the 19 years of service the respondent would receive three month pay for each year which would translate into 57 months pay. It would be in our view, unlawful to award the respondent more than 57 months pay under (1). Again, severance allowance cannot cover a period beyond 19 years of the respondent's service.

Therefore, the respondent is entitled to 3 months pay for each of the 19 years that he actually served. He is also entitled to 19 months pay for severance allowance and the 12 weeks pay for the appellant's refusal to obey a re-instatement order. The result is that the respondent shall receive K6,482,250.33 as compensation following the just and equitable principle in terms of section 63-(4) of the Employment Act. He shall get K341,171.07 being 12 weeks pay arising from the appellant's refusal to re-instate the respondent and the sum of K2,160,750.11 as severance allowance. The total amount payable by the appellant to the respondent in terms of the Order of Chinangwa, J, is K8,984,171.51. The appellant is condemned to pay the costs of the appeal.

DELIVERED in Open Court this 16th day of October, 2007 at Blantyre.

Sgd......................................
D.G. Tambala, SC, JA

Sgd.....................................
I.J. Mtambo, SC, JA

Sgd................................
A.K. Tembo, SC, JA