



The Malawi Judiciary

**IN THE INDUSTRIAL RELATIONS COURT
SITTING AT THE LILONGWE DISTRICT REGISTRY**

IRC Matter No. 752 of 2020 (LL)

In the Dispute Between:

APPLICANTBEN WANDAWANDA

AND

RESPONDENTS.....STANDARD BANK PLC

CORAM: Austin B. B. Msowoya, Chairperson
Nthunde (Mrs.), Court Clerk

At the Bar

Prof. Kuwali, LL.D., Nkhutabasa & Mhango, of counsel, for applicant
Soko, of counsel, for respondents

Judgment

Msowoya, A. B. B.,

Mr. Benjamin Wandawanda, applicant herein, filed suit against respondents, Standard Bank Plc, his former employers, claiming compensation for unfair dismissal. In his 'plaint, applicant alleges that respondents dismissed him unfairly when they declared his position redundant and terminated his contract of employment; professedly, consequent on the bank restructuring its organization to improve operations and optimize its competitiveness and profitability. Needless to say, respondents contend otherwise. That the termination of applicant's contract was substantively and structurally warranted; legally and procedurally compliant and, therefore, not unfair dismissal.

Pleading his case, applicant asserts that respondents' actions declaring his position redundant, and eventually terminating his employment, was unfair under the law. At the core of applicant's 'plaint is that when respondents declared his position redundant and terminated his employment, they acted unilaterally and did not follow their own established procedure, in breach of their redundancy policy. Second, they breached his rights under the Constitution and applicable labor laws. And third, they did not comply with international obligations meant to uphold employee rights and mitigate the debilitating social and economic impacts of redundancies and retrenchments. Debunked, applicant asserts that the entire process respondents undertook, from first declaring his position redundant to terminating his employment, was premeditated, unilateral, un-

procedural and illegal, and constituted unfair labor practices, in all amounting to unfair dismissal.

On their part, respondents contend that terminating applicant's contract was necessary on account of their organizational restructuring. That his position was no longer needed in the section he was located. That he lacked the skills and competence to be retained or reassigned anywhere else within respondents' new operating structure, both locally and internationally. That, in declaring his position redundant and terminating his contract, they tried, in all sincerity, to follow their redundancy policy and procedure. That they tried to comply fully with all applicable labor laws and widely advocated best practices, and so, cannot be faulted.

Respondents concede, however, that in the manner they declared applicant's position redundant, they might have inadvertently failed to follow some procedures required by their redundancy policy or mandated by law. Respondents plead that those breaches of law and process are inconsequential and be disregarded. They cannot, and should not be held against them. Rather, consideration be placed on the efforts they made to comply because they had no ill intentions towards applicant and never meant to act with malice. Regarding applicant's third assertion, respondents contend that obligations under international law, and especially those imposed by international labor conventions, even if ratified, are not applicable in Malawi because they are not law on grounds of non-domestication.

I closely scrutinized the pleadings both applicant and respondents filed. I also weighed carefully the evidence laid at the Bar before me, comprising both documents and oral testimony witnesses called gave at trial; first, by applicant testifying on his own behalf and second, by witnesses testifying on respondents' behalf. Lastly, I took full cognizance of the oral arguments and written submissions the attorneys for both applicant and respondents advanced and filed in summation of their respective cases.

Having carefully reflected on the pleadings and analyzed the facts, the evidence and the law, it was my finding that respondents, in the manner they declared applicant's position redundant and proceeded to terminate his contract, both on the facts and on the applicable laws, did dismiss him unfairly. I found that not only did respondents breach their redundancy policy and established procedure, they also breached applicant's constitutional rights to fair labor practices, statutory provisions meant to preserve justice and equity in employment associations, best practices in the labor and employment spaces, as well as internationally mandated norms governing due process on retrenchments and redundancies.

Finally, much as some of the labor conventions Malawi ratified are yet to be domesticated, which respondents repudiate as inapplicable, I nonetheless found that respondents breached these conventions because Malawi is obliged by international law to ensure provisions imposed by these conventions are enforced and complied with under its municipal law. Moreover, and indisputably, these conventions reflect and consolidate globally accepted best practices on due process to safeguard employees against social and economic hardships occasioned by job losses due to retrenchments and redundancies. Most notably, the best practices reflected in, and emanating from these conventions have been adopted with approval and are championed by domestic labor authorities such as the Ministry of Labor through guidelines on carrying out retrenchments and redundancies. As such, they cannot be dismissed whimsically out of hand on the pretext they have not been

enacted into law domestically. On the contrary, as becomes clear in the course of this judgment, they are discernible in the substance and spirit of not only the Employment Act, but also in the jurisprudence developed over the years in cases of unfair dismissal resulting from retrenchments and redundancies.

On these findings, I entered judgment for applicant. This now is my reasoned opinion and on which basis I award applicant compensation for unfair dismissal. To start off, however, some preliminary observations that informed and shaped my reasoning determining and disposing this suit.

First, I am most grateful for the industry the attorneys at the Bar demonstrated litigating this suit. Their interrogation into the legal issues emerging in this case, and their examination of the witnesses at trial have been enlightening and allowed me gain deeper insights into the seemingly intricate, but surprisingly uncomplicated legal questions raised. Similarly, their research on the applicable laws, both municipal and international, and the analysis of the evidence adduced have been invaluable to my understanding of the questions, both factual and legal, that I was called to determine. Certainly, the task before me would have been insurmountable without such dedicated and impassioned advocacy.

The delay issuing this opinion, while fully acknowledged and most regrettable, stems from, first, my personal idiosyncrasies. First, an insatiable insistence to clearly contextualize and understand the peculiar facts giving rise to this suit. Second, the unerring need to isolate critical legal questions from a convoluted mash of random urgencies to sway my opinion one way, if not the other. Third and lastly, a yearning to engage meaningful scholarship on law and practice as would permit, in my estimation, a just and equitable resolution of the dispute before me.

Second, and I do not make this observation lightly, I am of the fortified conviction that there really is not much disparity between the parties on the facts. So far as I followed the developments leading to respondents terminating applicant's employment, I find no glaring, nor cataclysmic, contention between them. Actually, and to a large extent, the parties' seemingly opposed positions converge seamlessly when the chronology of events leading to the termination of applicant's contract are carefully unraveled and examined under law's microscope.

Where the parties differ markedly, in my considered judgment, are conclusions either party argues ought to be drawn from the facts, juxtaposed against; first, respondents' redundancy policy and established procedure carrying out redundancies and second, the law and practice, both domestic and international, that govern termination of employment through redundancies or retrenchments. And so, where disagreement appears diametrical between the parties; is located the reasons on which disposition of this suit turns.

The disparities between the parties emanate from, and relate to, the sufficiency of consultation respondents engaged with applicant and its implications, from when they first declared his position redundant and throughout the developments leading to termination. I will speak to those instances in my judgment; on my finding that respondents indeed unfairly dismissed applicant.

At this point, and at the outset, I find it compelling to make clear what I believe this matter is really about and what it is not about. Simultaneously, and more importantly, I need to eliminate misconceptions both parties, perhaps respondents more so than

applicant, seemed obsessed with that bear little or no relevance to the reasons grounding my finding unfair dismissal.

Contrary to what the parties presaged at trial and in summation, this matter really revolves, first on the facts, around respondents' decision to declare applicant's position redundant and their actions leading to termination of his employment. Developments that all occurred within a short period of time, less than two months, and at most, four months, to be exact, from April to July of 2020. And, from applicant's assertions, respondents' actions between May 15, when he first became aware that his position was impacted, to July 24, when respondents formally terminated his employment. Finally, and again from applicant's assertions, respondents' actions in the immediate aftermath of terminating his contract, including the manner and period within which they dealt with and dismissed his appeal, events that unfolded between July 24 and August 3, 2020.

Second, and directly linked to the points above, this matter is about, and concerns the law, procedure and practice when carrying out redundancies and retrenchments leading to termination of employment based on the operational requirements of an undertaking under s. 57(1) of Cap. 55:01 of the Laws of Malawi, the Employment Act (henceforth, the Employment Act). Unwittingly or otherwise, respondents seemed to labor under some misconception that applicant's suit has no basis on said law, asserting at sub-paragraph 3.5 of their Statement of Reply, “[T]o the extent that the applicant is not claiming a contravention of [s.] 57 of the Employment Act, he has brought a claim that is unknown to law.” In my considered opinion, the position at law generally, and specifically on procedure in the Industrial Relations Court, is quite different.

Applicant's claim is for compensation for unfair dismissal. His pleadings substantively allege that respondents unfairly dismissed him when they declared his position redundant and terminated his employment. His pleadings clearly disclose a cause of action, unfair dismissal on termination of employment through redundancy (*Lawrence Kandulo & Anor. –v- Avis Rent a Car*, IRC Matter N 89 of 2017 (PR) (Unrep.)). I do not believe express mention that an employer contravened s. 57 in a claim for unfair dismissal is mandated, either by law or the rules of procedure (*Adnes Nyaka –v- Toyota Malawi Ltd*, IRC Matter No. 988 of 2022 (PR) (Unrep.)). Specific mention of a provision, or lack of, neither validates nor negates, a claim of compensation for unfair dismissal. Only where the pleadings do not disclose a cause of action would a statement of claim be considered bad for disclosing a claim unknown to law (*Charles Chikumba Banda –v- Malawi Housing Corporation*, IRC Matter No. 233 of 2015 (LL) (Unrep.)).

Contrary to respondents' contention, the disposition of applicant's suit rests entirely on a close scrutiny and analysis of the law, jurisprudence, procedure and practice implicated by s. 57(1) of the Employment Act, particularly its latter part, and its direct linkage to respondents' redundancy policy, as well as labor conventions at international law. Whether respondents breached their redundancy policy and established procedure, as applicant persistently argued, or did not, as respondents themselves contended, is relevant to the disposition of this matter within the context of s. 57(1) legislating for termination of employment based on the operational requirements of an undertaking. In turn, respondents' redundancy policy is relevant to the disposition of this suit to the extent it reflects and meets, or does not, for that matter, the law's prescriptions on the grounds and procedure established to carry out redundancies or retrenchments under the Act. Exploring respondents' redundancy policy and processes thus needs to be undertaken

within the question whether respondents' breached s. 57(1), or did not. And on that account, applicant's pleadings, for purposes of stating his claim, is competent as disclosing a cause of action well known to law.

To that end, in disposing this matter, I interrogate whether respondents complied with requisites on substance, process and best practices under both municipal law under s. 57(1) of the Employment Act, respondents' redundancy policy, and internationally imposed obligations under the Termination of Employment Convention, 1982 (No. 158) (in places, Labor Convention No. 158) that Malawi ratified, alongside its accompanying Termination of Employment Recommendation, 1982 (No. 166). Measures that have been approved, adopted and recommended by the Ministry of Labor in its guidelines to the labor and employment industry on terminating employment through retrenchments or redundancies.

On the other hand, this matter is not about, and the disposition of this suit does not turn on Mr. Wandawanda's competence as a banker, nor on his skillsets as a business development specialist in the banking industry. Both parties went out of their way to highlight or downplay Mr. Wandawanda's competencies and performance relating to the execution of his responsibilities in the Bank's employ, in obvious pursuit of their disparate interests. From applicant's standpoint, to elevate his profile as a highly qualified, respected and decorated business and customer development specialist. From respondents' viewpoint, to purposely trumpet and accentuate his shortcomings and poor performance, on which they stake their inability to redeploy or reassign him, following their decision to declare his position redundant and terminate his employment.

None of this, however, is particularly relevant to my disposition of this suit, except perhaps within the narrow context of interrogating whether respondents acted fairly when evaluating Mr. Wandawanda's competence and skillsets in their efforts to reassign him an alternative portfolio within the bank's new organizational structure. In and of itself, though, this comprises but only a fraction of the interrogation whether respondents indeed complied with the law, their redundancy policy, established procedure and best practices when they declared applicant's position redundant and went on to terminate his employment.

In light of these preliminary observations, I will first attempt to collate and analyze the emerging jurisprudence around the law, process and best practices respecting redundancies and retrenchments based on the operational requirements of an undertaking under s. 57(1) of the Employment Act and the protections imposed by Labor Convention 158. Thereafter, I will consider the evidence both parties presented, whether documentary or oral, to support their assertions and rebuttals for or against whether respondents complied with the law, their redundancy policy or applied accepted best practices when they declared applicant's position redundant and ultimately terminated his contract.

