



REPUBLIC OF MALAWI

**INQUIRY BY THE OMBUDSMAN  
IN THE MATTER**

**BETWEEN**

**OWEN SINGINI.....COMPLAINANT**

**AND**

**MINISTRY OF TRANSPORT AND  
PUBLIC INFRASTRUCTURE.....RESPONDENT**

**INQUIRY NO: 22/2020**

**FILE NUMBER OMB-11- LL-111**

**DETERMINATION**

**CORAM:**

- MARTHA CHIZUMA - OMBUDSMAN**
- Owen Singini - Complainant**
- George Mhango - Respondent (Director of marine department)**

## DETERMINATION

1. The Complainant lodged his claim through a letter dated 5<sup>th</sup> July, 2011 alleging unjustifiable gratuity deductions. Investigations failed to resolve the matter and it was recommended for a public inquiry which was held on 25<sup>th</sup> November, 2019. The Complainant was present and the Respondent was represented by Mr George Mhango, the Director of Marine Department.
2. The evidence shows that the Complainant was as of 29<sup>th</sup> August, 2008 working as Assistant Director of Marine Services (safety) Department within the Ministry of Transport.
3. There seemed to have been a crisis at Malawi Lake Service Company (MLS) as a result of collapse of the concession agreement between Government and the Concessionaire. A steering committee composed of different government institutions was constituted to handle the process of full take-over of the company by Malawi Government pending identification of new concessionaire.
4. During a meeting that was held on 27<sup>th</sup> August, 2008 by the said Steering Committee, one of the resolutions was that in the meantime a team from Government was to be deployed to the Company. One of the positions that this Government team was supposed to hold was the General Manager position.
5. On the file are alleged minutes (albeit not signed) of the said meeting of the steering committee which was held at MLS Conference Room in Monkey Bay where one of the resolutions was that **'the officials (those from Government to be deployed to the Company) will be receiving normal daily allowances and MLS Ltd to meet these payments'** (emphasis intended).
6. Through a letter dated 29<sup>th</sup> August, 2008, the Department of Marine Services sent the Complainant from Department of Marine Services to Malawi Lake Services as General Manager.
7. As to the Terms and Conditions under which the attachment to Malawi Lake Service was going to be the relevant part of this letter stated that:  

'You and your team will proceed to Monkey Bay under Civil Service Conditions of Service currently applicable to you. We

also expect that you will enjoy some of the Company's conditions of service applicable to its staff'.

8. The evidence shows that the Complainant did proceed to Monkey Bay to take over the position of General Manager of Malawi Lake Service. He proceeded to occupy the house meant for the General Manager of the Company but was still drawing the K7000/day subsistence allowance. As per Civil Service Regulations obtainable at that time he was supposed to get K7000/ day if no accommodation is provided and K3500 if accommodation is provided.
9. A query was raised about this and evidence on the file shows that on 17<sup>th</sup> February, 2010 Mr Msowoya wrote the Complainant directing him to immediately start drawing an allowance of K3700/day since some accommodation was being provided to him. This directive came upon management seeking guidance from DHRMD. They told him that he could not be staying in the Company House whilst at the same time drawing the full allowance.
10. He however raised the issue about the state of the house that it did not have the amenities required and he proceeded to stay at Club Makokola and drawing the K3500 albeit that arrangement being costly.
11. He later brought this issue up on 23<sup>rd</sup> February, 2010 with Mr Msowoya the Director of Marine who told him to go back to the house and revert to the previous arrangement on allowances and he complied and started drawing k7000/day again.
12. According to his complaint letter, not long after he returned to the house, auditors from the National Audit Office came and it was his view that these were sent by Mr Msowoya as throughout the audit they dwelt much on the issue of the allowances.
13. Through a letter dated 15<sup>th</sup> March, 2010, the Complainant's attachment at MLS was terminated as the new concessionaire was ready to take over. On 23<sup>rd</sup> December, 2010 the Secretary for Transport and Public Infrastructure wrote the Complainant about the audit query raised by the Auditor General on the issue of the allowances. The letter stated that a total of K854, 700 was deemed to have been wrongfully drawn by the Complainant in form of allowances and thus informed him that the money

