SUB-THEME 5: Social Security and Protection in Africa

The Façade that is Social Security and Protection in Malawi: Who is Benefiting?[1]

Abstract

Seven years after the enactment into law of mandatory, universal social security and protection system in Malawi, the majority of the workers are yet to benefit. The system was hurriedly put in place without considering the negative economic environment in which most employers were operating in. Further, the system was almost dumped on employers and workers, most of whom were ill-prepared for its administration. The default rate of the mandatory contributory pension and non- contributory gratuity schemes is overwhelming. Overseer and enforcement institutions, like the Reserve Bank of Malawi, Ministry of Labour and the Industrial Relations Court face implementation challenges. The Reserve Bank of Malawi, which is the supervisory institution, is threatening non-compliant employers with penalty interest on arrears on contributions while social partners are calling for law review. This paper argues that threats and law revision will not bring benefits to the worker. The system has failed. It needs major overhaul.

Background

Social security refers to national mandatory contributory or non-contributory social protection schemes. These are normally based on the principles of universality (i.e. covering the whole of the country's population) and unified general coverage against the risks of illness, accidents, old age, unemployment etc and loss of revenue occasioned by family responsibilities. According to the definition, social security is not restricted to employment or labour matters only. It has a wide application that covers all sectors of human life including work life, health, housing, family responsibilities, disability, dependent children, old age, etc.

In Malawi, the only form of State sponsored universal social security is in the health sector, where public health facilitates provide free health services[2]. Other forms of social security applied in Malawi by the State are not universal because they are administered in selected districts or areas for special interest groups; the poorest members of the society. These groups have no means to income security. These schemes are usually time specific and temporary in nature, for instance, direct cash handouts[3], food for work, school feeding, Kuzigulira malo (allocation of land), agricultural subsidy, farm input subsidy programme (fisp) and similar programmes aimed at cushioning members of the society from the hazards of social insecurity in times of crisis.

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[1] This paper is in draft format. Please do not quote or reproduce as yet.

[2] The free service is dependent on availability of medicine, equipment or medical personnel at any particular facility. There is active debate on whether these services should attract a fee?

[3] Social cash transfer scheme targeting the ultra- poor or labour constraint households administered by District Social Welfare Officers under the Social Protection Programme (*Sikwese RS, in Labour in Malawi, 2nd edn. Lexis Nexis, 2014, Durban*

This paper discusses in general terms the status of social security and protection in Malawi. It is an overview discussion because the system is fairly new and in the process of developing. The paper opines that the Malawi Government has, for a considerable period of time, been contemplating providing social security and protection to its people. What has been a challenge is perhaps the form that the system should take. This is evident from the labour legislation that preceded the pre-Constitution Employment Act of 1966, namely, the Employment Act of 2000 (hereinafter referred to as the Act of 2000) in which without any preamble or elaboration the legislature introduces social security in a number of provisions. Within the Act of 2000 the legislature provides for payments to be made to employees after termination of employment. However these payments could not be referred to as a form of social security. They were more of lump sums of money received by an employee after a period of service with an employer. There was no form of regulation on the conduct of this lump sum other than that it should be paid within a specified time. It was paid depending on manner of termination meaning that some employees were excluded from receiving it although they may have earned it due to length of service with one employer. The only form of secured earnings which did not depend on manner of termination were pension funds. However provision of pension scheme was at the discretion of the employer through contract.

After much controversy on the law as it stood on these terminal payouts, the legislature amended the Act of 2000 to make for provision for situations where an employee would be entitled to a payout after termination of employment regardless of the manner of termination and regardless of whether or not their contracts provided for pension. This amendment has characteristics of social security and protection. This view is buttressed by the fact the Act of 2000 itself seems to have social security and protection at the back of its mind although the concept is not articulated.

This view is also confirmed when one considers that the amendment comes on the background of global call, through the International Labour Conventions and Standards of the International Labour Organisation (ILO) for all States to conform to international standards on social security and protection[4]. At regional level, SADC also calls for its members to establish and maintain a system of social security[5].

Of the different kinds of social security schemes or systems available to a State, it seems that Malawi chose to go for employment driven social security scheme as its tool to complying with the international standards; the mandatory National Pension Scheme.

Social protection schemes prevailing on the labour market are meant to provide workers with income security. Income security in Malawi has since 2010- 2011 become mandatory. It is covered in three schemes namely; contributory payment (pension), non-contributory payment

[4] ILO Convention Concerning Minimum Standards of Social Security No. 1o2 of 1952. Malawi is yet to ratify this Convention.