As nuanced, much of the evidence either party dwelt on bears little or no relevance to the interrogation I undertake to determine whether or not respondents unfairly dismissed applicant. And so, on careful introspection and exercising abundant caution, I do not intend to regurgitate the entirety of the witness' testimonies or canvass the full corpus of documentary evidence the parties submitted or tendered. Such regurgitation of testimony and canvassing of the evidence would neither purpose pragmatism nor brevity. It would only occasion needless prolixity at the expense of concise articulation of the reasoning underpinning my judgment. Instead, I will discuss

the testimony and documentary evidence only as it serves to advance the reasoning in my judgment. First, though, a summary of the facts giving rise to this suit, gleaned from the pleadings the parties filed on record.

From the pleadings, Mr. Wandawanda joined the respondent bank in January of 2007 as Head of Business Banking. According to Mr. Wandawanda, at the time of his joining, respondents' Personal and Business Banking franchise had been loss-making over a significantly lengthy period. Upon joining, and to reverse the bank's loss-making trend, he was tasked responsibilities intended to drive respondents' personal and business banking strategy, with emphasis on relationship and revenue margins development and management. To that end, he led and supervised a team of 3 segment heads and an overall personnel of 33. He was also entrusted with structuring and resourcing personal and business banking to meet business challenges and legislative compliance. Finally, Mr. Wandawanda was tasked with ensuring disclosures towards customers on accreditation, service fees, and commissions in line with the Financial Advisory and Intermediary Services. Again according to Mr. Wandawanda, he so successfully grew respondents' Personal and Business Banking franchise that within eleven or twelve months of his joining, the business unit he led started making significant profits such that respondents' overall Personal and Business Banking franchise, in turn, became profitable.

Having maintained appreciable growth in respondents' Personal and Business Banking franchise for several years, Mr. Wandawanda was interviewed for, and successfully transferred to Kenya to join respondents' Kenyan banking business as Head of Business Banking for Kenya and South Sudan. In Kenya, he was responsible for the development of a transaction-led strategy for business banking, formulation and integration of best sales and service practices, and consistent operating structures for the implementation of the bank's strategy across the country and, by extension, to South Sudan.

He was also tasked with the delivery and maintenance of customer value propositions and an improved retail market share as well as building and activating innovative sales performance strategies across the banks' several operating segments. And finally, he was tasked to contribute to the creation of a performance excellence culture through remedial process development. Again, according to Mr. Wandawanda, in 2013 and in spite of slow economic growth brought by a volatile post-election environment in Kenya, he was able to redesign the bank's Business Banking strategy and optimized it for execution and delivery of excellent results. Owing to Mr. Wandawanda's interventions, the bank's Business Banking in Kenya made significant profits for the entire Personal and Business Banking franchise by November of that same year to become profitable for the first time since 2002.

According to Mr. Wandawanda, while in Kenya, and in acknowledgment of his performance and invaluable contributions, he received several Excellence in Performance awards that included the Sales Manager of the Year in 2017 and Best Commercially Astute Banking Executive of the Year in 2018. His contract, initially offered and meant to span two years, was renewed twice more until 2019 when he was repatriated to rejoin respondents as their Head of Business Development in Malawi. Again, in the six-year period he spent in Kenya, Mr. Wandawanda received performance-based bonuses, cash bonuses and share incentive schemes totaling MK17 million in 2013, MK49.2 million in 2015, MK89 million in 2016, MK138.9 million in 2017 and MK143 million in 2018.

About half a year of his returning to Malawi, around January of 2020, Mr. Wandawanda was ostensibly subjected to a Performance Improvement Plan that lasted some twelve weeks or so. According to applicant, and admitted by respondents, he successfully completed the Performance Improvement Plan around March of that same year. It was also in January of that year, continuing through the months after applicant's completion of his Performance Improvement Plan that respondents purportedly initiated and carried out the organizational restructuring that resulted in applicant's position being declared redundant. By July of that year, Mr. Wandawanda's contract was terminated.

As earlier noted, there really is not much the parties are in contention over on the facts. What they are in contention over are the conclusions to draw on the facts, from declaring applicant's position redundant, their ensuing interactions between then, to the termination of his employment. Again, as noted, the disparity between applicant and respondents on these facts primarily concern the sufficiency or inadequacy of the interactions as constituting consultations to satisfy requirements under respondents' redundancy policy. Applicant argues that these interactions were grossly insufficient, ill-intentioned and designed solely to rid him from respondents' employment. That they were ill-intentioned in terms of objectives, lacking in substance, and unreasonable in duration to consider them consultations in the context of the requirements of both respondents' Redundancy policy as well as s. 57(1) of the Employment Act on termination based on the operational requirements of an undertaking.

Respondents, on the other hand, contend that these consultations were sufficient and satisfied the requirements of their redundancy policy. They further argue that if they did not canvass all processes comprising consultations for purposes of redundancy required by the redundancy policy, then those lapses were minimal and should be ignored or be resolved in their favor.

The disparities between applicant and respondents on these contentions emerge from the testimony of the three witnesses that testified at trial. Mr. Wandawanda on his own behalf; Ms. Zandile Phangaphanga and Mr. Phillip Madinga, Head of People and Culture, and Chief Executive Officer, on respondents' behalf. Before I examine the testimony and documentary evidence presented and tendered at trial, which inform my findings and judgment, it is apt that I first examine the law and procedures mandated when terminating employment based on the operational requirements of an undertaking under the Employment Act, along with the emerging jurisprudence and widely accepted best practices, both domestically and as mandated or influenced by Labor Convention No. 158 on termination of employment grounded on economic reasons.

Much has been argued on the applicable law and procedures by which applicant's position was declared redundant and his employment terminated, either to make out applicant's claim for unfair dismissal, or to negate those claims on respondents' part. As earlier posited, I am of the considered opinion that this matter quintessentially turns on a debunking of s. 57(1) of the Employment Act, its linkage to respondents' redundancy policy as well as a collocation of internationally mandated norms on due process in cases of redundancies or retrenchments.

Applicant's success in his claims against respondents turns on whether respondents, on declaring his position redundant and terminating his employment on grounds of redundancy, complied with the law and acted with justice and equity within the framework inherent in s. 57(1) of the Employment Act. Answering that question

implicates a careful consideration of the law on termination of employment grounded on operational requirements, best practice within the Malawi labor and employment spaces and international conventions Malawi is party to.

First, under the Employment Act, the termination of an employment contract can only be effected on three grounds: capacity, conduct or the operational requirements of an undertaking. To begin with, the full text of s. 57(1) of the Employment Act is couched as follows:

The employment of an employee shall *not be terminated* by an employer unless there is *a valid reason* for such termination *connected* with the *capacity* or *conduct* of the employee or *based on the operational requirements* of the undertaking (emphasis mine unless otherwise acknowledged).

When s. 58 states that “a dismissal is unfair if it is not in conformity with section 57 or is a constructive dismissal pursuant to section 40 (it should read s. 60),” it reveals a little understood or recognized concept both by the practice and the academy. Section s. 57 of the Employment Act does not create claims for unfair dismissal. What s. 57 does is create a process by which termination of employment can be effected lawfully and by implication, fairly. Where the grounds and procedure for terminating employment set out by s. 57 are properly raised and followed, the resultant termination is lawful and cannot be impeached for unfairness. Termination of employment only becomes unfair dismissal when the prerequisites spelled out in s. 57 are breached. On that foundation, s. 57(1) provides that the termination of a contract of employment can only be effected on three grounds. These are termination based on capacity, conduct, or operational requirements of an undertaking.

Termination on grounds of capacity relates to an employee’s inability to perform and deliver on the duties demanded of a position the employee represents they possess the necessary qualifications, skillsets and experience required for its performance (*Cosmas Banda –v- Nkhatabay Development Trust*, Matter No. IRC (Mz.) 75 of 2010 (Unrep.). In the suit at the Bar, this ground is inapplicable and warrants no discussion.

Termination on grounds of conduct relate to an employee’s relationship with colleagues in the workplace, third parties dealing with the undertaking as well as society at large. Conduct also relates to the employee’s dealings with the assets, resources and financial instruments owned by an employer. A dismissal based on conduct may involve an employee’s insubordination towards superiors, inappropriate and unsanctioned or unlawful behavior towards colleagues, abuse of an employer’s resources and assets or engaging in corrupt dealings in one’s position to advantage personal interests (*Terrastone Construction Limited –v- Solomon Chatuntha*, M.S.C.A Civ. App. No. 60 of 2011 (Unrep.)). Similar to termination based on capacity, this ground is inapplicable in the suit at the Bar and similarly warrants no discussion.

The third basis on which employment can be terminated, and which is applicable in the suit at the Bar, is termination “based on the operational requirements of [an] undertaking.” In this context, and only in this context, does the law allow an employer to terminate a contract of employment without the need for the employee to be at fault, otherwise as is required in terminations based on capacity or conduct (*Banda -v- Lekha* (2008) M.L.L.R. 338). In this instance, the employer can terminate employment for any number of reasons that affect the operation of the business the undertaking is engaged in. These reasons may involve the financial standing of the business, technological

innovation resulting in the need to lay off human personnel or indeed the need to scale down operations owing to economic downturns. In such cases, the employer is instead only mandated to follow certain procedures before terminating the employment contract. Termination of employments contract based on the operational requirements of an undertaking includes retrenchments and redundancies.

The rationale behind requiring an employer to follow specified procedures before terminating employment based on operational requirements is to mitigate, as much as possible, the social or economic hardships affected employees may suffer from the job losses, such as financial or economic hardships (*Freud –v- Bentall Ltd* [1982] IRLR 443 (EAT)). In that regard, the employer is required to explore measures that limit the number of people who may lose their jobs. Such measures include reassigning employees to different jobs, placing employees on shared jobs, putting employees to work on a part time basis or in rare cases, reducing wages and benefits. Requiring the employer to explore these alternatives to termination ensures justice, equity and fairness for the employee. The subject and target of the requirements or measures imposed by law in terminations of employment based on operational requirements is the employee, not the employer.

On account the employment contract is terminated without any fault on an employee's part, terminations grounded on operational requirements of an undertaking through retrenchment, redundancy or otherwise have come to be known as 'no-fault' dismissals (see *South African Clothing and Textile Workers Union et al –v- Discreto (A Division of Trump and Springbok Holdings Ltd,* (JA95/97) [1998] ZALAC 9 (June 22, 1998)). In these jurisdictions, as is the case under the Employment Act, no fault dismissals are permitted where an employer can proceed to terminate an employee's contract of employment by merely giving notice of the impending termination, as long as the requisite conditions on the process are adhered to (see *Buttmer –v- Oak Fuel Supermarket Ltd* [2023] IEHC 126).

In Malawi, the Employment Act does not specifically provide that retrenchment and redundancy are terminations based on the operational requirements of an undertaking. Nevertheless, authorities exist that conclusively demonstrate that no fault dismissals include termination resulting from redundancy and retrenchment (*Boloweza & Anor. –v- Doogles Lodge* (2008) MLLR 362)).

From a conceptual standpoint, retrenchment is effected when the employment of a class or group of employees is terminated at once. In the United States' for example, the termination of employment comprising groups of employees is commonly referred to as 'layoffs' (see the Federal Worker Adjustment and Retraining Notification Act (WARN) (29 USC 2100 et. Seq.). Layoffs are usually necessitated by a need to downsize on account of economic downturns or other challenges, as happened widely in the wake of the 2020 COVID pandemic (See **RACHEL SOPHIE SIKWESE, LABOUR LAW IN MALAWI, 4TH ED, 2022;** 242-243). They may also occur when a company restructures its organization and does not need a certain class or group of employees due to technological innovation, automation and the like. In *Chazika –v- Bata Shoe Company*, IRC Matter No. 123 of 2004 (Unrep.), Deputy Chairperson Zibelu-Banda (as she then was) defined retrenchment as "[W]here an employer terminates the contract of employment because the employer is carrying out

some restructuring in order to cut costs or boost the entities' economic performance (sic)."

On the other hand, redundancy occurs when positions become duplicitous or unnecessary due to restructuring or, as in retrenchments, because of technological innovation or economic downturns. It may also occur when several positions are amalgamated to improve the undertaking's efficiency or reduce operating costs. In *Timothy Chiba Chiume -v- SS Rent-A-Car Ltd*, IRC Matter No. 149 of 2000 (Unrep.), Deputy Chairperson Zibelu-Banda defined redundancy as "[W]here an employer terminates the contract of an employment because the employee's position no longer exists or is to be temporarily or permanently scrapped off due to operational needs of the employer (sic)."

While the reasons for redundancies and retrenchments may coincide or indeed overlap, it is generally people that are retrenched and positions declared redundant. In that regard, an individual cannot be retrenched and groups of people cannot be declared redundant (*I. Kamwanje & Others -v- Paladin (Africa) Limited*, Matter No. IRC (Mz.) 25 of 2014 (Unrep.)).

