

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC CIVIL CAUSE NO. 71 OF 1998

BETWEEN:

THE STATE

and

THE NATIONAL COMPENSATION TRIBUNA.....RESPONDENT

EX PARTE PETER KAMSULI CHIRWA.....APPLICANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr R. Z. Kasambara, of Counsel for the Plaintiff
Counsel for the Defendant, absent
Mrs Moyo, Official Interpreter/Recording Officer

Kapanda, J.

JUDGMENT

Introduction

The Applicant, Peter Kamsuli Chirwa, by notice dated 5th November 1998, made an application for leave to apply for Judicial Review of the Respondents decision denying him additional interim compensation for medical treatment. The said leave was granted and on 11th November 1998 the Applicant took

out a notice of originating motion for Judicial Review. The Applicant's motion has not been challenged by the Respondent. Further, there was no appearance on behalf of the Respondent at the hearing of the said motion.

The Motion

In the said Originating Notice of Motion the Applicant is praying for the following reliefs:-

1. An order similar to *certiorari* quashing the decision of the National Compensation Tribunal refusing to provide the Applicant additional interim compensation for medical treatment.
2. An order similar to prohibition restraining the Respondent from continued denial of the said additional interim compensation.
3. An order similar to *mandamus* requiring the Respondent to pay to the Applicant the said additional interim compensation requested.
4. Damages.
5. Costs of these proceedings.

And the Applicant has stated the following as the grounds upon which the abovementioned reliefs are being sought:-

- (a) The decision of the Respondent was contrary to the legitimate expectation of the Applicant in that all along the Respondent indicated that they could be in a position to provide the Applicant with

additional interim compensation causing the Applicant to suffer expense only to be rejected later.

2. No reasonable body would deny the Applicant the only opportunity he has to lead a healthy life.
3. The Applicant having suffered ill health due to abuse of power of the previous government the Respondent is obliged to compensate the Applicant in the most appropriate manner in this case allowing the Applicant to receive the necessary medical treatment.

Evidence

The Applicant has sworn an affidavit in support of the Originating Motion for Judicial Review. It was sworn on 5th November 1998. The Respondent has not filed any affidavit evidence in opposition to the Applicant's said affidavit. The Applicant's affidavit evidence, therefore, stands uncontradicted and the relevant parts of the said affidavit are as follows:-

- “1. On 19th May 1998 Medical Officer at Nkhotakota District Hospital recommended me to have further special medical attention due to my critical poor health ---**
- 2. I explained to the Administrator of the National Compensation Tribunal for financial assistance since I was paid K20,000.00 interim payment in September 1996.**
- 3. The Administrator gave me hope and gave a letter to be examined by a Medical Specialist at Queens Elizabeth Central Hospital in Blantyre on June 5th 1998---**

4. **At Queens a Specialist recommended that I see a Neurologist for further examinations and treatment.**
5. **Therefore, they directed me with a letter to Dr. Ntafu---**
6. **Later, Dr. Ntafu who is Neurosurgeon examined me and treated me on condition that I go for further medical examination and treatment to South Africa.**
7. **Dr. Ntafu wrote a medical report on my behalf to the Tribunal for their urgent attention---**
8. **The report was brief and analysed my problems and that I had lost weight considerably.**
9. **The Administrator, Mr Mapata wrote another letter requesting Dr. Ntafu to estimate how much money was needed to cover my travel, Examinations and treatment in South Africa---**
10. **On the Tribunal's request Dr. Ntafu wrote back to them to at least pay K300,000.00---**
11. **Thereafter, the Administrator assured me that they were to request for special funding from Government as they did with - Esau Phiri, Sadyalunda, late Dr. Nkhwazi, A. Nyirenda who died in South Africa because of the Tribunal's delaying tactics.**
12. **As such, I was shocked to hear from the Administrator that the Chairman of the Tribunal refused to release any funds without giving any tangible reasons.**
13. **Therefore, I requested him to put it in writing to me and he did so as you can see per attached documents---**

14. **All in all, I am left in a very difficult situation that I have so far paid some money to Dr. Ntafu leaving other expenses unpaid for his services and my travel fares from Nkhotakota to Blantyre accommodation, food etc ---**
15. **Finally, I feel I have been fooled and my human rights have been humiliated and violated.**
16. **I am now a destitute, because of my poor health I cannot work as an Editor of any Newspaper. I urgently need medical attention.”**

As noted earlier the Applicant's evidence is unchallenged and it will therefore be accepted as correct for the purposes of this judgment. Further, there was no representation on behalf of the Respondent at the hearing of these proceedings. Thus there are no arguments, on the law, representing the views of the Respondent. In point of fact this court only had submissions, both written and *viva voce*, from the learned Counsel for Plaintiff.