[5] Article 10, Charter of Fundamental Social Rights in SADC and Article 4.2 Code on Social Security in SADC

(gratuity or pension[6]) and punitive payment (severance allowance). These schemes are aimed at cushioning the working class and their families from risks of illness, accidents, old age, disability, orphanhood, unemployment etc. This Paper analyses and discusses the various provisions of the Employment (Amendment) Act 2010 (hereinafter referred to as Act of 2010) which purports through its characteristics, to cater for social security and protection in Malawi. The paper argues that from a practical view point, social security and protection in Malawi is a façade. The reasons for this view are as outlined below, in the form of legislation and how it is applied in practice, the Industrial Relations Court cases, on disputes relating to pension, the role of the executive arm of government through the line Ministry on supervision for compliance and to some extent, and in considering the question of who is benefitting from the pension regime, the paper looks at the role of insurance companies and banks.

The Façade

It is probably unfair to call social security and protection in Malawi a façade because the Government has not come out to declare that it has developed, established or that it is operating a social security system to protect its citizenry. The façade however is Government's deliberate efforts to introduce social security as a mere phrase in the law without anything more to it. This is evident from the following provisions:

1. Statutory Regime. The Legislature

The Malawi Constitution

Unlike some jurisdictions in the region, Malawi does not have any piece of legislation dealing with social security and protection and incidental matters[7]. It does not have a line Ministry on social security and protection[8], its policies on social security are ad hoc in nature and to a large extent not transparent. The judiciary's role under the Constitution is to interpret the law, in the absence of clear legal provision on social security and protection, the judiciary in Malawi does not have any case authorities and hence there is no jurisprudence on the subject. This omission could probably be traced back to the framers of the Malawi Constitution, 1994. It does not provide for social security and protection in its substantive human rights chapter or as an area of concern under the principles of national policy which mandates the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving various objectives other than social security. Instead Malawi makes casual reference to social security in the Act of 2000.

[6] Some employers opt to make 100% pension contribution toward their workers' pension funds. This is purely contractual. Once on 100% pension contribution employer cannot unilaterally reduce or demand contributory payment from worker

[7] For instance, Unemployment Insurance Act 63 of 2001 in South Africa, Unemployment Insurance Contributions Act 4 of 2002 in South Africa and Social Assistance Act 13 of 2004 also in South Africa.

[8] Mauritius has a Ministry of Social Security.

Employment Act 2000

The Act of 2000 is an act to establish, reinforce and regulate minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice and for matters connected therewith and incidental thereto. It contains 69 provisions and none of them concerns social security, meaning that the section 3, the Interpretation clause, does not contain a definition of social security. However, social security is referred to in three provisions of the Act. The relevant parts are reproduced below in order of appearance in Act:

(a) Insolvency of Employer

Section 34(3) providing that; "on the insolvency or winding up of an employer's business, the claim of an employee or those claiming on his behalf to wages and other payments to which he is entitled under this Act or any contract shall have priority over all other creditors, including the State and the social security system".

(b) Prohibition relating to Payment of Remuneration

Section 52(2) provides that; no employer shall deduct from the employee's wages any amount, except (a) 'the employee's contribution to a compulsory social security scheme'.

(c) Setting of Minimum Wages

Section 54 (3) states that; "in prescribing minimum wages, the Minister shall, as far as possible, consider (a) the needs of workers and their families, the general level of wages, the cost of living, social security benefits and the relative living standards of other social groups".

It seems from these provisions that the legislature in Malawi had social security at the back of its mind but failed to adequately articulate the concept in the law or national policy. There is no definition of social security in the aforementioned provisions, neither do the provisions make any cross reference to any Act of Parliament or national policy on social security. It does seem misleading when considered from the legal point of view, hence the conclusion that social security scheme in Malawi is a façade. In terms of general principles of interpretation at common law, the Court would find that should the legislature intended to provide for social security, it would have said so in 'clear and unequivocal manner'.

Could it be said then, that Malawi does not have a system of social security and protection? The question can be considered by looking at the prevailing legal framework and national policies. It has been alluded to above that Malawi Government does take care of its vulnerable citizens by providing free health services, free primary education and cash handouts in selected areas. These are forms in which social security can take. Apart from cash handouts, the two forms, health and education are more specific and not transferrable unlike income security which this paper is more concerned about. The cash handouts are not universal and are ad hoc, paid out based on availability of funds. There is not much material to work on. There would be need for more research to determine the extent and status of cash handouts as a form of social security and its impact on the people.

The next consideration is on the legal frame work, whereby all relevant statutes are read together, interpreted broadly and applied to the practice on the ground. The Government amended an existing law and introduced a fairly harmless and straightforward piece of legislation that substantially share characteristics of social security and protection as understood in the labour and employment sector. Although the amendments and the new law do not refer to social security as the purpose of their enactment, it is clear that the intention by the Malawi Government is to make some provision that takes care of social security for the working population.