In her book on labor law, Sikwese echoes this distinction on the meaning of retrenchment and redundancy. She observes that there is often confusion both in the practice and the academy concerning the meaning of retrenchment and redundancy. She notes that the underlying factor distinguishing the two concepts is that retrenchment involves a reduction in the workforce by an employer while redundancy involves a reduction in positions (**RACHEL SOPHIE SIKWESE, LABOUR LAW IN MALAWI, 4TH ED, 2022**; 242-243). Sikwese states that in more practical terms, the difference between the concepts is that retrenchment targets people while redundancy targets positions. Sikwese writes: "[A] person cannot be declared redundant but a position which a person is holding can be declared redundant." She adds, "It is possible to declare one position redundant and therefore only one employee loses [their] job but it is unlikely that only one employee will be retrenched unless the establishment has a very small workforce." (*Id.*)

Now, with regard to retrenchments and redundancies, and as noted above, the employer is mandated to follow certain protocols and procedures before and in the period leading to the redundancies and retrenchments being carried out. A major part of those protocols and procedures involve engaging and consulting those members of the workforce as would likely be affected on the reasons for retrenching or declaring redundancy. In this regard, Sikwese notes that it is not enough to simply allege that the company is experiencing an economic downturn or requires restructuring. In order to ensure justice and equity, an employer must demonstrate that there was established a transparent system by which factors necessitating the redundancy or retrenchment are clearly laid out. An employer would thus be required to produce supporting evidence, through statements of accounts, operational protocols and expected improvements and outcomes that justify the redundancy or retrenchment.

An employer must demonstrate that an objective process was adopted and followed by which specific employees or positions were identified and earmarked for redundancy or retrenchment. Sikwese highlights that fair labor practice in retrenchments and redundancies entails that practices followed must be even handed, fair, reasonable, acceptable and expected from the standpoint of both the employer and

employee but also by all fair-minded persons looking at the unique relationship between the employer and employee as well as good industrial and labor relations.

In addition, the International Labor Organization, through Labor Convention No. 158 imposes obligations on State Parties to ensure that factors that constitute fair labor practices in mass dismissals and redundancies must include information, consultation and alternatives to retrenchments and redundancies. To that end, the Labor Convention No. 158 requires that when the employer contemplates termination for reasons of an economic, technological, structural or similar nature, the employer needs to provide to the concerned employees or their representatives relevant information, including reasons for the termination contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

Additionally, the employer is expected to give, in accordance with national law and practice, the concerned employees or their representatives, as early as possible, an opportunity for consultations on measures to be taken to avert or minimize the terminations, or implement measures to mitigate the adverse effects of any termination on employees concerned, including finding alternative employment (see SIKWESE, op cit, 245).

Finally, while contested by respondents in this case, and admittedly yet to be legislated in Malawi, it is important and expected that relevant authorities in a country be notified of the retrenchment or redundancy process, an obligation expressly imposed by Labor Convention No. 158. In the case of Malawi, it is the Ministry of Labor that needs to be notified of the intended retrenchment or redundancy, including inviting ministry officials to appreciate for themselves, and perhaps oversee and monitor the actual processes as they are undertaken. And this includes all efforts at consultations and the eventual outcomes of the processes.

Malawi, through the Ministry of Labor, has approved, adopted and recommended specific guidelines drawn from the Labor Convention No. 158. It in turn has outlined specific requirements on the procedure that employers are mandated to follow when terminating employment through retrenchments or redundancies. On account they reflect the very obligations imposed by Arts. 13 and 14 of Labor Convention No. 158, I find it important to highlight these guidelines as comprehensively as possible.

First, it is significant to note that the rationale underpinning the Ministry's guidelines was Malawi's obligation as a State Party, to implement the obligations imposed by the Convention. To that end, the Ministry advised that the Convention requires employers contemplating retrenchments to consult representatives of the workers concerned on measures taken to avert or to minimize the terminations and implement measures that mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. Under the guidelines, and in applying the terms of the Convention, employers contemplating retrenchments and redundancies are required to fully comply and follow the Ministry's recommendations which are in line with the Convention and its accompanying Termination of Employment Recommendation 1982 (No. 166).

First, an employer contemplating retrenchments and redundancies is required to report such intention to the Secretary for Labor, copying their nearest District Labor

Office and representatives of affected employees. They are required to include in the report reasons for the retrenchments and criterion for selecting employees earmarked for retrenchment or redundancy. They are required to include in the report the names, ages, sex, current remuneration and benefits, dates of employment and the type of employment of all affected employees. These details must include the terminal benefits to be paid as required by law and the contract of employment, the formula for calculating the terminal benefits and the amounts due, where possible, under each head of terminal benefits for every affected employee. They are also required to indicate the anticipated dates the retrenchment is to be effected and disclose whether consultations with representatives of the affected employees had already commenced by the time the report is submitted.

The guidelines require that an employer commences consultations with representatives of affected employees as soon as becomes clear retrenchments or redundancies are an option. Upon such confirmation, the employer is required to inform the Secretary for Labor immediately such a decision is taken. The Ministry, through the Secretary, is then obliged to respond to the report within 7 days of its receipt, and provide, where necessary, advice for the conduct of the retrenchments or redundancies.

The guidelines specifically outline what the consultations should include. These are that the consultations should aim at jointly exploring ways and means of averting or minimizing the retrenchments by finding out if alternative employment is available within its undertaking, implementing the retrenchment in a phased program, grant annual leave to employees who have accumulated outstanding leave days, especially where such grants of leave would improve an employer's standing as might avert the retrenchments or redundancies, or make them no longer necessary and finally, allowing voluntary early retirement accompanied by appropriate and satisfactory incentives.

The employer is required to consider any support capable of being offered to affected employees to facilitate their securing alternative means of livelihood where possible, including training for enhancing marketability or entrepreneurial capacity building. Where an employer has capacity, the guidelines encourages the provision of resources, including start-up capital or investment resources. It is also essential and a requirement that employers seek feedback from employees or their representatives on the criteria for selecting affected employees to ensure objectivity, fairness and non-discriminatory outcomes. The guidelines also provide that where there are any dissatisfactions or grievances in the manner the retrenchments were carried out, whether such grievance be on account of the selection criteria, employees should be granted liberty and can exercise such liberty to report their grievances to the Secretary for Labor.

Upon completion of the retrenchment process, the guidelines require the employer to furnish a final report to the Secretary for Labor within 14 days of completion indicating the names, ages, sex, date of employment, type of employment for each retrenched employee, details of their final remuneration and benefits, details of the terminal benefits paid with corresponding amounts and the formula used when computing such benefits for every affected employee, including the actual dates of retrenchment. Finally, the guidelines mandate employers to consider retrenched or

employees whose positions were declared redundant as a priority when rehiring opportunities arise for which they meet the requirements to perform any jobs becoming available.

As clearly demonstrated in these guidelines, when engaging in consultations with concerned employees, such consultations are required to be meaningful and not be mere smoke screens to mask dismissals the undertaking does not really necessitate. Anything less than genuine consultations conducted in good faith would result in the retrenchments and redundancies being declared unfair dismissals.

The requirement to consult being made by the Ministry in its guidelines notwithstanding, there is still discord generally, both in the practice and the academy, whether an employer is duty bound under the law to engage and consult affected employees before terminating their employment through redundancies or retrenchment. Under Malawi law, jurisprudence suggests two apposite emerging schools of thought. The first, adopted and argued for applicant, holds that an employer is duty bound to consult and the second, adopted and argued for respondents, holds they are not, except where the terms and conditions of service expressly mandate such consultation.

Arguing that an employer is not required to consult before terminating employment on grounds of retrenchment and redundancy, respondents submit that in *First Merchant Bank –v- Mkaka & Others (No. 1)* (2014) MLR 105 (SCA), the Supreme Court held and settled that there is no duty on an employer to consult the employee or hear them before terminating employment on the basis of the operational requirements of an undertaking. On that score, respondents suggest that applicant's argument that an employer is duty bound to consult draws from *MTL –v- Makande & Anor.* (2008) MLLR 35. Respondents argue that applicant, in so far as he seeks to rely on *Makande* to argue that respondents were under an obligation to consult him before declaring his position redundant and terminate his employment, is misguided because that decision was overturned by *Mkaka (No. 1)*.

Respondents again argue that in so far as applicant seeks to rely on the International Labor Organization Labor Convention No. 158 providing for procedures on terminations based on economic challenges leading to retrenchments and redundancies, he is similarly misguided. Respondents argue that *Mkaka (No. 1)* held that Labor Convention No. 158 of the International Labor Organization is inapplicable in Malawi because Parliament has, in the Employment Act, provided for "a different procedure for terminating employees, which procedure did not domesticate Art. 13 of the Labor Convention No. 158." Respondents augment this argument by referencing that the Supreme Court had two opportunities to reconsider the position in *Mkaka (No. 1)* and change or clarify its position. Respondents observe that it did not. And quite correctly, the Supreme Court did not posit a change in its position advanced in *Mkaka (No. 1)*.

Respondents argue that first, in *Airtel Ltd –v- Komiha & Others*, MSCA Civ. App. No. 59 of 2013, the Supreme Court declined to comment on its position in *Mkaka (No. 1)*, and thus, implicitly upheld it. Second, in *First Merchant Bank –v- Eisenhower Mkaka & Others (No. 2)*, MSCA Civ. App. No. 19 of 2017 (Unrep.), the Court refrained from commenting on whether an employer bears a duty to consult affected employees in cases of termination based on operational requirements. Instead,

the Court observed that the requirement to hear an employee before termination in s. 57(2) of the Employment Act specifically applies to cases of termination grounded on capacity or conduct and not terminations based on the operational requirements of an undertaking.

That, by exclusion, the duty to consult or hear an affected employee cannot be extended to termination based on operational requirements. Respondents argue that these decisions affirm that an employer has no obligation to consult in cases of termination based on operational requirements. That such consultation is only required if an employer's terms and conditions of service expressly provide for such consultation.

On his part, applicant argues that the employer is duty bound to consult an affected employee before termination on grounds of retrenchment or redundancy on the basis of employee protection rights granted by the Constitution, provisions for justice and equity afforded by statute, accepted best practices domestically and state party obligations imposed by conventions of the International Labor Organization.

First, applicant submits that under s. 31(1) of the Constitution, an employee has the right to fair labor practices and the right to lawful and procedurally fair administrative action under s. 43. He argues that s. 31(1) of the Constitution grants the right to fair labor practices, which entails the right to know the reasons for dismissal under the right to fair administrative decisions granted in s. 43.

Second, applicant submits that ss. 29, 30, 35, 57, 58, 61, 62 and 63 of the Employment Act all lend weight and entrench the rights an employee is accorded under ss. 31(1) and 43 of the Constitution by protecting employees from a breach of the rights the Constitution grants. These include protections from dismissals without a valid reason, the obligation to give notice on termination or payment in lieu, awards relief in cases of unfair dismissal and mandates due process before dismissal, requires justification of termination and provides a range of remedies to a successful claimant on a finding of unfair dismissal.

On the question of the requirement to consult, the decision that closely collated and analyzed the authorities to determine whether consultation is mandated at law, without conditioning such consultation on an employer's terms and conditions of service that *Mkaka (No. 1)* holds is *Eric Thomson & Others –v- Telekom Networks Plc*, IRC Civ. App. No. 9 of 2023, (Unrep.). In that case, appellants, applicants in the suit at first instance, brought suit when their positions were declared redundant on appellee's, respondents in the Industrial Relations Court, undertaking an organizational restructuring grounded on a three-year strategic plan. Applicants argued they were neither consulted nor informed of the criteria appellees used to declare their positions redundant. At the trial, appellees adduced evidence demonstrating that appellants were informed about the restructuring process. Meetings were conducted across the country and all employees were informed that in all, 138 positions were declared redundant. Appellees also implemented a voluntary redundancy program to incentivize willing staff receive favorable redundancy benefits.

Appellees issued various updates on the progress of the restructuring through emails, newsletters and short videos. Appellees also arranged psychological services to prepare affected employees for the impending job losses. Appellees also brought evidence showing that no new employees were recruited to replace appellants after

their dismissals. Finally, appellees showed that they duly informed the Ministry of Labour about the organizational restructuring and attendant job losses.

The Industrial Relations Court found that respondents did not in fact recruit staff replacing appellants and that they were not discriminated against. The Court did find, however, that appellees did not consult appellants but rather merely informed them of the restructuring and impending redundancies. Still, the Court dismissed appellants' suit on grounds it was bound by the Supreme Court's decision in *Mkaka (No. 1)* that appellees were under no obligation at law to consult applicants on the organizational restructuring and impending redundancies. *Quaere* whether this was really termination on grounds of redundancy and not retrenchment within the context of the specific meanings attaching to either term discussed above. Given the number of people 'laid off', the facts disclose retrenchment and not redundancy.