Issues for Determination

In my opinion, based on the contents of the Originating Motion; the matters deposed to in the affidavit of the Applicant; and the submissions of Counsel for the Applicant, the issues that have to be determined in these proceedings for Judicial Review are as follows:-

- (a) Whether or not this court has jurisdiction to review the decision of the Respondent.
- (b) Whether or not the decision of the Respondent, in refusing to pay additional interim compensation to the

Applicant, was contrary to the legitimate expectation of the Applicant thereby entitling the Applicant to the relief being sought herein.

- (c) Whether or not the decision of the Respondent, in refusing to pay the said additional interim compensation infringed the **Wednesbury** principle and/or was unreasonable in the **Wednesbury** sense.

I wish to observe that the issues that I have enumerated above will have be decided based on the evidence on record and on the applicable law. Before proceeding to make any findings of fact on these issues it is important that the chronology of events be set out for a better understanding of the facts as disclosed by the evidence on record. The said sequence of events in this matter, as shown by the affidavit evidence of the Applicant, is as follows:-

September 1996:

The Applicant is given, by the Respondent, the sum of K20,000.00 as an interim compensation.

19th May 1998:

The Medical Officer at Nkhotakota District Hospital recommends that the Applicant should get further medical attention.

5th June 1998:

The Tribunal Administrator contacts the Senior Medical Superintendent at Queen Elizabeth Central Hospital

requesting him to examine the Applicant so as to diagnose the Applicant's ailment.

June 1998:

A Clinical Officer at Queen Elizabeth recommends that the Applicant should attend a Neurosurgical clinic.

29th July 1998:

Dr. A.G. Nga Ntafu writes the Tribunal Administrator to advise him of his findings regarding the examination conducted on the Applicant. In particular Dr. A.G. Nga Ntafu concludes that "the patient has been treated here with analgesics, antinflamatory drugs etc some improvement has been achieved, but the headache still remains. The next procedure is to extend the examination to include CAT - scan, arterio-grams of blood vessels in the neck and head etc. to try and find out the actual cause of the problem. Some of these examinations and tests can only be done outside Malawi. This means larger amounts of money shall be required to do this: the earlier the examinations are done, the better for the health of the patient---"

5th August 1998:

The Tribunal Administrator writes Dr. A.G. Nga Ntafu to enquire on the estimated costs of medical treatment in a foreign country.

7th September 1998:

In an unsigned letter, purportedly originating from the Surgery of Dr. A.G. Nga Ntafu, the Tribunal Administrator is advised that the said medical treatment of the Applicant, outside the country, would cost K300,000.00.

23rd September 1998:

The Tribunal Administrator writes the Applicant, after referring to the medical report of 29th July 1998 and letter of 7th September 1998, advising him that the Respondent was unable to assist the Respondent with a further interim award.

5th November 1998:

The Applicant applies for leave to move for a Judicial Review of the Respondent's decision in refusing to pay him additional interim compensation.

11th November 1998:

The Applicant takes out a Notice of Originating Motion for Judicial Review of the Respondent's decision in refusing to pay additional interim compensation to the Applicant.

Law and Findings

It is trite law that in civil proceedings the standard of proof is on the balance of probabilities and that a party who makes a positive allegation of fact must prove such assertion of fact.

These two principles of law will be borne in mind when this court is making findings of fact in this matter, on the issues that require this court's determination.

Regarding the issue of whether or not this court has jurisdiction to review the decision of Respondent this court finds that this point has been answered in the affirmative. An instructive authority on this finding is Section 142(1) of the Constitution, of the Republic of Malawi, which confers jurisdiction on the High Court to hear applications for Judicial Review of the decision of the National Compensation Tribunal.

