

REPUBLIC OF MALAWI



THE MALAWI JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

MZUZU REGISTRY

MATTER NUMBER I.R.C. MZ 59 OF 2025

BETWEEN

OSMAN KAPIDA.....APPLICANT

AND

SALIMA SUGAR COMPANY LIMITED.....RESPONDENT

CORAM: HIS HON. A. P. KAPASWICHE : DEPUTY CHAIRPERSON
MR. L. MBULO : FOR THE APPLICANT
MR.C. NDALAMA/ MISS T. BANDA: FOR THE RESPONDENT
MR H. MHONE : COURT CLERK

RULING

BACKGROUND

On the 5th day of March 2025, the Applicant took out IRC Form 1 commencing the within proceedings against the Respondent claiming unlawful dismissal. The reliefs sought were damages for breach of constitutional right to unfair labour practices, damages for unlawful dismissal and an order of reinstatement. On the same date of filling the IRC Form 1, the Applicant filed an Ex-Parte Notice of Motion for an Interim Relief under **Rule 24(1) (m)(i) of the Industrial Relations Court (Procedure) Rules 1999**. The interim relief sought is aimed at staying the disciplinary processes against the Applicant and the subsequent decision of the Respondent dated 18th February 2025 dismissing him from employment pending the hearing and final determination of his substantive action herein. This Court directed that this Notice of Motion be heard Inter-parties. The Respondent opposed the motion and this Court proceeded to hear the parties on the motion. The deponents of the affidavits in support and in opposition to the within motion were cross-examined at the request of the respective parties. This is my ruling having appreciated the submissions before me.

EVIDENCE AND ARGUMENTS

The present motion was supported by an affidavit and a supplementary affidavit sworn by the Applicant himself. The Applicant stated that he was employed by the Respondent as Chief Security Officer on the 27th day of June 2023 stationed at the Respondent's estate in Salima. He exhibited his letter of employment as **exhibit OK 1**. He was suspended from employment on the 24th day of September 2024 pending disciplinary processes and the suspension letter was exhibited as **exhibit OK 2**. On 4th November 2024, he was given a notice of disciplinary charges issued by the Respondent's Executive Chairman/ Chief Executive Officer, Mr. Wester Kosamu and the charges accused the Applicant

of negligent discharge of duties, incompetence and serious misconduct. The notice of the disciplinary charges was exhibited as **exhibit OK 3**. The Applicant went further to state that in a letter dated 11th day of November 2024, the Respondent further communicated that it had empanelled a subcommittee of its Board of Directors to preside over the said disciplinary hearing and the said letter was tendered as **exhibit OK 4**.

The Applicant proceeded to state that upon noticing that at the material time there was no Board of Directors for Salima Sugar Company and no sitting Board of Directors for Green Belt Authority-the Respondent's parent company which could legally empanel a subcommittee to preside over the disciplinary process, he wrote the Respondent on the 17th day of December 2024 through email questioning the validity, legality and propriety of his said pending disciplinary processes. Despite the inquiry, the Respondent proceeded with the disciplinary hearing which resulted in the Applicant's dismissal. The dismissal letter was issued by the Executive Chairman/ Chief Executive Officer of the Respondent.

The Applicant proceeded to state that he believes that the disciplinary hearing and the subsequent dismissal are invalid and unlawful because the Executive Chairman, Chief Executive Officer acted without legal justification in dismissing the Applicant as his tenure at the Green Belt Authority expired on the 3rd day of August 2024. He tendered confirmation of Board members of Green Belt Authority from Malawi Parliament and the Expiry of Tenure for the Green Belt Authority Board from the Controller of Statutory Corporations tendered as **exhibit OK 6** and **OK 7** respectively. It was further stated that ever since Mr. Shireesh Betgiti, the former Chairperson of the Board of Directors of Salima Sugar Company left office, no person has been employed as the Respondent's Chief Executive Officer. It was further stated that there is no Board of Directors at Salima Sugar Company Limited which could have lawfully and validly dismiss

him from employment or institute or conduct the disciplinary processes against him, being a senior employee.