Now, in *Eric Thomson*, no conditions of service were submitted at the trial. This means the Court did not have evidence to determine whether or not consultation was provided for in respondents' terms and conditions of service as *Mkaka (No. 1)* requires. The High Court reversed. Finding unfair dismissal, the Court found that appellees did not consult appellants as required by law.

The importance of *Eric Thomson* in the context of the suit at the Bar is the Court's analysis of *Mkaka (No. 1)*'s precedential value, holding, as it did, that an employer does not have an obligation to consult affected employees facing termination of employment through retrenchment or redundancy. Muhome J., critically juxtaposed the ratio in *Mkaka (No. 1)* against comparable authorities and concluded that *Mkaka (No. 1)* had been challenged, distinguished or explained so widely that its precedential value had all but been eroded, or whittled down that it can hardly be considered binding anymore.

Muhome J., observed that before *Mkaka (No. 1)*, both the High Court and the Industrial Relations Court had consistently held that an employer is obligated by both municipal and international law to consult an employee facing termination of employment due to operational requirements (*Ngwenya and Gondwe –v- Automotive Products Ltd*, IRC Matter No. 180 of 2000 (Unrep.); *Boloweza and Another –v- Doogles Lodge* (2008) MLLR 362; *Chauncy Nanthambwe –v- Bunda Collage of Agriculture*, Civ. App. No. 4 of 2014 (Unrep.); *Rabecca Kayira –v- Malawi Telecommunications Limited*, Civ. App. No. 40 of 2010 Unrep.); *Malawi Telecommunications Ltd –v- Makande and Another*, (2008) MLLR 35.

He noted that over time, the courts developed standards mandating employers to comply with before carrying out retrenchments or redundancies. Building on these standards, he points out that *Ngwenya* and *Boloweza* set out important questions a court needs ask itself to determine whether or not the redundancy or retrenchment was properly conducted. These include, whether there was any consultation between the employer and employees or their representatives; whether there were attempts by the employer to reach a consensus with the affected employees; whether information was disclosed to affected employees; whether employees were afforded an opportunity to make representations of their own regarding the retrenchments or redundancies and the process involved when carrying them out; and finally, what the criteria adopted to earmark employees subject to retrenchment or redundancy was.

In his reasoning, Muhome J., pointed out that in *Makande*, the Supreme Court posited that consultation prior to termination based on operational requirements needs to entail genuine engagement and not merely be a purported attempt at implementing what would otherwise be a unilateral notification of the terminations without seeking feedback from affected employees. Muhome J. went on to observe that this position subsisted until 2014 when *Mkaka (No. 1)* was decided, holding, for the first time, that consultation prior to redundancy is obligatory only where the terms and conditions of service provide for it. Muhome J., opined that the Supreme Court curtailed *Makande*'s precedential reach, declaring it no longer applicable only on account it preceded the Employment Act 2000. This, the Court reasoned, on grounds that the Employment Act 2000, in the context of and under s. 211(1) of the Constitution, provided otherwise than Arts. 13 and 14 of Labor Convention No. 158 do, thereby ousting the application of state obligations the Convention imposed.

Muhome J., noted that since *Mkaka (No. 1)* was decided, the courts, including the Supreme Court itself, have struggled to reconcile its reasoning with *Makande*. In *BM Phiri –v- Mount Soche Hotel*, Civ. App. No. 15 of 2015, for example, Tembo J., forcefully implored the Supreme Court to revisit *Mkaka (No. 1)*, and, agreeing with Chikopa JA's dissenting opinion, pointed out that *Mkaka (No. 1)*'s reasoning is antithetical the fair labour practices s. 31(1) of the Constitution grants and the requirement for an employer to act with justice and equity under s. 61(2) of the Employment Act. In essence, echoing that consultation is the hallmark of fairness, justice and equity in all cases involving redundancies or retrenchments.

Muhome J., goes on to observe that in other instances, the courts have devised novel mechanisms to bypass *Mkaka (No. 1)* and deem it nonbinding. So, for example, in *Premium Tama Tobacco Ltd and Others –v- Frank Mambala and Others*, Civ. App. No. 103 of 2015, Mkandawire J. (as he then was), distinguished *Mkaka (No. 1)* and held that where doubt arises on the genuineness of the reasons for retrenchment, it does not apply wholesale. Again, in *Opportunity Bank of Malawi Ltd –v- Chiphwanya and Others* Civ. App. No. 24 of 2019, whilst accepting *Mkaka (No. 1)*'s binding authority, Ligowe J., held that the application of Arts. 13 and 14 of Labor Convention No. 158 was unavoidable in the interpretation of the concept of 'justice and equity' in s. 61(2) even if, from a legislative standpoint, the Convention is not part of the law in this Country.

In *Eric Thomson* itself, Muhome J., observed that the Supreme Court had the opportunity to review its holding in *Mkaka (No. 1)* but, regrettably, sidestepped commenting on it. Finally, Muhome J. observed that the Industrial Relations Court has constantly utilized *Mkaka (No. 2)* to hold that consultation in cases of retrenchment or redundancy is a legal requirement, not only contractual, as it did in *Prescott Nkhata and Others –v- Indebank*, IRC Matter No. 398 of 2016 (PR.) (Unrep.) and *Richard Chikalipo –v- Manica (Malawi) Ltd*, IRC Matter No. 1 of 2021. (PR)(Unrep.).

Beyond this analysis, Muhome J., proceeds to conclude that the Supreme Court's majority judgment in *Mkaka (No. 1)* was decided inadvertently, if not *per incuriam*, and should not have binding effect on either the High Court or the Industrial Relations Court when deciding cases of termination of employment grounded on retrenchment or redundancy. That discourse, however, is beyond the purpose of the interrogation before me and so, I will not engage it for irrelevance. Suffice to say,

however, that upon Muhome J., discussing how he viewed *Mkaka (No. 1)* as decided inadvertently, he went on to elaborate how he believed courts have ingeniously sidestepped authorities inadvertently decided or decided *per incurium* and, on that basis, proceeded to disregard its binding authority.

Consequently, he reversed, finding unfair dismissal. He ordered that compensation be assessed in applicants' favor. My view that Muhome J.'s reasoning in *Eric Thomson* finding *Mkaka (No. 1)* to have been decided inadvertently or *per incurium* is irrelevant for purposes of the inquiry before me needs be unpacked.

While *Mkaka (No. 1)* could very well be considered unfortunate for restricting employee rights to fair labor practices protected by s. 31 of the Constitution and the principle of justice and equity in s. 61(2) of the Employment Act, I for one, do not find Muhome J.'s reasoning in *Eric Thomson* persuasive or justified to disregard *Mkaka (No. 1)* and its precedential value within the revered doctrine of *stare decisis*. The binding effect of decisions of superior courts are not, and should never be superfluously ignored or wished away except through clearly established principle, either through distinguishing, explaining or holding them inapplicable on the facts or the law.

I would, of course, and for obvious reasons, respectfully join others critiquing the Supreme Court's reasoning in *Mkaka (No. 1)* as contradictory to both s. 31 of the Constitution and s. 61(2) of the Employment Act, amidst the other clarion trumpeters calling for its review and overturning. And so, while I would not go so far as to disregard its binding authority, I would, nevertheless, go so far as to out rightly propose, as others have all but come short to declare, that *Mkaka (No. 1)* is bad law and indeed ought to be overturned, if only to restore the protections the Constitution grants and statute provides on employee rights surrounding retrenchments and redundancies. This, much like both the Supreme Court and the High Court have all but declared *Chawani –v- The Attorney General*, (2008) MLLR 1 bad law, but only to the extent it has unintentionally grossly warped compensation in cases of unfair dismissal post 2000.

In keeping with this reasoning, regardless of what criticisms are leveled at *Mkaka (No. 1)*, and recognizing its binding effect on this Court, for purposes of disposing the inquiry before me, *Mkaka (No. 1)* is inconsequential in so far as it holds that consultation is not a requirement unless provided for in an employers' terms and conditions of service. This is singularly because in the case at the Bar, respondents' terms and conditions expressly provided for consultation.

Ironically, and deferring to the doctrine of *stare decisis*, the determination of this suit then falls squarely within the exception that *Mkaka (No. 1)* carves out. That consultation is mandated only where the terms and conditions of service provide for it. In the case before me, consultation was obligatory on respondents. It was expressly provided for in the terms and conditions of service through their Redundancy Policy.

Now, recapping that while *Mkaka (No. 1)* holds that consultation is not a requirement under the Employment Act, unless specifically provided for in the terms and conditions of service, it is crucial to conclude and make mention that it does not, thereby, oust the nature or extent of the consultations required. Once established that the terms and conditions of service provide for consultations, an employer is

mandated, and the courts must closely interrogate if the employer followed, without excuse or limitation, the full range of consultations anticipated by law.

Where consultation is held applicable, as in the suit at the Bar, respondents were under an obligation to consult applicant to the fullest extent of the principles applicable when terminating employment on grounds of redundancy. It is to an examination of the evidence the parties adduced that I now turn, and a consideration of whether, in the manner they declared applicant's position redundant and terminated his employment, respondents followed the obligation to consult applicant required by law.

By this, I return to my interrogation whether respondents followed their redundancy policy. And, as alluded to at the outset, that is an inquiry that can only be carried out within the context, and as demanded by s. 57(1) of the Employment Act, where respondents are obligated to take appropriate steps in consultations when carrying out the redundancy.

In his submissions applicant argues, and quite correctly in my judgment, that respondents' terms and conditions of service provide detailed steps to comply with when consulting to effect redundancies or retrenchments. These include an obligation to undertake preliminary measures prior to declaring redundancy showing a clear exploration of measures to avoid the redundancy unless it be the option of last resort. This entails undertaking comprehensive consultations with individual employees and collectively with trade union representatives, availing rights of appeal for affected employees to challenge any decision averse to their interests, and a showing of the selection criteria on which those earmarked for redundancy or retrenchment were selected and finally, payment of redundancy benefits if the redundancy is unavoidable.

Applicant also references Arts. 13 and 14 of the Labor Convention No. 158 of the International Labor Organization, which stipulates measures and obligations State Parties are mandated to enact and implement in their jurisdictions, requiring employers to comply with when effecting retrenchments or redundancies.

Observably from these submissions, much of what the parties argue and submit on the law and best practices are not questions on which they hold diametrically opposed positions. To begin with, it is not disputed by either party that consultation is a major prerequisite when effecting retrenchments or redundancies. The parties unequivocally agree on the mandate burdened on respondents to conduct consultations. The only difference the parties' positions exhibit is when the consultation is expected to be conducted and what constitutes such consultation as to satisfy law's demands.

Respondents' position is that consultation was carried out before applicant's employment was terminated. Applicant argues that it was not. The question needing resolution, and on which I found respondents wanting is the sufficiency of the consultation undertaken and whether it can measure up to the degree required by law to conclude they did in fact consult applicant. My conclusion is no.

No such consultation, in the manner mandated by law, was conducted. Respondents did not engage applicant in the interactions they had with him to pass muster as consultation under the applicable laws and best practice, whether under municipal law or the labor conventions. As my analysis of the evidence will show, respondents' actions interacting with applicant between the time they initially

embarked on their restructuring program in January to their terminating applicant's employment in July, was not conducted in the manner both the law and respondents' redundancy policy requires such consultations be conducted.

A careful weighing of what transpired in this case, at least from the facts and the evidence before me, leads me to surmise that respondents may have attempted to conduct some form of consultation, but such as lacks sufficiency of engagement one can confidently dismiss as unapprised at most, and at worst, a derision of what the law mandates as consultation. The manner and degree of engagement, juxtaposed against the period within which respondents claim they consulted applicant does not come close, by any stretch of the imagination, to satisfying the requirements mandated both by respondents' redundancy policy and applicable laws or best practice under the International Labor Organization's Labor Convention No. 158.

In my considered judgment, many of the breaches of respondents' redundancy policy, and by extension, of the law and best practice respondents committed stems from their lack of knowledge on what their own redundancy policy provided. Simply put, respondents knew there was a policy on redundancy, but did not pay attention to its actual requirements. To better ground and illustrate this conclusion, it is important to closely examine what depth of consultation both the law and respondents' redundancy policy expects an employer to undertake when engaging affected employees as can reasonably be held consultation to have taken place.