As pointed out above this court must make a finding of fact on the question of whether or not the decision of the Respondent, in refusing to pay additional interim compensation, was contrary to the legitimate expectation of the Applicant. It is the Applicant's argument that there were no reasons, either written or oral, given to the Applicant for the refusal to give him additional interim compensation. The Applicant, through Counsel, has further contended that the Respondent made assurances to him that were he to get a favourable and reasonable medical report, in respect of his ailment, the Respondent was going to give him additional interim compensation. Counsel, in support of this argument, referred this court to what the Applicant has deponed to in his affidavit in paragraphs 3, 9 and 11. The Applicant has further submitted that what the Respondent did was in contravention of the provisions of Section 43 of the Constitution, of the Republic of Malawi, in that the said decision of the Respondent, in refusing to pay him additional interim compensation without giving reasons for such decision, was a violation of the Applicant's right to a fair administrative action and also a violation of the Applicant's legitimate expectation.

Further, I have observed that the Applicant is relying on the Provisions of Section 43 of the said Constitution of the Republic of Malawi. The meaning of this section, as enunciated by the Malawi Supreme Court of Appeal in the case of **Dr. B.S. Chawani -vs- The Attorney General** MSCA Civil Appeal No. 18 of 2000, is that it gives a person (a) a right to lawful and fair administrative action and (b) a right to be given reasons including written reasons which must support an administrative action. Furthermore, the Supreme Court said that these two rights arise where a person has, *inter alia*, a legitimate expectation. In other words if there is no legitimate expectation the right to a fair administration and the right to be given reasons for an administration action or decision cannot be invoked and/or enforced. Indeed, if a person claims that these two rights, or any one of them, has been contravened in respect of him such person can not be given a remedy unless it is shown that he/she had a legitimate expectation.

Moreover, it must be noted that a legitimate expectation can arise from either an express promise or representation - **Attorney General of Hong Kong -vs Ng Yuen Shiu** [1983]2 AC 629 and the said representation must be clear and unambiguous - **R -vs- I.R.C. exparte MFK Underwriting** [1993]2 All E.R. 225. Alternatively, a legitimate expectation may be derived from a representation implied from established practice upon past actions or conduct - **The GCHQ Case [1985]AC 374**.

In the present case I do not see how the alleged legitimate expectation arose. Firstly, it is interesting to note that, from the letters written by the Respondent's officer, which are exhibited to the Applicant's affidavit, there was no express promise or representation that the Respondent was going to pay additional interim compensation to the Applicant. As a matter of fact the said letters were actually not addressed to the Applicant.

Further, from the letters exhibited to the said affidavit it can not be said that it was clear and unambiguous that the Respondent made an express promise or representation to the effect that it was without fail, going to make an additional interim compensation after presentation of a medical report by the Applicant. Furthermore, the assertions of the Applicant to the

effect that there were oral representations made to him that he was going to be given additional interim compensation cannot stand in view of the contents of the letters that have been exhibited to the Applicant's affidavit. The intent of these letters is inconsistent with a proposition that the Respondent made a representation to the effect that it was going to pay the Applicant additional interim compensation upon production of a medical report.

There is an attempt by the Applicant, in paragraph 11 of his affidavit, to show that the Respondent assured him that it was going to secure funding for the said additional interim compensation like was done with other people thus the said assurance created a legitimate expectation on the part of the Applicant. In my considered opinion, and due regard being had to the evidence as a whole, this assertion can not stand. In the first place paragraph 11 of the said affidavit, in my view, is untenable in light of the tenor of the letters that have been exhibited to the Applicant's affidavit. Further, the matters deponed in paragraph 11 are not enough to establish that it was a normal and/or established practice by the Respondent to get special funding from Government to pay additional interim compensation to claimants. Furthermore, the fact that some people were allegedly paid compensation so as to enable them go for treatment outside the country is not enough, in my opinion, to raise an implied representation that the Respondent was going to give the Applicant an interim additional compensation to allow him to go

outside the country for treatment and to that end raising a legitimate expectation on the part of the Applicant.

Now, since the right to a fair administrative action and the right to be furnished with reasons for any administrative decision only arise if there is a legitimate expectation, and in view of the fact that this court has found that there was no such legitimate

expectation in the instant case, it therefore follows that the fact that the Applicant was not given reasons for the refusal to pay him additional compensation can not be a ground for Judicial Review in the instant case. In the premises this court finds that the question of whether the decision of the Respondent, in refusing to pay a further interim compensation, was contrary to the legitimate expectation of the Applicant has been answered in the negative.