The relevant statutes are the Employment (Amendment) Act 2010 and the Pension Act 2011. These labour law reforms clearly make provision for mandatory universal social security schemes although they make no direct reference to social security.

Employment (Amendment) Act 2010

It is argued in this paper that Malawi shifted the burden of social security to the employer by compelling every employer to place its employees on a mandatory pension scheme. The main objective of the law is to cushion the employee and his family against the risks of illness, accidents, old age, unemployment and loss of revenue occasioned by family responsibilities. The relevant provisions are highlighted below.

Section 2 of the Employment (Amendment) Act 2010 (hereinafter referred to as the 2010 Amendment) states that section 35 of the Employment Act (hereinafter referred to the principal Act) is amended- (a) by deleting (1) and substituting therefor the following new subsection as subsection (1)- “On the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstances, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance.”

The principal Act had couched the provision in the following manner; “on termination of contract, by mutual agreement with the employer or unilateral by the employer, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance”.

The Mischief

It was felt especially by the employer that severance allowance placed an onerous financial burden on the employer. This was because severance allowance was due each time an employer terminated a contract of employment by agreement with the employee or unilaterally. In a substantial number of cases the employee would also be on pension by virtue of a contract. The terminal package would therefore comprise of both severance allowance and pension. Although before the introduction of mandatory pension scheme fewer employees were on pension, the financial burden was still felt by those employers who had pension contracts. The situation created unfairness in a sense that some employers had to pay their employees more than others and also that some employees in similar position received better terminal benefits than others.

There was an attempt by the Executive through the Minister of Labour, Youth, Sports and Manpower Development to 'rectify' the anomaly by amending the Act of 2000 so that only the greater amount between severance allowance and pension should be paid to an employee on termination. However the amendment was challenged in *Khawela and ors v Commercial Bank of Malawi,* because the Minister did not follow proper legislative processes before effecting the purported amendment. The law was declared null and void ab initio[9].

The mischief was cured by the enactment around the same time of the Pension Act 2010 which is; "an Act to make provision for mandatory pension, and for matters relating to the supervision and regulation of pension funds and umbrella funds, and for matters connected therewith and incidental thereto". This time round and because of the Act, each employer is mandated to operate a pension scheme to level the playing field for both employers and employees.

Pension Act 2010

Section 2(1) 'Unless expressly exempted by the Minister in writing, with approval of the Cabinet, this Act shall apply to every employer and employee in Malawi'. The most progressive aspect of this Act is its interpretation clause which is as exhaustive as possible. It leaves little room for doubt or ambiguity. Just as an example, it defines a dependent as, 'a spouse and child of the member', and goes on to define child as a member's child regardless of the circumstances of the birth of the child and includes adopted child, and an unborn child in the womb of its mother'[10].

Relevant to the subject of social security and protection, the Pension Act provides for the following:

1. Obligation of Employer

(Universal Mandatory Scheme)

Section 9 (1): Subject to section 10, every employer shall make provision for every person under his employment to be a member of the National Pension Scheme (this author's underlining). This provision answers to the universality of a social security scheme because it makes it mandatory by using 'shall' for 'every employed person' to be placed on a National Pension Scheme. It should be noted that the previous legal framework did not provide for mandatory pension provisions.

Sanctions for Non Compliance

The obligation of the employer under the Act has legal force and enforceable. Sub section 3, provides that; any employer who, without reasonable excuse, fails to comply with the above provision, is liable to administrative penalties under the Financial Services Act, 2010.

[9] [2008] MLLR 194 HC

[10] This is subject for another discussion

According to a Ministry of Finance Notice No. 33, Government made an order for employers to pay thirty five percent (35%) bank rate plus ten percentage points (10%) on delayed pensions fund contributions[11]. This punitive interest rate is aimed at compelling the employer to remit funds on time but also to cater for effects of lost investment earnings on the pension due to delayed remittances.

2. Exemptions, Section 10

Reasonable Excuse may include the fact that the employer is exempted from causing his employees to be on pension scheme. The exemptions include size of the employer's work force, salary threshold of the employee and certain specified classes of employees, section 10 of the Act. All matters relating to exempted employers and employees are governed by the provisions of the Employment Act, (section 10(4)).

However where the exemptions no longer apply, an employer, shall recognize as part of an employee's pension dues, the employee's entitlements accrued from the date of employment of the employee to the date when the employee becomes a member of the National Pension Scheme, (section 10(5)).