On this point, authority is replete expounding the nature and extent of consultations required of an employer when they undertake redundancies or retrenchments. In *Chiume*, a matter that arose before the Employment Act came into force in 2000, Deputy Chairperson Zibelu-Banda (as she then was), while acknowledging the Act was inapplicable, held that "[T]he Court [would] apply provisions of the Constitution, International Labor Organization (ILO) standards, case law, texts on Employment Law and internationally acceptable good practice and procedure (sic)" to determine whether respondents had properly consulted an employee when declaring a position redundant.

In the suit at the Bar, the operational requirements in issue directly relate to raising the bank's competitive edge in the banking industry through the improvement of its operations to increase revenue generation and profit margins. In this regard, Sikwese notes that it is not enough to simply allege that the company is experiencing an economic downturn or requires restructuring. In order to ensure justice and equity, the bank must demonstrate that there was established a transparent system by which factors necessitating the redundancy or retrenchment were clearly laid out. The bank, as an employer was thus required to produce supporting evidence, through statements of accounts, operations protocols and the expected improvements and outcomes that justify the redundancies or retrenchments.

The bank, as an employer, must demonstrate that an objective process was adopted and followed by which specific employees or positions earmarked for redundancy or retrenchment were identified and selected. This is because, as Sikwese aptly highlights, fair labor practice carrying out redundancies or retrenchments entails that the processes followed must be even handed, reasonable, fair, acceptable and justified from the standpoint of not only the employer and the employee, but also from the standpoint of fair-minded persons looking at the unique relationship between the

employer and employee, as well as from the standpoint of good industrial and labor relations.

At the international scale, the International Labor Organization states that factors that constitute fair labor practices in mass dismissals and redundancies must include information, consultation and alternatives to retrenchments and redundancies. To that end, the ILO standards require that when the employer contemplates termination for reasons of an economic, technological, structural or similar nature, the employer needs to provide to the concerned employees or their representatives relevant information including reasons for the termination contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. Additionally, the employer is expected to give, in accordance with national law and practice, the concerned employees or their representatives, as early as possible, an opportunity for consultations on measures to be taken to avert or minimize the terminations or measures to mitigate the adverse effects of any termination on employees concerned, including finding alternative employment (see SIKWESE, op cit, 245).

From this collation of law and jurisprudence, it is suggested that when an employer determines to terminate employment, either through redundancy or retrenchment, there are several requirements that an employer must follow and satisfy. First, an employer must develop a concept justifying the restructuring and giving propositions how the restructuring will be carried out. The restructuring concept should include a full and frank disclosure of its financial standing and how the retrenchments and redundancies will lead to improvements in its operations. The concept should also contain an objective criterion for selecting employees likely to be impacted or positions likely to be declared redundant.

Second, an employer must prepare a report for submission to the Ministry of Labor enclosing the restructuring concept. The report should also include all information required to be submitted by the guidelines the Ministry of Labor issued regarding the conduct of retrenchments and redundancies discussed earlier. At the same time the initial report is submitted to the Ministry, the employer must commence consultations with employees likely to be affected, either individually or through their representatives, if extant. These consultations should seek to provide as much information as possible on the prospected restructuring, setting out clear goals that are to be achieved, the expected outcomes and setting timelines within which each stage of the restructuring process will take. The information disclosed should provide for possible engagement, an objective criteria or proposal on how affected employees are to be selected. The criteria should be open, objective and fair such that every employee should at the very least clearly understand the process and objectives being sought. The employer, if capable, should also disclose any measures being taken or proposed to be taken to minimize job losses as much as possible, or measures to provide safety nets and measures to enable impacted employees transition either to other employment or economic activities after the restructuring program.

The employer must also establish mechanisms to receive feedback from the affected employees or their representatives on any contributions by the affected employees and how their concerns or ideas would be addressed. In the end, and as the law and authorities seem to strongly advocate, any organizational restructuring must be

underlined by transparent and objective process that ensures every employee, including and especially those impacted feel, as far as an employer can manage, that the process was fair, transparent and rooted in equity and justice. It is with these propositions in mind that I move to consider respondents' redundancy policy and what it provided. The question remains, did respondents follow their own redundancy policy in the context of s. 57(1) and as best practice and international law mandates?

First, respondents' redundancy policy, which both parties acknowledged and did not have contentions over. Ignoring the meaning respondents placed on what the policy states constitutes redundancy for irrelevance, respondents' redundancy policy provides that in the event of a reduction in the demand for operational requirements of a post, the first step to take "shall be to consider organizational ways of adjusting to the reduction." In this is included reducing costs where possible, cutting back on overtime, reducing the number of short term temporary or agency staff, bringing work in-house rather than using contractors where possible, redesigning jobs and reorganizing work and asking for volunteers to work part time or job shares and any other options that would avert job losses.

A careful exploration of respondents' evidence does not suggest any of these measures were considered at all, let alone followed. Respondents, neither through Ms. Phangaphanga nor Mr. Madinga adduced evidence to demonstrate that respondents tried to reduce operating costs, cut back on overtime for any of the staff, reduce the number of short-term temporary or agency staff, or brought work in-house as opposed to using contractors, redesigned jobs or reorganized work or indeed, as respondents tried in *Eric Thomson*, asked for volunteers to work part time, share jobs or indeed opt for voluntary redundancies.

Second, respondents' redundancy policy sets out an elaborate procedure for carrying out redundancies. For starters, the policy states that in the event redundancies become unavoidable, so far as is reasonably practicable, the bank would notify the Ministry of Labor and all employees at the same time, of the likelihood of the redundancies so that all stakeholders are kept informed of impending developments. It also requires the bank consults what it acronyms 'CIAWU' or employee representatives about the proposed redundancies, the reasons for the redundancies, the likely number and descriptions of employees at risk of redundancy, the likely number of employees of that type employed in the company, the proposed method of selecting the employees for redundancy, how the redundancies will be carried out, and how any of the redundancy payments will be carried out. It also undertakes to consider ways of avoiding the dismissals, reducing the number of employees to be dismissed and that respondents would endeavor to mitigate the consequences of any dismissals effected.

As part of its obligations on this measure, the bank undertook, upon consultation with all key stakeholders, to explore ways of averting the redundancies, or reducing the number of employees to be dismissed and inform the Ministry of Labor and all employees about these developments. The bank further committed to disclose the actual measures taken, implementation timelines, the likely impact on employees and the proposed mitigation or compensating factors.

Respondents further undertook, in their policy, to disclose to all consulting parties all relevant information as would allow the consulting parties engage effectively in the consultation and ensure joint decision making. Where the grounds for declaring

redundancies involve financial incapacity, the bank undertook to disclose to the consulting parties its financial position, including all relevant accounting documents.

Respondents also undertook, where, after consultation with all stakeholders, to proceed with the proposed redundancies or measures of reducing the proposed number of employees to be declared redundant, they would invite at-risk employees to formal one on one meetings, where practical, to notify them of their being at risk of redundancy. On this, respondents undertook to provide all information relevant to assist applicant prepare for such a meeting. The bank undertook to officially give the employee notice of termination of employment through redundancy, including details on how they were selected and information on their redundancy package, subject to allowing such employee reasonable time and opportunity to respond to any issues raised and consider their own responses to such a development. The bank also undertook at this stage to give employees or at risk employee priority status and continue searching for measures and ways of avoiding the dismissals or identification of suitable alternative employment.

Again, respondents' policy expressly provides that in the event or after the notice period expires no suitable alternative employment is found, or means of avoiding the dismissal are found, the bank would invite the affected employee to a second meeting where the outcome would be communicated. It is only at this invitation to the second meeting that the employee would be advised that the possible outcome of the meeting might be dismissal by reason of redundancy.

Finally, it is worth pointing out that respondents' redundancy policy notes that it would refer to different principles for selecting staff into the new established structure as a result of declaring a particular post redundant. While varied depending on peculiar circumstances attaching to each case and position under consideration, these principles include interviews where there are more employees than positions, and, where only one position exists and one candidate available, it would turn on whether the line manager for that position has confidence the available candidate is suited to take on the position and, where they are not, a wider search through advertisement would be undertaken.

Before I contextualize respondents' treatment of applicant in the manner they selected him for redundancy and interrogate whether they followed their redundancy policy, or acted within the Constitutional grant of the employee's right to fair labor practices and the statutory principle of justice and equity, including the dictates of Labor Convention No. 158, it stands to reason that I set out my understanding of the exact requirements the policy makes regarding declaring a position redundant leading to termination.

First, when respondents determined there was need for a reduction of staff on grounds of operational requirements under s. 57(1) and embarked on their organizational restructuring, the first step they should have taken was to consider organizational ways of adjusting to the reduction. To do this, as their redundancy policy required, they should have considered reducing costs where possible, cutting back on overtime, reducing the number of short term temporary or agency staff, bringing work in-house rather than using contractors where possible, redesigning jobs and reorganizing work as well as asking for volunteers to work part time or job shares and any other options that would avert job losses.

Second, having considered these preliminary measures and, on determining that retrenchments and redundancies were unavoidable, they should have notified the

Ministry of Labor and all employees simultaneously, of the likelihood of the redundancies. This, to alert and keep informed all stakeholders and at risk employees of the impending job losses. In this, respondents should have consulted CIAWU (whoever or whatever that is), or the trade union, if it exists, or employee representatives, if a trade union did not exist, and individual members, if their positions were affected, but who, on account of their seniority as part of the Executive Management, as was the case with applicant, could not be members of the trade union, about the impending redundancies. Again, as the policy requires, this information should have included the proposed organizational restructuring, with the proposed organogram, the proposed redundancies, the reasons for the redundancies, the likely number and descriptions of employees at risk of redundancy, the likely number of employees of that type employed in the company, the proposed method of selecting the employees for redundancy, how the redundancies would be carried out, and how any of the redundancy payments will be computed and carried out. That information should also have included a consideration of ways to avoiding the dismissals, propositions on reducing the number of employees to be dismissed and any endeavors to mitigate the consequences of the dismissals. According to the redundancy policy, this information should also have been provided to the Ministry of Labor and should also have included a candid disclosure of the actual measures proposed to be taken, the implementation timelines and the likely impact on employees and any proposed mitigation or compensating factors under consideration to cushion at risk employees from the adverse impact of the job losses.

At this point, and according to the redundancy policy, respondents should have disclosed to all consulting parties and at risk employees all relevant information as would allow them engage effectively in the consultation process to ensure joint decision making. Finally, but certainly not least, since the restructuring involved financial considerations, in that the bank intended to optimize operations and increase competitiveness and revenue generation to increase profitability, the bank should have compiled and disclosed to the consulting parties, at risk employees or their representatives, its financial position as accurately as possible, including, in such disclosures, all relevant accounting documents.

Respecting, and significant to the inquiry now before me, respondents having determined, after consultation with all stakeholders, to proceed with the proposed redundancies, should have invited him to one on one meetings to notify him of his being at risk of redundancy. At that point, they should have provided applicant with all information deemed relevant to assist him prepare for the meeting. The bank should have given him the notice of termination of employment through redundancy, and ought to have included details on how he was selected and should have afforded him reasonable time and opportunity to respond to any issues raised and consider his own responses to those developments. Respondents should have, at this stage, given applicant priority status and made concrete efforts to search for measures and ways of avoiding his dismissal or the identification of suitable alternative employment. It is only at this stage that respondents would have invoked their criteria for evaluating his competences and capabilities to identify a possible position to locate him in the new structure. In doing so, they were mandated to consider applicant in his own right, not collectively with others, whether a position could be identified for him to fill. Only where none were available were respondents at liberty to inform him of the unavailability and engage a wider search

for suitable candidates to fill the position(s) in the new organizational structure on a competitive basis, including advertising to recruit externally.

In his arguments, applicant insisted that respondents were obligated to give him pre-redundancy notice and post redundancy notice. Respondents seemed at pains to understand what he meant by this. In their defense, they argued that he was given the appropriate notice and was appropriately paid his dues in lieu of such notice. The truth of the matter is that applicant was referring to the policy requirements of giving ample notice of the possibilities of redundancy, and creating the necessary space and time to realistically implement the provisions of respondents' redundancy policy. Simply put, applicant expected respondents to reserve sufficient time and attention to ensure that the requirements of respondents' redundancy policy as clearly explained here were followed.

As it were, and as I find in agreement with applicant's arguments, the period within which he was ostensibly notified of his impending termination on grounds of redundancy and his employment terminated was way too short for respondents to be taken as having complied with the timelines that the policy indicated all requirements between the declaration of redundancy and termination of employment would have occurred. In light of this expose, it is quite clear that respondents misunderstood applicant's reference to pre-redundancy notice and payment in lieu of notice as one and the same. It was not.