It was the contention of the Applicant that Mr. Kosamu was appointed as Director by virtue of his membership of the Green Belt Authority and his term at Green Belt Authority having expired on 3rd August 2024, he ceased to have the mandate to hold the position of the Executive Chairman of the Respondent. It was further stated that the MEMARTS of the Respondent do not provide for the position of the Executive Chairman as no article in the MEMARTS provides for the position that Mr. Kosamu has. The position created by the MEMARTS is that of Managing Director appointed by Directors and not Executive Chairman hence the position that Mr. Kosamu holds is non-existent at the Respondent's institution,

The Applicant contended that his dismissal is irregular and unlawful for having been made by an officer who was irregularly and unlawfully doubling as the Respondent's Executive Chair and Chief Executive Officer. It was the prayer of the Applicant that while waiting for the disposal of the substantive action, he should be granted an interim relief staying the disciplinary process and subsequent dismissal.

The Respondent opposed to the motion through an affidavit in opposition sworn by Mr. Wester Kosamu who is the Executive Chairman of the Respondent. The deponent stated that he was appointed amongst the Directors of the Respondent in relation to Article 100 of the Memorandum of Understanding and Articles of Association of the Respondent which were exhibited as **exhibit W.K1**. Mr. Kosamu went on to discuss the genesis of the formation of Salima Sugar Company which this Court will not dwell much into in dealing with the present motion as it that would be pertinent at the substantive trial. It was stated that the Respondent has its specific MEMARTS guiding the appointment of both directors and Executive Chairman of the Company. It was stated that the company has always had an Executive Chairman and a Chief Executive Officer

concurrently, with the Executive Chairman having the overall authority of management. The deponent stated that he was duly appointed as the Executive Chairman of the Respondent at the 11th Board Meeting of the Respondent and the minutes of the meeting were exhibited as **exhibit W.K 5** and **W.K 6** respectively.

Mr. Kosamu proceeded to state that the Applicant was suspended on several allegations of misconduct and was called for a disciplinary hearing and a decision was made that the Applicant will be heard by a Committee of the Board. The Respondent then changed their position after realising that the Applicant was not recruited by the Board but rather by Management and for that reason, the Respondent saw no reason for the Applicant to be disciplined by the Board and the change was contained in exhibit **W.K.8**. However, no member of management took part in the Applicant's disciplinary hearing committee as he was heard by a committee constituted by existing shareholders of the Respondent, which is a committee of the Board. Mr. Kosamu contended that he was advised that where there is a gap in a board of an entity, the shareholders, and or ex officio members of the entity exercise powers to ensure continuity of operations.

The deponent continued to state that despite the allegations that he holds his office illegally; he is the one who confirmed the appointment of the Applicant hence the Applicant should consider himself an illegitimate officer having been confirmed by a person whose tenure expired. It was further stated that the Secretary to the President and the Cabinet issued a public notice advising all parties to refer communications and dealings of the Respondent to the office of Executive Chairman which he holds hence he was vested with management authority. The public notice was tendered as **exhibit WK 10**. The deponent believes that he was rightly appointed as the Executive Chairman of the Respondent and that he had the authority to discipline the Applicant.

The above presents a summary of the evidence from the parties as presented in their respective affidavits.

THE LAW

The law on urgent interim reliefs is provided for under **Rule 25 (1) (m)(i) of the Industrial Relations Court (Procedure) Rules 1999**. The said rule provides that without prejudice to the decision-making power of the Court under section 67, the Court may on application or of its own motion at any time grant urgent interim relief pending a decision by the Court after a hearing.

ANALYSIS AND DISPOSITION

Rule 25(1)(m)(i) of the Industrial Relations Court (Procedure) Rules 1999 gives this Court powers to grant urgent interim relief pending a decision by the Court after hearing. I must firstly acknowledge the fact that the parties have presented comprehensive accounts of the issues surrounding this case and I guess this is why both parties wanted to cross-examine the deponents of the affidavits. The information presented before me is tempting as it may result into the Court disposing off the matter comprehensively, yet this is not the time for a comprehensive analysis of the issues as that is the task that lies ahead after hearing the substantive case as presented in the IRC Form 1. To this end, this Court is alive to the fact that it is only required to deal with the motion of an urgent interim relief as presented by the Applicant.

In my earlier ruling on the preliminary objections raised by the Respondent which was delivered on the 12th day of March 2025, I did mention that much as the issues raised in the present matter may seem to be complex, the only interest of this Court under its jurisdiction is only to look into the aspect of the dismissal of the Applicant. In doing so, it should be emphasized that the law on unfair dismissal concerns itself with two aspects being the existence of valid reasons for dismissal

and procedural fairness in dismissal. The issues raised in the present motion concerns a challenge by the Applicant with respect to the competence of the people who managed his disciplinary process. What the Applicant is complaining about is that the people that handled his disciplinary hearing were not competent to do so.