3. Minimum Contribution Rates
   (Contributory)

Section 12: Subject to subsection (2), and without limiting the powers of the Minister to make regulations on pension contribution, contributions relating to pensionable emoluments for an employee shall, under the National Pension Scheme, be made in the following manner-

(a) A minimum of ten percent (10%) by the employer and
(b) A minimum of five percent (5%) by the employee: Provided that the minimum contribution rate prescribed in paragraph (a) may be set at seven and a half per cent for the employer from the date of commencement of this Act until the latest 1st January before the expiry of two years from that date.

Optional and Voluntary Contributions

(1) The rates of contribution prescribed in sub section (1) may, upon agreement between an employer and an employee, be revised upwards, from time to time, provided that the Registrar shall be notified of the revision.
(2) Notwithstanding the provisions of subsections (1) and (2), an employer may agree or elect to bear the full burden of the total contributions provided that in such case the employer's contribution shall not be less than the sum of the employer and employee contributions prescribed in subsection (1).

[11] Business News, The Nation, 24 March 2014

(3) An employee or self-employed individual may, in addition to the total contributions being made by him and his employer, make voluntary contributions to his account: Provided that such contributions do not exceed the threshold set by the Minister under section 10(1).

4. Taxation

Section 13(2) provides that any lump sum received at retirement, as specified in section 68, shall be exempt from income tax.

5. Life Insurance Policy

Section 15(1) provides that an employer shall, in addition to making pension contributions on behalf of its employees, maintain a life insurance policy in favour of each of its employees for a minimum life policy insurance cover of one times the annual pensionable emoluments of the employee.

Proceeds from Life Insurance Policy

Section 15 (2) provides that the benefits of the life insurance policy specified in subsection (1) shall form part of the member's death benefits and shall be distributed in accordance with section 70.

6. Payment of Benefits

Section 64: Subject to this Act, benefits in respect of a member of a pension fund shall be payable out of the fund only if, on application, the trustee is satisfied that-

(a) The member has reached retirement age;
(b) The member has retired on the basis of years of service or any other conditions under the fund rules as approved by the Registrar;
(c) The member is retired on the advice of a qualified medical practitioner registered with the Medical Council of Malawi, or a legally constituted medical board certifying that the employee is totally and permanently disabled from carrying out the functions of his office;
(d) The member is about to leave or has left Malawi permanently;
(e) The member has died
(f) The member has permanently left the service of the employer, in which case, except as set out in this section, the benefits may only be paid out for transfer to another fund;
(g) The registrar has given permission under section 65.

Application to Withdraw Benefits

Section 64(2) states that; an application for purposes of this section shall be made-

(a) By or with the authority of the member

(b) In the case of a member who has died or is under a legal disability, by or with the authority of the member's legal personal representative; or
(c) Otherwise, in accordance with the Registrar's directives

7. Early payment of Benefits

Section 65 (1): Subject to this Act, the Registrar may, on application by a member to the trustee, where the member has permanently left the service of the employer, whether because he has resigned or because the employer has terminated his employment, for any reason otherwise than in circumstances described in section 64 (a) to (e), permit the trustee of the fund to pay benefits to the member out of the fund if the Registrar is satisfied that –

(a) The member has not secured another employment for a period of six months; and
(b) Benefits paid to the member are limited to that part of the contributions paid by the member, not the employer, and any investment income on these contributions.

Benefits payable in respect of a member of a pension fund shall be paid as an annuity by a licenced insurer, (section 67(1) (a)).

Section 65 (2): Payments of an annuity or pension to a member of a pension fund on the basis that the member has retired shall not begin unless the trustee is satisfied that the member has reached retirement age, or has met the conditions for retirement as may be prescribed under section 64 (1) (b), or is totally and permanently disabled as described in section 64 (1) (c).

8. Payment of Benefits upon Member Permanently leaving Malawi

Section 69: Benefits payable from a pension fund in respect of a member on the basis that the member has left, or is about to leave Malawi permanently shall be payable as follows-

(a) Forty per cent (40%) of the amount payable shall be payable on granting of the application; and
(b) The balance of the amount payable shall be payable at the end of twelve months after the payment made under paragraph (a), but only if the trustee is then satisfied that the member has left Malawi Permanently.

9. Death Benefit Nominations

Section 70, states that; a member of a pension fund may give the trustee a written nomination directing the trustee to pay the fund member's benefits on his death to all or any of the following-

(a) The member's widow or widower, as the case may be;
(b) The member's child; or
(c) The member's close relation

10. Payment of Death Benefits

Where for some reason a member does not make a nomination, or the nomination is invalid or the nomination does not reach the trustee, subject to this Act and not withstanding any other law to the contrary, those benefits, or that part of those benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee of the fund, being a person or persons who, the trustee is satisfied, was or were financially dependent on the member at the time of his death, (section 71(3)).