The pre-redundancy notice under respondents' policy is the period during which respondents should have engaged in meaningful consultation to consider all options the policy allowed, while applicant's reference to post-redundancy notice refers to the period he would have served notice before termination and, accordingly, for which respondents paid him in lieu.

I now turn to the evidence and testimony given by applicant, on his own behalf, Ms. Phangaphanga and Mr. Madinga on respondents' behalf that bring out the factors grounding this analysis and findings. As clearly advised at the outset, I will only explore the evidence as relates to interrogating whether respondents followed their redundancy policy within the context of s. 57(1) of the Employment Act, best practices and Labor Convention No. 158.

In his testimony, Mr. Wandawanda testified that he holds a Master of Science and Bachelor of Science degrees. That he started his career with IT Center, then worked for Airtel before joining respondents, Standard Bank Plc on being head hunted as Head of Business Banking in 2007 (Exb. AW-BW 1(i)). He worked for Standard Bank for 6 years, and was then transferred to Kenya on a long term assignment in 2013 as Executive Head of Business Banking (Exb. AW-BW 1(ii)). He testified that at the time he moved to Kenya respondents' Personal and Business Banking was struggling and performing poorly. While in Kenya, the team he led managed to turn its performance around to start registering considerable profit margins. He testified that his contract in Kenya had initially been intended to last two years. On account of his performance, his contract was renewed twice more and he served some 6 years instead of the initial two (Exb. AW-BW (iii); Exb. AW-BW (iv)). While in Kenya, applicant won prestigious awards such as Sales Manager of the Year in 2017 (Exb. AW-BW 4) and was voted Commercially Astute Banker of the year in 2018 (Exb. AW 4a).

He was repatriated to Malawi and appointed Executive Head for Business Development in February of 2019 in respondents' Personal and Business Banking (Exb.

AW-BW 1(v). During that period, he was not informed of his performance rating until December of 2019, approximately around the same time that Mr. Madinga joined the bank in January of 2020 as Head of Personal and Business Banking.

Although he was rated as needing improvement, he testified that he did not appeal against the rating. He testified that in the 13 years he had worked for the bank, he had never been rated as needing improvement. For that reason, he believed that he could improve on the rating because he concluded the rating had been erroneous. Again, he testified that he did not appeal the rating because Mr. Madinga had just joined as his line manager and he reasoned it would not be necessary to have his new line manager deal with the appeal when he had barely joined and was yet to fully settle down. He testified that he took the low performance rating and the ensuing Performance Improvement Plan as a challenge he could overcome. Indeed, within twelve weeks, he was taken off the Performance Improvement Plan as he had achieved all the objectives set for him to achieve as to be taken off the Plan.

He testified that it was also during this time that the Bank initiated and implemented its organizational restructuring, which included the Personal and Business Banking. He testified that in April of 2020, the bank's leadership presented the new organizational structure to its staff. The new structure did not include the Executive Head position applicant held.

Mr. Wandawanda testified that they had been assured that no job losses would occur during the restructuring program. In the presentation of the new organizational structure, all meetings held by respondents were conducted virtually. The Head of Personal and Business Banking called him and told him that he would be offered a position at a lower grade because his position of Executive Head was no longer in the organizational structure. Mr. Wandawanda testified that he expressed reservations at being offered a position at a lower grade having risen through respondents' structure, a feat demonstrating experience and achievement to become an Executive Head.

Instead, he was asked to and expressed interest in three jobs for which he was invited to attend interviews. He testified that for purposes of the interviews, he prepared one presentation across and covering the three jobs on offer. He attended a feedback meeting on July 17, 2020 where he was told he did not meet the expectations for any of the three roles and that his profile was lower than his other competitors for the three positions he had interviewed for. He was told that they were engaging regional availability for an Executive role. He testified that instead, he was told a termination package would be prepared for him and was given three days to respond. Mr. Wandawanda testified that he responded much earlier than the deadline they had set for him and he sought feedback on how exactly he failed against his competitors in the interviews.

Mr. Wandawanda testified that in compiling results for the interviews, respondents used psychometric results from an entirely different interview he attended some time earlier. That he did not undergo psychometric evaluation for the three available positions he had been advised to apply for. He testified that he felt it was apparent that all they wanted was for him to leave the bank. He testified that they then declared his position redundant and went so far as to ask him not to serve any notice on account of his employment being terminated.

Mr. Wandawanda testified that he did not receive any pre-redundancy notice as required by respondents' policy. The notice he received was dated July 20, a day earlier than a meeting he had been invited to on July 24, I believe to discuss his responses to the letter formally informing him that his job was declared redundant dated July 17. I take note that this is supposedly the letter that was given applicant after the meeting on July 25, the subject of a protracted cross with Counsel for respondents Mr. Soko later during applicant's testimony.

Continuing, Mr. Wandawanda testified that even his appeal was turned down in circumstances that he questioned. He testified that three people were affected by the declaration of redundancy. Amongst the people that were affected, two had their employment terminated. One was demoted. So, in all the organizational restructuring, only two people had their employment terminated. Mr. Wandawanda testified that he never received any redundancy notice from respondents in the period leading to the termination of his employment.

In cross, Mr. Wandawanda confirmed that he joined Standard Bank in 2007. He confirmed that he understood that the Bank had policies and terms and conditions of service that were part of his conditions of service. He noted that this is why he made reference to respondents' redundancy policy. He testified that he previously worked for Airtel/Celtel. He pointed out that he understood clearly that an employment contract is contractual and is not for life

He pointed out that he had grievances in the way respondents terminated his contract on grounds of redundancy when all along he had been a star performer both in Malawi and especially so when he worked in Kenya. He testified that he also took issue with respondents' implementation of their organizational restructuring and declaring his position redundant as having been premeditated. He insisted that respondents did not follow their own redundancy policy when they declared his position redundant and terminated his contract.

Mr. Wandawanda stated that he had three main grievances with the way respondents declared his position redundant and terminated his employment: That he had been a star performer the whole time he had been in respondents' employ; that the process respondents followed was premeditated; and respondents did not follow its own established procedures when they terminated his services.

Mr. Wandawanda testified that he understood that his services were not terminated because of poor performance. That if the Bank had had issues with his performance, they would have let him go on the basis of performance, not dismiss him on grounds of redundancy. He denied that the termination of his employment was connected to the low rating he was given at the year-end review. His low rating was given during the mid-year year review. That it was that low rating that led to his being placed on the Performance Improvement Plan. Applicant testified that he successfully completed the Performance Improvement Plan and he was taken off it. Applicant testified that he has been with the bank for 13 years and 7 months. He knows that when there is no improvement on performance after a Performance Improvement Plan, there are consequences that follow, and that these include additional improvement plans and ultimately, might lead to separation or termination.

Mr. Wandawanda testified that he never believed that the bank would use the Performance Improvement Plan to terminate his employment because respondents'

policy is clear on what follows after Performance Improvement Plans. He testified that he knew and would expect the bank to follow through on its policy regarding performance. He testified that he was aware that policies can be perverted and inappropriately applied. It is possible to apply a policy perversely if the bank's interest was to simply get rid of an individual.

At the time he received his low rating, respondents' Personal and Business Banking was being led by Dr. Margaret Kubwalo-Chaika. The process of rating was conducted during Dr. Kubwalo-Chaika's term, but the results and feedback was only provided after Dr. Kubwalo-Chaika had left the bank. It was Dr. Kubwalo-Chaika who put him on the Performance Improvement Plan. It was Dr. Kubwalo-Chaika's successor, Mr. Philip Madinga who managed the Performance Improvement Plan after Dr. Kubwalo-Chaika left.

Applicant testified that this Personal Improvement Plan was successfully completed. He also testified that the rating Dr. Kubwalo-Chaika gave him was prematurely given, as it was too early to rate him as he had only been with respondents less than six months upon his return from Kenya. Mr. Wandawanda was shown Ms. Phangaphanga's witness statement deposition and a document identified as ID ZP6. He identified it as respondents' Performance Management Policy. He noted that the system for performance rating is not in the policy.

He testified that he is aware that for people who just join the Bank, they are not subjected to performance rating as those who have been with the bank for a while. He also testified that he was aware that the rating is not done by one person but many players within the bank. Given his experience, his performance rating would have involved the General Manager and the Regional Head of Personal and Business Banking. He testified that under respondents' Performance Management Plan, ID ZP6, he had the right to contest the rating he was given, but he decided not to challenge it.

He testified that the process to terminate his employment was premeditated and it was not properly managed. Applicant was shown a document that he identified as respondents' Redundancy Policy, marked as Exhb. AW-BW 6. On reading para. 1.0, of the policy, at the second clause, he confirmed that the policy states that job losses and redundancies may be unavoidable and may be inevitable. He confirmed that he was aware of the redundancy policy and confirmed that under the policy, redundancy may occur in one of two ways. First, from a reduction of staff in a position and second, the elimination of the position itself altogether.

Applicant testified that the way the bank went about filling posts after the restructuring supposedly followed its Recruitment and Selection Policy. Applicant was shown a document that he identified as respondents' Recruitment and Selection Policy, identified as PM4-ID. Reading paras. 3.3.1 and 3.4, he noted that without being prescriptive, it did not mean the bank could depart from its own laid out procedures.

Applicant testified that when he joined the bank, he was interviewed and he underwent a psychometric assessment. He admitted that an employer has the prerogative to decide how and who to recruit. They decide this through the formal selection process. They decide how to constitute a panel to interview candidates and they do this through the Recruitment and Selection Policy. They decide how to frame the questions and, in his case, how they were going to recruit managers. He admitted that an employer also decides on the skillset for candidates to be interviewed. Applicant testified that he did not

go through a psychometric assessment for the roles he was advised to apply for in this instance.

He testified that the psychometric assessments are out sourced by the bank to external consultants. One of the several contracts is Joint Prosperity. Once they conduct the assessment, the data is kept by the consultants. The results of the psychometric assessment are shared with the candidate.

Applicant was shown a document identified as PM5 which he stated were his psychometric assessment results. He testified that he was not shown the results of his psychometric assessment. He did, however, admit having an interaction with a consultant from Joint Prosperity in the presence Mr. Madinga and Ms. Phangaphanga. He stated that Ms. Phangaphanga referred to the psychometric results but he was not sure which ones she was referring to because he had not done any for purposes of the positions he had been invited to apply for.

Applicant reiterated that he was not given pre-redundancy notice at all. That information was withheld from him throughout the redundancy process. He responded that as he understood the process, notice is given where some positions are to be declared redundant. Everyone impacted is supposedly invited and explained to about what has brought the redundancies and who has been affected. He testified that he was one of those employees that were impacted. He noted that individually, people impacted must be engaged and informed of how they are impacted. That at that point, the redundancy policy kicks in and a pre-redundancy notice is issued to pave way for the process. That this is the notice the bank did not issue him. He stated that he understood notice to be a formal communication by way of a letter stating it as a redundancy notice. It is not merely bringing someone to the knowledge of something.

Mr. Wandawanda stated that the purpose of a redundancy notice is best captured in respondents' redundancy policy in Exhb. AW-BW 6. He disclosed that he became aware of the abolition of his position around April 17, 2020 when respondents shared the new organogram on the restructuring that impacted his position to the entire bank.

Mr. Wandawanda testified that he was given the letter of termination of employment on July 24, 2020, a period of 90 days thereafter. He noted that the new structure had many positions missing and that they were notified of about the restructuring.

He countered, however, that sharing and circulating the new structure and its organogram did not amount to a formal notice under respondents' Redundancy Policy. He noted that para. 5.6.1 requires that a redundancy notice should be issued. He testified that he had two engagements with Mr. Madinga and Ms. Phangaphanga. That the first was on May 15, then July 17 and finally on July 24. He testified that at these engagements, he was only informed about what the bank had been doing to secure alternative employment for him. On May 15, he was only told what they were going to do to look for alternative employment. He did not see these engagements as structured consultations.

When asked about the appeal he lodged after receiving the letter terminating his employment, Mr. Wandawanda testified that he filed nine grounds of appeal, but the appeal did not deal with them all. He stated that the same people who handled the redundancy process were the very same ones that dealt with his appeal. These were Mr.

Madinga, the head of Personal and Business Banking, Ms. Phangaphanga, the head of People and Culture, and Mr. LeRoux, respondents' Chief Executive Officer.

When asked how he knew this, he responded that the response he received did not mention any other person apart from these. That there is no evidence other than the letter by Mr. LeRoux that Mr. Madinga and Ms. Phangaphanga were involved with the appeals process (see Exhb. AW-BW 8). He pointed out that he expected responses to all nine grounds of appeal he had lodged whether or not the bank agreed with him.