Hearing both sides on the issues, it is clear that at the material time, being the time that the disciplinary proceedings against the Applicant were commenced up to the time that the Applicant was dismissed, no Board of Directors existed at Salima Sugar Company. The Respondent does not dispute this fact. The affidavit of the Applicant has **exhibit OK 4** which is a letter from the Company Secretary of the Respondent. In the said letter, the Respondent informed the Applicant that his disciplinary hearing will be conducted by a subcommittee of the Board with a mandate to conduct the same. The letter in question recognises that the Board of the Respondent was the one with the mandate to conduct a disciplinary hearing against the Applicant and the powers of the Board to conduct the disciplinary hearing can be delegated to the Board's subcommittee. Despite the fact that the Respondent changed their mind and felt that the Applicant could still be disciplined by management and not the Board, the result was that the disciplinary hearing was still not conducted by management but rather it was spearheaded by what was called Ex-Official members of the Board.

Now, the fact that the Respondent did not have a Board at the material time begs the question as to how would the subcommittee of the Board exist? Who would have the power to appoint a subcommittee of the Board when the Board does not exist in the first place? The Respondent in their letter dated 18th day of December 2024 to the Applicant stated that the committee that handled the disciplinary hearing of the Applicant was set up by Ex-Official Board members. The question that comes up immediately is as to whether in the absence of a Board there could be said to exist Ex-Official Board members who can competently

discharge the duties of the Board. These are very pertinent questions that have not to be answered now as they better be resolved after full trial. However, the existence of these questions is enough to raise a triable case as this means that the claims by the Applicant are not frivolous claims. On the face of it, it seems to this Court that the Applicant was being tried by people with no power to do so and the Respondent would have to prove otherwise during trial as in unfair dismissal claims the burden of proof lies with the employer. The Respondent agrees in actual fact in their skeleton arguments that there are triable issues being raised by the Applicant in the within matter.

The other aspect of the pertinent issues raised by the Applicant is the fact that the charges against the Applicant were issued by Mr. Wester Kosamu in his capacity as the Executive Chairman of the Respondent. It is the same Mr. Kosamu, again in his capacity as Executive Chairman of the Respondent, who issued a letter dismissing the Applicant from his employment. The Applicant argues that the position of Executive Chairman does not exist at Salima Sugar Company as the MEMARTS of the company under article 100 provides for the position of Managing Director. The MEMARTS were exhibited by the Respondent in the affidavit in opposition and the said Article 100 indeed provides for the position of Managing Director and there is no mention of the position of Executive Chairman in the said article. On the other hand, Mr. Kosamu states that the position of the Executive Chairman emanates from the same article 100. The Court will need to understand during trial as to whether the said Executive Chairman position does exist and what is the role of the position, if at all it exists. Again, just on the face of it, the position of Executive Chairman seems not to be provided for in the MEMARTS of the Respondent.

In the substantive claim, the reliefs being sought by the Applicant are damages for breach of constitutional right to unfair labour practices, damages for unlawful dismissal and an order of reinstatement. The law on remedies for unfair dismissal

under **Section 63 (1) of the Employment Act** provides for three remedies upon a Court's finding of unfair dismissal of an employee. The remedies provided are an order of reinstatement, an order of re-engagement and an order of compensation. **Section 63 (2) of the Employment Act** provides that the Court shall, in deciding which remedy to award, first consider the possibility of making an award of reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal. The meaning of this provision is that reinstatement is an order that the law prefers on a finding of unfair dismissal of an employee.

The fact that the Applicant has raised triable issues in his claims poses a danger that if an interim order sought is not granted and he is successful on trial, he may be found in an awkward position where his position is filled by another person hence making it difficult for an order of reinstatement to be made. It is the view of this Court that the circumstances of the present case justify the grant of the urgent interim relief sought in this motion and I proceed to grant the Applicant the urgent interim relief that stays the disciplinary processes and the subsequent decision to dismiss the Applicant until the final determination of the substantive action herein.

Dated the 1st Day of APRIL, 2025 at Mzuzu.


ANTHONY PITILIZANI KAPASWICHE

DEPUTY CHAIRPERSON