11. Protection of Benefits

Section 73(1) states that; except as provided by this Act-

(a) Amounts paid as contribution to a pension fund in respect of a member;
(b) A member's entitlement to benefits in a pension fund; and
(c) Amounts paid out of a pension fund by way of benefits in respect of a member, shall not be liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever

Subsection (2); except as provided by this Act, a member's entitlement to benefits in a pension fund is not part of his estate.

12. Benefits not to be Assigned or Pledged

Section 75 (1) a member's entitlement to benefits in a pension fund shall not be capable of being assigned or transferred , or pledged or charged or otherwise being subject to a security interest, however described.

Subsection (2); states that; the trustee of a pension fund shall not recognize, or in any way encourage or sanction, a purported assignment or transfer of, or the granting of a pledge, charge or other security interest, however described, in respect of a member's entitlement to benefits.

As can be discerned from the above provisions, the Pension Act shares characteristics of a social security and protection scheme. In fact, to be appointed as trustee under the Act, section 6(6) provides that, the Minister, must be satisfied that the person is fit and proper and has qualifications and experience in fields relating to pension, insurance and social security among other qualifications.

The mandatory provisions leave no doubt that the Government through the legislature intended to have all employees on some form of social security scheme. The protective nature of the pension benefits is aimed at ensuring that benefits are not depleted or lost before a member needs them. This is contrary to other financial provisions relating to earnings where an employee is entitled to use his money as he pleases at any time. Although the protection is also subject to controversy, whereby employees argue that they need to use the money to invest it in the manner that would yield profits while a member is still active and energetic and not kept away at the mercy of insurance administrator. They argue that the value of the funds would be lost along the away. The fact that pension administrators are mandated to invest the funds is no consolation as their evidence that due to the dwindling economy, prospects of yielding high earnings on investments are not guaranteed.

13. Complaint Resolution Mechanism for Pension Funds

Section 57(1): The trustee of a pension fund shall take reasonable steps to ensure that, at all times, arrangements are in force under which-

(a) Persons referred to in subsection (2) have the right to make an inquiry or a complaint as specified in that subsection; and
(b) Such inquiries and complaints are properly considered and dealt with within sixty days

Subsection (2): For the purposes of subsection (1) (a)-

(a) A beneficiary or former beneficiary of the fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to him.

The above two pieces of legislation provide what would in the absence of clear provisions on social security, the basis, for arguing that the Malawi Government operates a form of social security. In practice some Malawian citizens are protected by the law from economic hardship in times when they are not able to work. This is further confirmed by the mandate of the Industrial Relations Court to deal with disputes relating to pension.

2. The Court System

The Malawi judicial system is based on common law. The highest court of record is the Supreme Court of Appeal. It has one registry in the Southern region of Malawi. Of the nine justices including the Chief Justice, only one is female. Justices of appeal are appointed by the President. Appeals to the Supreme Court come from the High Court of Malawi. It has four registries across country. The High Court exercises both original and appellate jurisdiction. The Industrial Relations Court, is a specialized court established under the Constitution to handle labour and employment disputes including disputes involving pension under the Pension Act. It is a subordinate court with registries in the three regions of Malawi; North, Centre and South. Appeals from the Industrial Relations Court go to the High Court. The Magistrate Court, is the lowest court on judicial hierarchy. It has both civil and criminal jurisdiction. Its jurisdiction is however limited by the law. It has establishments in most parts of Malawi including rural areas.

This research has not yielded any decided and authoritative case on pension dispute under the Pension Act 2010. However the Industrial Relations Court has since 2013 seen a rise in the number of registered cases involving non- payment of pension. Below is a table showing the trend in pension disputes:

Table1. Registered Disputes involving Non Payment of Pension

No.	Year	Pension Disputes
1	2013	18
2	2014	46
3	2015	38
4	2016	39
5	2017	43

These statistics show that there might be some controversies in the operation of the Pension Act which require court's intervention. Most of these disputes involve non- payment of pension benefits as required by the law. The implication is that these Malawians are not benefitting from the social security scheme as envisaged by the Government. In the worst case scenario some of these complainants are yet to receive even their own pension contributions which were deducted from their salaries over a period of time. The delay in payment of pension benefits has a social and economic impact on the complainants and their families. The worst being the devaluation of the Malawi currency whereby the value of the sum payable diminishes with time. In similar cases, the Supreme Court of Appeal (hereinafter referred to as SCA) has ruled that the employer should pay the benefits with interest charged at commercial bank lending rates to cater for loss of value[12]. However it is yet to be seen whether such principles and authorities will be followed in the above cases when decisions are eventually made against the defaulting employer.