He strongly expressed the opinion that it is a matter of decency and common practice to do so as indicated in Exhibit AW-BW8. They did make reference to having received all the grounds he had raised. He observed that it is important that what was done should be anchored in policy or procedure. It was his belief that only then can confirmation be made that the bank followed its own procedures and policies and did not act in bad faith.

Mr. Wandawanda insisted in his testimony that the procedures and policies are a standard against which respondents' behavior as a bank as his employer should be measured. To that end, Mr. Wandawanda testified that the bank did not even allow him to serve his notice on termination of employment. Of course, he confirmed that he was paid in lieu of notice. Still, he insisted that the redundancy policy makes reference to the pre-redundancy notice and not post redundancy notice where payment can be made in lieu of notice.

Counsel Soko made overtures to Mr. Wandawanda that the dates on respondents' letter dated July 20 were mere typos and was supposed to be dated July 25. Mr. Wandawanda responded that he was unable to respond to the question on the suggestion that the date was a mere error on typing. Mr. Wandawanda did point out that if the date was an error, it would be considered an error of ample magnitude. He categorically pointed out that the date on the post redundancy notice was not an error because this was his career and as such errors would have serious implications on his personal life. He retorted that juniors holding minor office and responsibilities may make and be excused for making such mistakes, not senior managers at the level of Mr. Madinga and Ms. Phangaphanga.

In relevant parts, this constitutes applicant's testimony. At this point, applicant closed his case. On the other hand, respondents brought two witnesses. The first was Ms. Zandile Phangaphanga, respondents' head of People and Culture. The second was Mr. Phillip Madinga, respondents' Chief Executive Officer.

Having taken oath, respondents' first witness stated that her name is Zandile Phangaphanga, head of People and Culture. She pointed out that hers is a human resources position where she ensures people management is handled. She confirmed making a deposition of her testimony in a statement she filed on record. She also tendered documents as part of her testimony that I ordered marked BW 1, 1-9.

She testified that in early 2020 they were informed that respondents' operating model was changing. That this prompted the initial letter they wrote to labor, I reckon referencing the Ministry of Labor. That the Personal and Business Banking took lead on these changes. She testified that the operating model first changed. The head was informed on April 16, 2020 and was taken through the model with his Executives. She pointed out that Mr. Wandawanda was present, as was Mrs. Mughogho, Mrs. Chalamba Tembo, Mrs. Effie Malange and Mr. Webster Mbekeani. Mr. Madinga shared with the

team the new structure, the most impacted and roles introduced in the change on April 17. Every participant received what the head presented on the impacted roles and the new roles on May 15. She pointed out that they engaged applicant with the head of Personal and Business Banking to articulate the process.

She testified that Mr. Madinga emphasized that every affected employee was at liberty to apply for a new job they see fit under the new structure. She stated that Mr. Madinga advised that should one not be successful; the bank would seek roles elsewhere within the group as expected under the Redundancy Policy. She pointed out that failure to do so means the legal procedures would initiate under the Redundancy Policy. She stated that the process was to give every person an opportunity to understand the structural changes.

Ms. Phangaphanga testified that on May 17, they also met applicant after the interviews had been conducted. She stated that he was asked to put up any mitigating factors the bank was to consider as he had not been successful. He was further informed the bank was looking for available roles elsewhere to mitigate against adverse outcomes. Ms. Phangaphanga testified that the search was unsuccessful, and on May 24, applicant was also engaged where he was informed that he would be made redundant, having been heard on the issues he raised. She stated that applicant was paid in lieu of serving notice. He appealed and his appeal was unsuccessful and this was communicated to applicant.

Regarding the Performance Management Framework, Ms. Phangaphanga testified that at the end of each year, management meets to strategize for the following year, setting out performance indicators and targets to be achieved. At the beginning of each year, every head sits with his team to adjust their departmental strategy. Within the quarter, every person is requested to frame their goals that speak to the bank's broad and overall goals.

The goals are then put into the system. She pointed out that the time applicant was with the bank, the system was called 'people fluent'. It is now called 'my performance'. She went on to say that once an individual captures the goals, line manager approves. Once approved, it is called a 'performance contract'. All performance discussions are aligned to the goals and an additional parameter called 'values' that everyone is assessed on. The system is open for people to report on progress throughout the year. She pointed out that there are two touch points, these are mid-year performance review wherein an individual and line manager must report on their dialogue by which an employee is rated. The same takes place at the end of the year. She noted that mid-year reviews are between June and July. End of year reviews may start from October to year end.

She testified that the least performance is called 'time to step up performance'. This is where an individual fails to meet most of their goals. Once rated, a performance improvement plan is initiated. This is when the employee and their line manager together with People and Culture support the employee to focus on the goals not met and the line manager is expected to and provides support in terms of frequent engagement and extra resources needed to improve. The aim of the Performance Improvement Plan is to support the employee to get out of the poor performance space and improve on the delivers and performance. The second rating is 'making progress'. This means an employee is meeting all but some of their goals. The third rating is 'right on track' where an employee meets all their targets. The highest rating is 'setting example' where the employee exceeds expectations.

The Performance Improvement Plan implicates three months of monitoring that People Culture oversees on the dialogue and performance aligned to the Performance Improvement Plan. An employee can get out of the Performance Improvement Plan within three months. Failure to improve leads to a written warning and the Performance Improvement Plan would be extended for another three months.

In the warning, specific areas of concern are outlined so it is clear what the team is to focus on in the three months allowed. If there is still failure to improve, the line manager, with People and Culture initiate a ‘performance inquiry’ with approval from a senior person within their function. At that point, the disciplinary process kicks in. A chair is identified and a panel set up and, if satisfied at the end of the process that the employee has consistently failed to meet their goals, their employment is terminated. She testified that there is always room for appeal.

Regarding psychometric assessments, Ms. Phangaphanga testified that certain managerial levels are subject to psychometric assessments, for example, cognitive complexity, navigation tests, strategic problem solving skills, etc. At recruitment, potentials are subjected to competency tests and psychometric tests designed to test cognitive ability. This places people at different levels. The first is ‘bottom operational level’. This is basic with no strategic problem solving skills. The second is the ‘tactical middle junior management roles’. This is where growth is coupled with learning but with little strategic orientation. The third is ‘strategic operational level’. Senior managers and executives. The fourth is ‘strategic senior executives’.

She testified that at the point of identification for psychometric tests, People and Culture consults Joint Prosperity. The results are shared with the assessed individual and requesting office. In the past, Joint Prosperity would submit results, but this is now restricted by the Data Protection Act. She testified that she would dispute applicant’s claims that he was not subjected to a psychometric assessment for the roles he was invited to compete for because he was taken through the process like everyone else. She testified that they provided transparency that allowed him to question progress. That applicant was adequately informed before, during and after the process.

She testified that Mrs. Mughogho was subjected to the same tests even though she was the only one who applied. The policy restricted us from sharing the results of the other individuals in order to protect their data. She said that it was incorrect that the consultant disagreed with them because it is the same consultant who debriefed them and the head.

In cross, Ms. Phangaphanga testified that the Performance Improvement Plan had nothing to do with applicant’s exiting the bank (RW1-3). She stated that the minutes captured everything discussed with applicant and she had nothing to add. She pointed out that there was an old structure and a new structure. New positions were created, but she could not say if more positions were created than in the old structure (PM 1). She conceded, on being shown the old structure compared to the new that the new structure had 24 manager positions than 22 in the old structure and 24 new positions against 21 positions in the old structure. In the old structure, there were 7 heads and again 7 in the new structure. Ms. Phangaphanga conceded that there were more managers and heads in the new structure than the old. That there was no staff reduction because there were more positions created in the new structure than existed in the old structure.

Ms. Phangaphanga testified that union engagement was held on April 14. The bank was unsure whether the process would result in job losses. That at the time of writing RW1-1, the letter to the Ministry of Labor, they were unaware of potential job losses. Exhibit RW1-1 does not mention specific redundancies nor numbers and individuals at risk of redundancy. It also does not provide a criterion for redundancy selection. It also does not outline how redundancies would be carried out in the process.

On continued cross, Ms. Phamgaphanga admitted that the bank used its Redundancy Policy to carry out the redundancies. She admitted that there is a slight difference between the letter to the Ministry, RW1-1 and the minutes from the April 14 minutes in RW1-3. The minutes do not have the redundancy proposals discussed. She admitted that there was no discussion of reasons for the redundancies nor the likely numbers of individuals at risk of redundancy. The procedure of the redundancy was not discussed nor payments that would be made. In RW1-1 through 3 there is no discussion of how the bank would avoid dismissals.

She conceded that what was done was not in line with the policy as the letter RW1-1 was written before it was known that there would be redundancies. She testified that restructuring process was carried out across the bank. She went on to state that the one on one with applicant occurred on May 15. She admitted that the bank was aware that applicant's position was one of those pending redundancies, but she declined to agree that this was the time at which point to notify Ministry of Labor of impending job losses. She testified that at the time applicant's employment was terminated, only the Personal and Business Banking had completed the restructuring process. This concludes the relevant parts of respondents' first witness' testimony.

Respondents' second witness took oath and stated that he is Phillip Madinga, respondents' Chief Executive Officer. He testified that in 2020 he was head of Personal and Business Banking. He confirmed making a deposition of his witness statement. He corrected a date on para. 8.1 to read April 16, 2020.

He testified that PM1 is the Personal and Business Banking old structure, the new structure and personnel impacted. He stated that PM 2 is the new Personal and Business Banking operating model and organization framework. He stated that PM 3 is an email to the head of People and Culture and changes there were in PM4 recruitment under the Human Capital policy. He noted that PM 5 is the Psychometric Assessment on applicant covering the jobs he was seeking. The other exhibits were PM6- Interview Report; PM7- Available positions; PM8-Emails between applicant and head of Human Capital; PM9- Data Privacy Policy; PM10- Terms and Conditions of Service; PM11- is a copy of the case study used in the interviews for the new roles in Personal and Business Banking while PM12- was the scoring sheet for the interviews (all marked RW2-1-12).

He testified that the Bank belongs to group and impacts are expected across that group subject to local regulating frameworks. He testified that in 2019, the Bank underwent a restructuring exercise. In Malawi, it was decided to pilot the Personal and Business Banking. The restructuring needed to address duplications and incompetence. The restructuring resulted in several positions being impacted and resulted in laying off of those positions. He said that several new positions were created. There was a need for procedure to engage the entire company. Initially it involved the company's Chief Executive Officer. On April 16, 2020 they engaged Personal and Business Banking to

advise changes highlighted in RW2-1-12. Managers were also engaged. Mrs. Chalamba Tembo provided the background and details on April 17, highlighting positions affected.

He testified that he provided the procedure that would be followed including psychometrics. He undertook one on one meetings with the individuals impacted by the redundancies. He said that he informed applicant there may be need to consider positions other than executive head. He testified that to ensure objectivity and fairness on May 15, 2020, he had personal discussions with applicant with the shift in the focus of his position. He testified that applicant was head of Business Development which would be one of the leading sections of the bank. He testified that in light of the new rules, applicant would be subject to competency tests. That he highlighted the process to be followed. That he pointed out that there would only be one executive head in Personal and Business Banking. That otherwise, the available positions remaining in Personal and business Banking would be non-executive positions. That he advised applicant that the bank would explore other executive positions within the group that he would be considered for.

Mr. Madinga testified that assessments were done on the back of these engagements, including psychometrics. Assessments based on a case study looking at competencies included psychometric evaluation to assess a candidate's competency operating at strategic level and strategic thinking. That applicant did not meet the competency parameters indicated. That applicant also failed psychometric evaluations as he achieved tactical operating levels and not strategic thinking. This was done in accordance with respondents' Recruitment and Selection policy.

Joint Prosperity submitted the psychometric tests, including giving candidate's feedback. He testified that no representations were made that no one would lose jobs and this was included in the communication to Ministry of Labor on informing them about the restructuring.

He stated that in his engagement with applicant, he informed him that his position was impacted and that the executive head position may not be available. That placement would be subject to evaluations. That everyone was informed to ensure that the process was fair. Respondents did not place individuals into roles without assessment. He pointed out that applicant was subjected to a fresh psychometric assessment. Those test results were submitted in court. He testified that the exercise did not target an individual. The restructuring impacted many sections in the bank. That applicant was not specifically targeted. That his best opportunity would have been at the time he served out his Performance Improvement Plan. That he was supported even in areas he was lacking. That applicant was given a fair process like everyone else was subjected to. He finally conceded that at least three people were affected.

In cross, Mr. Madinga testified that he would maintain that he would adopt RW 1's witness statement. As applicant was Head of Business Development, he was more senior than Ms. Phangaphanga, but she was involved in the interviews with applicant. That she was also part of the interview panel that conducted the competency based interviews. He noted that they would have used the Performance Improvement Plan as he had not met some targets.