- would be recovered from his gratuity as he was retiring from Civil Service soon.
14. Evidence shows that this amount was indeed deducted by the Respondents from the Complainant's terminal benefits as evidenced by the PSR Form 36 which shows a deduction of that amount and termed as loan. The terminal benefits were paid on or around February 2012.
  15. In his supplementary complaint letter dated 4<sup>th</sup> April, 2012 the Complainant raised this issue and demanded repayment of this sum. In response the Respondents in their letter dated 24<sup>th</sup> April, 2012 to which they attached the letter dated 18<sup>th</sup> April, 2012 from the Director of Marine Services who at that time was Mr Makuzula justified the deduction on the basis that the Complainant drew unjustified allowances during his time at MLS.
  16. From a combined reading of the two complaint letters being the 5<sup>th</sup> July, 2011 and the one dated 4<sup>th</sup> April, 2012 the Complainant claims; K854, 700 that was deducted from his terminal benefits; all the benefits accruing to the position of General manager of MLS which are company car, fuel, MASM membership, School fees for the kids; salary difference between his Director position and General manager of MLS; Payment of the claims for 25 months i.e. to the period when new concessionaire took over.
  17. In defence the present Director of Marine Services Mr George Mhango representing the Respondents insisted that according to the conditions of Public Service which the Complainant was entitled to, he was only supposed to draw K3,700 a night because a house was provided to him. It was the difference between the K7000 and K3700 which was later on recovered from the terminal benefits and indicated as a loan.
  18. Mr Mhango admitted that the letter of 29<sup>th</sup> August, 2008 which deployed him to MLS ought to have been clearer as to the entitlements of the Complainant but he insisted that the Complainant could only enjoy Civil Service Conditions.

### THE LAW AND ANALYSIS

19. As per the reading of the Constitution and the Ombudsman Act the Ombudsman mandate is to investigate allegations of;
  - i. Injustice
  - ii. Unfair treatment
  - iii. Abuse of power

- iv. Manifest injustice
  - v. Conduct qualifying as oppressive or unfair in an open democratic society
  - vi. Exercise or performance of duties in an unreasonable, unjust or unfair way.
20. My duty therefore is to establish whether the deduction of K854, 700 mentioned above and the failure to pay the other claims being claimed above fit into any of the instances mentioned above.
21. Most of the facts are not in dispute. The only point of dispute is whether the K854, 700 deduction was justified and whether the other claims are payable.
22. The best starting point in resolving this matter is the letter dated 29<sup>th</sup> August, 2008 which purportedly deployed the Complainant to MLS. This letter which is titled "attachment to MLS" basically deployed the Complainant from the position of Assistant Director of Marine Services in the Ministry of Transport to the position of General Manager of MLS a fully owned government company from the 1<sup>st</sup> September, 2008 to the date new concessionaire takes over the company. This deployment or attachment was to be subject to Civil Service Conditions and the Complainant was to also enjoy some of MLS's conditions of service applicable to its staff.
23. From my understanding therefore, the Complainant was seconded to the MLS. Secondment is a temporary transfer or attachment of an employee. In other words the employee remains the employee of the original employer. *See Simpson Nansional Finance Bhd & Anor v Omar Hashim [2002] 1 LLR 272 cited in Charles Mwasi & Others v Malawi Revenue Authority Civil Appeal No. 13 of 2015* (unreported).
24. Although the 29<sup>th</sup> August, 2008 letter was admittedly vague, the fact that largely the Complainant was subjected to Civil Service Conditions and the transfer was temporary thus he remained the employee of Marine Services and was subject to recall by them means he was on secondment.
25. The secondment in this case gave rise to a scenario where the Complainant was going to be holding a position with heavier responsibilities at MLS than his substantive position at Department of Marine. Despite being aware of this the Respondent did not address this, other than paying him a daily subsistence allowance and stating in their letter of 29<sup>th</sup> August, 2008 that

the Complainant was to also enjoy some of MLS's conditions of service applicable to its staff. This was unfair.