3. The Executive

[12] Kankhwangwa and ors v Liquidator, Import and Export (Mw) Limited [2008] MLLR 26 SCA, where the SCA decided that; ''where it is shown that failure to pay terminal benefits was due to the employer's unreasonable conduct, interest at the commercial bank lending rate may be awarded." This reasoning was also applied in Madinga v Nedbank (MSCA Civil Appeal No. 15 of 2009).

(a) The Ministry of Labour, Youth, Sports and Manpower Development

The Ministry of Labour, Youth, Sports and Manpower Development has the overall responsibility of administering labour laws. Its general functions include, provision of advice and information pertaining to labour and employment, setting of minimum of wages, to receive complaints relating to unreasonable conduct workplace conduct, unfair dismissal and non-payment of severance allowance, conciliation, adjudication and settlement of disputes. It is also responsible for inspection of work places and assessing compensation for workplace injuries, among other functions. The Minister responsible for labour and the Registrar of Financial Services, in consultation with the Minister responsible for finance, are responsible for ensuring compliance with the mandatory provisions of the Pension Act.

In terms of terminal benefits, section 35 of the Act of 2000 provides that; "a complaint that severance allowance has not been paid may be presented to a District Labour Officer *(an officer under the Ministry of Labour)* within three months of its being due and if the District Labour Officer fails to settle the matter within one month of its presentation, it may be referred to the *(Industrial Relations Court),* in accordance with section 64 (2) or 64 (3), which, if the complaint has been proved, shall order payment of the amount due". It is noted that there is no similar provision under the Pension Act in relation to payment of pension benefits.

In practice, aggrieved employees may lodge a pension complaint with the District Labour Officer based on the general advisory and settlement of disputes role of that office. It was however not easy to collect any data on complaints lodged with the District Labour Office at the Southern Region office which also caters for the commercial city, Blantyre. The Principal Labour Officer, instead, referred this author to the Reserve Bank of Malawi for statistics.

(b) Reserve Bank of Malawi

The Reserve Bank of Malawi has a major role in the administration and management of the National Pension Scheme as regulator.

General Overview of Operation of National Pension Scheme

Retrenchment Versus Resignation

The following case study is aimed at providing a glimpse of the realities of the National Pension Scheme also referred to in this paper as the social security and protection scheme in Malawi. It is a case involving a company registered under the Companies Act. Its main business is that of printing and paper sales. On 5 June 2017, the company retrenched 18 employees due to reasons connected with restructuring of the company. An additional four (4) members of staff resigned from their employment. The total number of terminations twenty -two.

Severance allowance Versus Pension

The employees that were retrenched and were on pension, were entitled to receive severance allowance and pension as part of their terminal benefits under the Employment Act 2010 and the Pension Act. However as at writing this paper, 10 months later, the employees had only received their severance allowance and not pension benefits. The employees that resigned were precluded from receiving severance allowance. They were under the law, only entitled to receive pension benefits.

Pension Versus Gratuity

Of the 22 employees, 18 were on pension under the National Pension Scheme, while four were not eligible, due to the exemption clause under the Pension Act. The termination of the four employees was therefore governed by the Employment Act 2010. In accordance with that Act, the four employees received their gratuity at the time of termination. This discharged the obligation of the employer on payment of terminal benefits.

The payments to the remaining 18 employees were governed by the Pension Act. Which provides that a member can withdraw his pension benefits if, he can show that he has not secured alternative employment six months after the termination.

Employer Contributions Versus Employees Contribution

The payment referred to only relates to the contributions made by the employee. The balance of the benefits, which are contributions by the employer remain in the scheme until retirement of the employee.

Proof of Contributions

Pay-slips of the employees showed that they were on contributory pension scheme. The employer was deducting from the employees, a sum of money every month which was meant to be remitted towards the employees' pension scheme. It was imperative that the employees should receive their own contributions six months after termination.

Application for Payment

Consequently at the expiry of six months and on advice from their trade union, Commercial Workers Union of Malawi (COWUMA), the employees, applied to withdraw pension benefits. The employer advised them that the pension funds were managed by two insurance companies, AON and Old Mutual and referred the employees to these insurance companies for payment.