He stated that the detailed plans and targets were not discussed in the witness statements. The restructuring plan affected all sections of the bank. No names have been submitted of persons in the other sections of the bank who were affected and whose

contracts were terminated. On whether evidence exists that there was engagement with Ministry of Labour during the restructuring of respondents' IT and Human Capital sections, the letter to Ministry of Labor makes reference to the entire organization and not just Personal and Business Banking. That it is not correct that the evidence in this court does not refer to other sections of the bank.

He testified that he was employed by the bank in January 2020. That his probation was from January to June, a period of six months. That the bank first engaged Ministry of Labor in January when he had just been recruited and was still on probation. He admitted that he was principally involved in the restructuring process while still on probation. He noted that the new Personal and Business Banking structure was bigger than the old. He did not agree that the new structure had more managers than the old one.

He admitted that Ms. Phangaphanga, according to policy, was not supposed to participate in interviews involving applicant. He confirms, however, that she did participate. He admitted that the psychometric tests are done by consultants. That it is not all done by computer. That there are evaluations done in person with consultants. He admitted that he would not know when applicant took the test, but believed that it was during the period these processes were on going. That applicant sat for the interviews on the positions he expressed interest in on June 24, 2020, but there is no date that appears as to when applicant took the psychometric assessment.

Mr. Madinga testified that applicant was given pre-redundancy and post-redundancy notices. The pre-redundancy notice in the policy means a notice is the process to ensure that everyone is aware of what is going on (PM1). The pre-redundancy notice grants three months, including the meetings with heads to explain the process and give impacted employees the notices (RW2-1, 2 and 3).

Mr. Madinga insisted under cross that applicant was notified of the process through the initial engagement, being the meeting with the staff around April 15 when respondents' staff were given the proposed new structure. On receiving his letter terminating employment, applicant appealed against the decision declaring his position redundancy and termination of his employment. Mr. Madinga conceded in cross that according to respondents' Redundancy Policy, an employee is entitled to receive their terminal benefits after their appeal is heard and determined. He admitted that the record shows that applicant was indeed paid before he lodged his appeal and before the appeal could be determined.

Admitting that the Redundancy Policy enjoins the bank to find suitable alternative employment in cases of redundancy, he returned that there were efforts to look for suitable alternative employment for applicant, but none was found. That applicant was considered but may not have been informed about this wider search. The roles of the new Personal and Business Banking were not brought specifically to applicant's attention.

That they did highlight alternatives. There were none in Malawi. Following the competency based interviews, several were considered within the Personal and Business Banking locally and outside. The final one was identified in Uganda but it was offered to a Ugandan national. That beyond this, the search they carried out did not yield any result.

He pressed that the assessments would still be relevant in considering the alternative roles. That they followed policy requirements from April 16 with the team and later with everyone. Individually with applicant, the process was conducted between May 15 to July 17 and finally on July 24, 2020.

This represents the entirety of the relevant testimony all witnesses called gave at the trial. Some striking observations from these testimonies. Recall I pointed out that this matter does not turn on applicant's competence and skillset as a banker or business development specialist. I highlighted that this matter instead turns on respondents' decisions to declare applicant's position redundant following their organizational restructuring. More specifically, this matter turns on respondents' decisions and actions between the time they declared applicant's position redundant and when they finally terminated his employment.

As can be observed, excepting applicant's testimony, both respondents' witnesses dwelt, for the most part, on how applicant was found wanting in the competency based interviews they conducted regarding the positions they asked him to express interest in. On this, they focused mainly on what they perceived as his poor faring compared to two other candidates also interviewed for the same positions. They also stressed that that poor faring was majorly affected by his psychometric assessment.

First, from the totality of the testimony, both from applicant himself and respondents' witnesses, I find that the psychometric assessment respondents used to rate his competence for the positions he interviewed for was one that he had undertaken for a completely different position, and not the three he was interviewing for. Applicant and both Ms. Phangaphanga and Mr. Madinga admitted that the psychometric assessment Joint Prosperity conducted and which they discussed with applicant was from an earlier job interview. A position he was being considered for in Zambia, not the three they advised him to express interest in. As such, the entire foray into what applicant's psychometric evaluation suggested is not relevant for purposes of determining whether respondents treated applicant with justice and equity upon declaring his position redundant and in the process leading to the termination of his employment. Both Ms. Phangaphanga and Mr. Madise all but admitted that the psychometric assessment that was used to evaluate applicant's suitability in the three roles he expressed interest in was not done for the purpose. They could not pinpoint at what stage or date in the period between the declaration of redundancy and competency based interviews applicant would have undergone the psychometric evaluation for purposes of the new roles. Mr. Madinga went so far as to recall that applicant may have attended the competency based interviews on June 24, 2020. He could not recall when applicant may have undergone the psychometric assessment. He also recalls that at the July 24 meeting, a consultant from Joint Prosperity was in attendance to explain to applicant how he was assessed on the psychometric evaluation. Importantly, that psychometric evaluation results related to an entirely different recruitment exercise. I am unsure what to make of this development. Where respondents went ahead and used psychometric evaluation results from a different recruitment exercise to determine applicant's suitability in roles unconnected with the initial purpose for which the psychometric assessment was initially conducted. I find as fact that the use of psychometric evaluation results from a different recruitment exercise may have significantly disadvantaged applicant and that he was within his rights to demand that he be given the grounds on which the other candidates performed better than he did, especially if a component of the competency based interviews did not allow for the use of appropriate psychometric evaluation results.

Both Ms. Phangaphanga and Mr. Madinga dwelt on applicant's poor rating in the performance reviews that led to his being placed on a Performance Improvement Plan.

The first thing to note is that respondents themselves suggest that his position being declared redundant did not have anything to do with his Performance Improvement Plan. In any event, the totality of the evidence at the trial was conclusive that he had successfully been taken off the plan as he had achieved all the goals set in the plan. That is, except Mr. Madinga, who later in the course of his testimony suggested, but without concrete evidence, that applicant may not have achieved all the goals set for him. I am grounded in my conclusion on applicant having successfully completed the performance improvement plan because there does not appear to have been raised anything related to performance in the interactions respondents had with applicant in the period between May and July, when the question of his position being declared redundant was expressly dealt with.

Again, from the totality of the testimony at the trial, I find the following to have been the chronology of events in the months between January 2020 and July 2020.

In January, 2020, Mr. Madinga joins respondents on probation as Head of Personal Business Banking, replacing Dr. Chaipa as applicant's Line Manager and inheriting the supervision of applicant's Performance Improvement Plan. This engagement lasted until March, when applicant ostensibly successfully completed the performance improvement plan and was taken off of it.

Again in that same January, respondents embark on their restructuring program. I do not have evidence pointing to the genesis of the restructuring. Anecdotal sentiments from Ms. Phangaphanga and Mr. Madinga has me conclude this restructuring program originated from the wider group and was not a brainchild of the Malawi operation. Whatever the genesis, it appears respondents at that point wrote Ministry of Labor advising the planned restructuring program. The Ministry responded advising respondents to keep them updated on the process with all required information to be submitted.

In April, respondents issue an advisory update to staff, including union representatives. Whatever actually happened, it would appear the heads within respondents' establishment were also availed this information through an email sent by one Mrs. Alinane Chalamba Tembo. This, however, seems to have been information relating to the new organogram for the Personal and Business Banking. This is the first time applicant realizes his position has been shorn off the organogram. As he rightly argues, this is not, and cannot constitute provision of information to an impacted employee both under respondents' Redundancy Policy, much less under s. 57(1) of the Employment Act and Labor Convention No. 158 as adopted and championed by the Ministry in its circular guiding retrenchments and redundancies in the country. Given the weight respondents' policy places on the need for consultations, respondents cannot argue, as they attempt, that this is an oversight of procedure that can reasonably be considered a minor infraction and be disregarded in considering whether they followed their redundancy policy.

Next after, respondents have discussions with union representatives and applicant in person as, by his executive head position, he was not a member of the union. At this meeting, he is informed that his position has been impacted and that he should express interest in any of three positions that he can be considered for. It is significant to note that at this point, the flow of information is completely top down, not an engagement where options are being weighed and applicant is being asked to give his thoughts and

suggestions as the policy requires. He is simply being told his position has been impacted and he must choose amongst three positions if he is interested. Put simply and colloquially, he is a passenger in a runaway locomotive where decisions are being made that will lead to the locomotive fatally crashing with him on board but on which he has no power to contribute to any solutions being considered to avert it from crashing and in turn, crushing him.

Applicant undergoes interviews for the three positions and, according to respondents at least, ostensibly performs poorly compared to his competitors. One of the considerations for his performance in the interviews is his psychometric assessment results. Respondents, however, do not subject applicant to a fresh psychometric evaluation. Instead they pull up results from an earlier evaluation applicant had undergone for consideration of a position in Zambia. Whatever the specific issues around that position might be, is unknown to me, as this was not led in evidence. What is clear, though, is that respondents use the psychometric results from that exercise to evaluate applicant's suitability for the three positions he had expressed interest in. They resolve he is not a suitable fit for any of them. They assure applicant that they are looking into other executive openings within the wider group and, if one is available, they will reassign him to that position. None are found to be available. In all these engagements, Mr. Madinga, then head of Personal and Business Banking is still on probation.

On July 17, barely a month or less from when Mr. Madinga would supposedly have completed his probation, they hold a second meeting with applicant. This time, providing him with a formal letter advising him of his position being declared redundant. They allow him several days within which to express his views and submissions. He responds earlier than they expected, raising questions about his performance in the interviews and demanding he be walked through his performance matched against the other candidates that had outperformed him, including raising questions on the psychometric evaluation results that were used to rate his suitability.

On July 24, respondents hold the last of the three meetings on his position with the bank, finally confirming that his employment was terminated. They write him to that effect, unwittingly dating that letter July 20. They advise him he was at liberty to appeal against that decision. Before he could lodge his appeal, so it would appear, respondents pay applicant his redundancy package on July 25. He lodges his appeal on July 26, raising questions on, among others, how it was that he was paid out his redundancy package even before his appeal was disposed of.

On August 3, respondents write applicant explaining that his appeal was unsuccessful. The team that reviewed his appeal is comprised Ms. Phangaphanga, Mr. Madinga and the Chief Executive Officer at the time, a Mr. LeRoux. At least for Ms. Phangaphanga and Mr. Madinga, the very individuals that were in charge and oversaw the entire restructuring process and who initially determined applicant's position redundant and made the decision to terminate his employment.

Arguing that respondents did all they could to avoid terminating applicant's employment, Counselor Mr. Soko conceded in his submissions that respondents may have breached the redundancy policy in some respects. That it is possible that they did not strictly follow the policy requirements. He submits, however, that these oversights of the redundancy policy are insignificant and the Court should mainly dwell on respondents substantively engaging with applicant in the period leading to the termination of his

employment. That even in disciplinary processes, the process itself cannot be impeached merely because a step or two was skipped, or inadvertently breached. That it is not cast in stone that all boxes must be ticked for respondents to be held as having followed through on their obligations under the redundancy policy. Well, not quite.

I do not believe that respondents' policy was meant as a loose guide on what to do when carrying out redundancies. From my earlier consideration of the requirements set down by the policy, it is quite clear that the objectives of the policy could never be achieved if respondents were allowed to pick and choose a method by which they apply the policy such that where the policy is not followed or complied with, some measure of compliance has to be applied on some scale and their decision be weighed against how much of the policy was followed or indeed how substantively were the consultations conducted.

The policy is very clear. It has to be followed because the process it governs has the potential to significantly impact individuals' livelihoods and future. To that end, I do not believe respondents could pick and choose how to apply the policy they themselves commissioned and undertook to uphold. The subject protected at the core of respondents' Redundancy Policy, as indeed is the case under s. 57(1) of the Employment Act, best practice and Labor Convention No. 158, is the employee, not the employer.

I find, in my judgment, that the entire process respondents engaged in when restructuring their organization was a complete breach of not only their redundancy policy, but the law on termination of employment based on the operational requirements under s. 57(1) of the Employment Act, principles espoused by Labor Convention No. 158 as well as best practices in the industry. Arguing that their acts were without malice and were done in sincerity is not an answer to a charge of injustice visited on otherwise hapless employees impacted by restructuring at no fault of their own. And as I pointed out earlier, it is imperative for respondents, or any employer for that matter, to actually read what their own policy requires of them to do when carrying out termination based on operational requirements.

Issued under my hand this 1st day of Nov. 2024

Austin Bwagadu Boli Msowoya
Chairperson