26. The Constitution under section Section 31 provides for a right to fair labour practices. Fair Labour practices would demand and dictate that the Complainant who was requested to go and discharge functions much higher and involving that his substantive post should have been given the difference in pay between his substantive post and the post he was temporarily holding. To do otherwise, thus exploit and take advantage of employees in such a manner was simply unfair.
27. This then brings me back to the issue of Subsistence Allowance. Having thus found that the Complainant was entitled to be paid the difference in salary between his substantive post and the higher position to which he was seconded to, I do not see how he ought to have been paid subsistence allowance. The 28<sup>th</sup> August, 2008 letter relocated him from Lilongwe to Monkey Bay for the period until new concessionaire was found. This was not expected to be a few days or weeks affair and as it happened it took close to two years.
28. I am further fortified in holding this view considering that when one reads Reg 1:1770 MPSR on Subsistence allowance it is clear to see that it is meant for the few days a public officer is away from normal place of work. In sub regulation 1 the emphasis is on the payment of the subsistence allowance for every night spent away from his *normal place of work* (emphasis intended). The 28<sup>th</sup> August, 2008 letter clearly stated that the Complainant was to be relieved of his duties in the Safety division of Marine Services. In other words the Marine Division was no longer his normal place of work.
29. Accordingly the claiming and the subsequent payment of subsistence allowance were totally illegal and unjustified. This should not have been paid to the Complainant in any form.
30. On the other claims of benefits attached to the position of the General Manager first thing I have noted is that the 28<sup>th</sup> August, 2008 letter did not clarify as to what other MLS benefits the Complainant was entitled to and the authority for that. I may as well add that the whole letter was a typical example of Human Resource failure as there was no reference to any regulation or any authority on which any of the directives therein was

- based. I need to confess that because of this I have struggled to come up with this determination.
31. In addition there is no provision in the MPSR for claims like these neither did the Complainant provide me with the Terms and Conditions of the MLS. Accordingly I have no basis for awarding these.
32. From the above it is my finding that;
- a. The letter of 28<sup>th</sup> August, 2008 was a huge reflection of an absolute failure of HR. The letter did not quote any regulation or authority under which the deployment of the Complainant to MLS was made thereby leaving things to sundry interpretation.
  - b. That Complainant was deployed or seconded to MLS to a higher grade which should have attracted a temporary increase in the Complainant's salary to cater for difference in salary between his substantive post and the post he was seconded to.
  - c. That the Complainant had to leave his substantive position of Assistant Director of Marines Services to take up the position of General Manager of MLS. Marine Services Department was no longer his normal place of work in the context of the MPSR and therefore was not entitled to claim subsistence allowance.
  - d. There is no provision in the MPSR to support the claim for other benefits attached to the MLS General Manager position. This claim fails.
  - e. The failure by the Respondents to pay the Complainant the difference in salary between his substantive post and the post of General Manager of MLS amounted to unfair and unjust treatment and was maladministration.
33. Where maladministration has been established the law under section 126 of the Constitution and section 8 of the Ombudsman Act mandates me to provide the appropriate remedy for the injustice suffered. The remedy is supposed to as much as possible put the Complainant in a place he would have been had the maladministration not occurred.
34. In the instant case what should have happened was to pay the Complainant the salary difference between his salary as Assistant Director at Marine Services and General Manager of MLS for the period he was on that position.

35. Accordingly, I direct that the Secretary for Transport in collaboration with the General Manager of MLS should calculate the difference in salary between the position of Assistant Director of Marine Services and General Manager of MLS. Once this is done, MLS being the institution that was benefitting from the services of the Complainant for the 15 months' period should pay the Complainant the difference in salary between the two positions as stated above.
36. To ensure that he gets value for money the rates to be used, subject to the Concession Agreement between the two offices, should be salaries of the Assistant Director of Marine Services and General Manager of MLS as of the day of this determination.
37. From the payment in 35 above, a deduction should be made of all the subsistence allowance that was paid to the Complainant during the period he was at MLS in Monkey Bay. The rate to be used again should be the subsistence allowance payable to position of Assistant Director of Marine Services as of the date of this determination.
38. The Secretary for Transport is to ensure that all of the above is carried out and the Complainant is paid by 31st May, 2020.
39. A report of the calculations and payment should be submitted by the Secretary of transport to my office by 5<sup>th</sup> June, 2020.

#### RIGHT OF REVIEW

40. Any party dissatisfied with this determination and with sufficient interest in the matter is at Liberty to apply for review to the High Court in accordance with section 123(2) of the Constitution within 90 days from the date of this determination.

Dated this 13<sup>th</sup> day of March, 2020

  
MARTHA CHIZUMA  
OMBUDSMAN