Confusion and Mis- Information

The company did not specify which of the 18 employees, were members under AON and which, were members under the Old Mutual policies. As a result the employees would just make enquiries at both insurance companies. The response from both insurance companies, is that the insurance companies do not deal with individual members; they deal with the company (privity of contract). Therefore they cannot divulge any information to the members. The only message that they can give to the employees is that their funds are not ready for payment. The insurance companies are in negotiations with the company to make the funds available so that the employees can be paid. For any further details the employees should inquire from their employer. As at 20 April 2018 when this author met the representatives of the employees the pension benefits had not been paid out to any one of them.

Cash flow Challenges

The employees in desperation kept visiting both the insurance companies and the employer. At each visit the employer promised that he was doing everything in its power to remit the pension benefits so that the employees can access it. He assured the employees he was making arrangements with the insurance companies to make payment once the cash flow improved. He begged the employees not to take him to court because he was doing everything in his power to remit the funds.

Directive and Expenses

The employees were patient but continued to check on the payment until the employer issued a directive to its existing staff not to let any of the pension seekers into the workplace premises. The employees have not relented, however, they are spending money on transport visiting the employer, the insurance companies and trade union offices for feedback.

Calculations and Payments Due

None of the employees waiting for pension knows how much is due to them. No one is willing to give them an account. Perhaps this is understandable considering that the obligation of the Trustee under the Pension Act to provide information on demand is based on the employee being a member of a scheme by virtue of remitting contributions. In the absence of contributions, there could be no information relating to the account of the employee.

Complaint Mechanism

Unlike the Employment Act the complaint mechanism provided under the Pension Act is not clear according to the case study. The employees are not members of any scheme in as far as the Pension Act is concerned. This is because their employer did not remit any benefits. There are no records of their membership. There seem to be no trustee, as such the employees have nowhere to complain. The Employment Act provides that any complaints in relation to non- payment of severance allowance be lodged with the District Labour Officer. The labour officer can make severance allowance calculations based on pay-slips and advise the employee accordingly. In court, the employee can make a specific (liquidated) claim based on the pay-slip. It is not as easy with pension.

Table 2: Operation of Pension and Gratuity under the Scheme

No.	Name	Pension	Gratuity	Paid	Not Paid	Reason for Termination
1	Kimu	✓			✓	Retrenched
2	Jonasi	✓			✓	Retrenched
3	Chimbayo	✓			✓	Retrenched
4	Zalimba	✓			✓	Retrenched
5	Chipwele		✓	✓		Retrenched
6	Whayo	✓			✓	Retrenched
7	Munthali	✓			✓	Retrenched
8	Mvula	✓			✓	Retrenched
9	Mwadala	✓			✓	Retrenched
10	Lemani	✓			✓	Retrenched
11	William		✓	✓		Retrenched
12	Kathebwe		✓	✓		Retrenched
13	Lungu	✓			✓	Retrenched
14	Mabvuto	✓			✓	Retrenched
15	Mphonde		✓	✓		Retrenched
16	Hajimani	✓			✓	Retrenched
17	Billy	✓			✓	Retrenched

18	Mkwezalamba	✓			✓	Retrenched
19	Makalani	✓			✓	Resigned
20	Chiphamba	✓			✓	Resigned
21	Edward	✓			✓	Resigned
22	Milliam	✓			✓	Resigned

General Challenges on Implementation

Based on the case study above, clearly there are challenges with the operation of the National Pension Scheme. The view is supported by random interviews and media reports that show that the main challenges relate to:

(a) Complicated legal requirements;
(b) low levels of awareness of the procedures;
(c) non-placement of employees on pension;
(d) non-placement of employees on group life insurance policy;
(e) non- remittance of contributions;
(f) harsh economic environment ;
(g) Rising arrears owed by government;
(h) Complicated Institutional framework; and
(i) Poor operating environment, among others.

The law itself is not self -regulating. There is constant reference to other pieces of legislation, directives and enforcement agencies. The law has created various institutions for purposes of managing, administering and enforcing the law. This has created bottlenecks in as far as operation of the scheme is concerned. Beneficiaries are at the mercy of these institutions, starting from the employer at the point of creating the pension to remission of the funds to administrator and to application for payment and complaint mechanism.

Employers Consultative Association of Malawi (ECAM), the umbrella body of employers' organizations in Malawi is a relevant player in operation of the Pension Act. It confirms that lack of awareness is hindering operation of the scheme. The Vice President of the association, Mr. Sean Longwe, is reported to have said that as a player, "we have a strict responsibility to stakeholders such as the regulator to ensure compliance. It is our prerogative to continue enhancing the capacity of employers on matters relating to the workplace. We have a duty to collect as much information through continuous consultation with members for us to advance issues of interest to relevant bodies." He then urged employers to remit pension contributions to avoid penalties.