The other ground on which the Applicant is seeking the reliefs in these proceedings is that he alleges that the Respondent acted unreasonably in denying the Applicant the only opportunity to lead a healthy life. It has further been stated, by the Applicant, that after having allegedly suffered ill health due to abuse of power by the previous regime the Respondent is obliged to compensate the Applicant in the most appropriate manner by allowing him to receive the necessary medical treatment. In his argument before this court learned Counsel for the Applicant has submitted that it is hard, if not impossible, to discern the reasoning behind the refusal to pay the said additional interim compensation in view of the fact that there was no reason given for the refusal.

The question which arises from this argument, and requires this court's determination, as observed earlier, is whether or not the Respondent, in refusing to pay additional interim

compensation to the Applicant, infringed the **Wednesbury** principle and/or if the said decision was unreasonable in the **Wednesbury** sense. The case of **Associated Provincial Pictures House Ltd -vs- Wednesbury Corporation** [1947]2 All E.R. 680 is for the proposition of law that a decision of a public body which, or a person who, performs public duties or functions will be liable to be quashed, or otherwise dealt with by an appropriate order, in Judicial Review proceedings where the court concludes that no

such person, or body, properly directing itself to the relevant law and acting reasonably, could have reached that decision. But it is trite law, and I have borne this in mind in the present case, that the power of the court to interfere in such a case should be exercised sparingly for a court is not allowed to substitute its decision for that of a public body or a person exercising such public duties or functions. Further, as stated in the **Wednesbury** case, the court can only interfere with an act of a public body, or person, performing public duties or functions if it is shown that the public body, or person, has contravened the law by acting in excess of powers and/or if the said public body, or person, has taken into account matters which ought not to have been taken into account, or conversely, has refused to take into account, or neglected, to take into account matters which ought to have been taken into account before arriving at such decision. Moreover, it is for him who asserts that a public body, or a person, performing public functions or duties has contravened the law by acting in excess of powers, and/or that the said public body, or person, has not taken into account relevant matters, or has taken into account irrelevant matters in coming up with a decision, to establish that proposition.

Turning to the present case, it is noted that in his affidavit the Applicant is neither alleging that the Respondent has contravened the law by exceeding its powers nor is he asserting

that the Respondent has taken into account matters which it ought not to have taken into account or that the Respondent has refused or neglected to take into account matters, which it ought to have taken into account. The Applicant's argument is that it is difficult, if not impossible, to discover the reasoning behind the refusal to give additional interim compensation in view of the fact that there is no reason for the refusal. In this court's opinion the Applicant has not established, through evidence and on his own admission in argument, how the said unreasonableness has come

about. Notwithstanding the failure, on the part of the Respondent, to demonstrate the unreasonableness the Respondent still wants this court to make a finding that the Respondent acted unreasonably. The fact that there are no reasons given for the refusal, in my mind, does not amount to acting unreasonably for as spelt out in the **Wednesbury** case a public body, or a person, exercising public functions or duties will be said to be acting unreasonably if it is shown that the said public, or person, has contravened the law by exceeding its powers or if it is shown that the public body, or person, has taken into account matters which ought not have been taken into account, or where the public body, or person, has refused or neglected to take into account matters which ought to have been taken into account.

The long and short of it is that the Applicant has not given this court persuasive facts upon which it can decide on the issue of whether or not the decision of the Respondent is unreasonable in the **Wednesbury** sense. It is not, therefore, possible for this court to make any of the orders for reliefs being sought by the Applicant because doing so would be tantamount to substituting the decision of the Respondent by that of this court in view of the admitted fact that the Respondent did not give reasons for its decision for the refusal to pay the said additional interim

compensation to the Applicant. In its place this court orders that this matter should go back to the Respondent to reconsider its position regarding the additional interim compensation that has been requested by the Respondent and give reasons for any decision it shall make. It is so ordered.

Costs

The question of costs has exercised my mind very much. This is so because the Applicant has not wholly failed neither has he substantially succeeded in his application for Judicial Review. I will exercise my discretion, as regards costs, by making no order as to costs of, and occasioned by, these proceedings.

Made in Chambers this 7th day of May 2001 at the Principal Registry, Blantyre.


F.E. Kapanda
JUDGE