The pension fund regulator acknowledges challenges relating to awareness. Some employers argue that, failure to comply is a result of lack of awareness of the procedures that must be followed to conform to the new pension requirements. This explains lack of remittances.

The rate of non- remission is high considering statistics from the Reserve Bank of Malawi which indicates that as at December 2017[13], pension contributions stood at Malawi Kwacha 5.2 billion. Although this was an improvement from the previous report, the default rate based on non-remittance was higher with some employers still remaining with a significant amount of contribution arrears, which stood at Malawi Kwacha 9.8billion in Dec 2017. This negatively affected accumulation of pension contributions, (page 27 of the report).

As a result of this default, the Reserve Bank of Malawi has threatened to Name and Shame Defaulters[14]. "The Reserve Bank of Malawi has warned that it will name and shame companies that are not remitting pension deductions to fund administrators. The central bank says this is one way of alerting employees that their employer has been playing with their retirement savings." "Employers should remit contributions promptly within 14 days to avoid being penalized. The bank will increase compliance inspections in conjunction with Ministry of Labour, Youth, Sports and Manpower Development …and will publish a list of all non-complying employers in the local print media and prosecute them"(page 14).

Apart from non-remission of funds, the report also shows that pension fund growth is affected by counterparty default, market risks, volatility of asset prices, downward revision in the policy rate, re-investment in interest bearing assets etc.

Pension Fund Managers share the views of the Reserve Bank of Malawi. One of the biggest insurance companies in Malawi, Nico Life Insurance Company's, Chief Executive Officer, Mr Eric Chapola, was said to have decried the rate of non- remittances. He advised that if the contributions are not remitted, the employee would get less returns as they would miss out of investment interest. He called upon employers to remit the funds so that the money can be invested and yield high returns which would ensure that after retirement an employee maintains a working class lifestyle.[15]

The business community has attributed non remittances to harsh economic environment of doing business in Malawi. This is echoed by views of the President of the Indigenous Business Association of Malawi (Ibam), Mr. Mike Mlombwa, who said that operating environment remains tough for local businesses, characterized by shrinking business opportunities and

[13] Financial Stability Report Updated December 2017
[14] Business News of The Nation, a daily newspaper in Malawi of 9 April 2018. The article by John Kasalika
[15] Business News, The Nation, 9 April 2018 reported by John Kasalika

unfavourable borrowing terms[16]. He lamented that, "from a theoretical point of view, one could argue that things are heading in the right direction by just looking at inflation, interest rates and other indicators. But from where we are seating, the practical point of view, things are not working. There is no business. Businesspersons are just walking around just like mad men. Every day we are getting complaints that things are not okay", (at page 11).

The private sector has also bemoaned the rising arrears owed by Government. The Malawi Government is the biggest customer for the private sector businesses. However for some time the private sector, through the Malawi Confederation of Chambers of Commerce and Industry (MCCCI) have decried the tendency of Government not to pay for goods and services rendered to it by private businesses. It is reported that the private sector is owed Malawi Kwacha 206 billion in unpaid arrears. This state of affairs is contributing to the worsening economic conditions experienced by employers in business. The International Monetory Fund (IMF) is reported to have raised serious concerns about the situation, (Business News, The Nation, 20 April 2018)

The harsh economic environment has forced many companies to restructure their organisations by downsizing the workforce. Business News in The Nation of 11 April 2018, reported of retrenchments at Nampak Malawi the largest paper and board packaging company in Malawi established in 1969 and registered under the Companies Act. It is reported that it has retrenched almost half of its workforce. The reasons cited for restructuring are poor operating environment, shrinking market, competition and energy /power cuts.

The Ministry of Labour, Youth, Sports and Manpower Development confirms the trend. It reports that 3000 workers were laid off in 2016/2017. Currently, thirty six companies have expressed intention to the Ministry to retrench their employees. This is just a tip off the ice berg as most employers retrench without notifying the Ministry[17]. Therefore there is no way of knowing the exact figure.

Conclusion

The case study is proof that the National Pension Scheme, which is the chosen form of social security and protection in Malawi is facing various challenges. These range from lack of awareness of the law to harsh economic environment. The current default rate in pension remittances is an indication that employees or their families are not benefitting from the scheme. The scheme is not performing to the requisite standard. The Malawi Government may wish to redesign the scheme so that it complies with international and regional standards on provision of social security and protection to its citizens.

[16] Business News, in the Daily Times, 9 April 2018 reported by Taonga Sabola, page 11

[17] The Supreme Court of Appeal ruled in *First Merchant Bank v Mkaka*, that, employers are not under legal obligation to notify Ministry responsible for labour on retrenchments and redundancies because there is no legal basis for such requirement, delivered in October 2014.

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