IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC CIVIL CAUSE NO. 10 OF 2001

BETWEEN:

D.M. BWANALI AND D.E. KUMKWAWA
representing themselves and members of the
University Wide CTS Welfare Committee.....APPLICANT

and

UNIVERSITY OF MALAWI.....DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Mr E. Banda, of Counsel for the Applicant
Mrs Matekenya, Official Interpreter

RULING

I am not quite sure why the ex-parte application I heard around 5.00 p.m. yesterday was placed on the file for Miscellaneous Civil Cause No. 10 of 2001. My recollection is that that cause, although between the same parties as in this case, commenced on 18th January, 2001 as a Judicial Review case. I on that day granted leave for Judicial Review proceedings to commence and along with that order granted two interim reliefs by way of injunction pending the determination of the Judicial Review.

Subsequent to that the Respondents in that matter took out an inter-partes summons to discharge the injunctions granted as interim reliefs. Upon hearing both parties on that summons I on 26th January, 2001 discharged one of the injunctions, to wit, the one that stayed the implementation of the new salary restructure, but I retained the injunction concerning the implementation of the MIM report. The position therefore is that as far as Misc. Civil Cause No. 10 of 2001 is concerned the Applicants have the leave of the court to proceed to Judicial Review on the grievances they raised therein against the

Respondents and pending the outcome of that procedure the implementation of the MIM report has been stayed.

Now for progress to be seen in that case therefore one would expect the Applicants to file a Notice of Motion for the Judicial Review to actually take place. If instead the Applicants bring a different ex-parte application for injunction, as they have now done, the assumption is that the application arises from new or different premises. I would thus have thought that the new application deserved its own cause number and its own file.

In fact on the face of it the Judicial Review and the present application, although between the same parties, are actually addressing different concerns. Whereas the Judicial Review appears to have been launched with the aim of mainly looking at the decision of the respondent regarding the salary restructure as then announced to staff and matters ancillary thereto, the current application relates to a press release based on what the respondents call a strike but what the Applicants call a peaceful sit-in. There was no strike or sit-in at the time the application for leave for Judicial Review was filed as is said to be the case now. There is thus no way the Judicial Review proceedings can be expected to just absorb in it a new feature which was no part of those proceedings and to, as it were, just host this application.

Clearly the problem the Applicants have now brought to court is in nature different from the one they brought earlier although it may share some roots with the earlier one. It will not do to just graft this application on the case registered earlier on the simple basis that it is another problem or an advanced problem between the same parties. The ground any particular case covers in civil litigation is normally predetermined by the pleadings in it and in this case the Judicial Review has nothing to do with a strike or a sitting-in. Thus although the present application has been filed in a cause that already exists the relationship between the two appears forced or strained and tenuous. Thus the new application essentially appears separate and independent from that commenced as a Judicial Review case.

Be this as it may I am still obliged to look at the summons the Applicants have filed which is based on Order 29 rule 1 of the Rules of Supreme Court. From what has been deponed in the affidavit in support the Applicants are saying that while there is an action in court between them and the respondents, it was resolved between the parties to negotiate their dispute out of court. They have to this effect exhibited letters exchanged between the respective lawyers for the two sides.

Further, the Applicants complain that while they looked forward to negotiations starting as the best way to resolve the issues between the parties, the respondent has through exhibit "EB3" issued an ultimatum to the Applicants to return to work by 8.00 a.m. on 28th March, 2001, which is today, or be deemed to be not interested in retaining their jobs with the respondent. Exhibit "EB3" is a Press release that apparently featured in one or more of the local newspapers in circulation. In the application and its affidavit no foundation is laid as to how and when the sit-in, alias strike, which has given rise to this press release started.

There is not even an attempt to trace for the benefit of the court the legal formalities observed by the Applicants prior to the commencement of the strike or sit-in so as to justify its existence. It seems the Applicants assume the legality of their said sit-in or strike and on that basis proceed to attack the press release of the respondents as intimidatory and provocative and to allege that its implementation would be illegal, unconstitutional, and contrary to the provisions of the Labour Relations Act. It is on this footing that they seek an injunction from the court to restrain the Respondents from implementing the contents of their press release and from carrying out the threats in it into effect and to treat the same as if annulled by the court.

Order 29 rule 1 of the Rules of Supreme Court, among other things, requires that before a court can consider granting an injunction, the Applicant must first establish before the court that he has a good and arguable claim to the right he seeks to protect. Such a right is normally articulated in an action commenced or about to be commenced. In this case as I understand it the right the Applicants seek to protect is not the action they commenced or one they intend to commence, but the right to negotiate and to do so while continuing with their sit-in or strike. As I have indicated earlier the Applicants in this case rather assume but have not in fact established or

otherwise laid a foundantion for the legality of their strike or sitting in. In his presentation of the application, Mr Banda, of Counsel for the Applicants did try to fill in for the gap that exists between the Judicial Review action and the present application, but as it is a well known rule of practice Counsel cannot give evidence on behalf of his clients through such an address. The position therefore remains that whereas the parties may have intimated a desire to negotiate, it is not clear cut in the matter whether the sit-in or strike that has attracted the ultimatum herein is or is not itself legal. The Applicants first needed to raise a *prima facie* case of the legality of this action on their part if their right to negotiate was to be seen as not affected or tarnished by the said sit-in or strike.

As I have said the Judicial review action does not extend to this development. As I have also pointed out the present application does not make any attempt to explain or justify the sit-in or strike so as to create a sound base for the present application. I thus do not see how in the circumstances I can just from the blues jump to the conclusion that the Applicants have raised good and arguable claim to the right to negotiate while continuing with their sit-in or strike which was non-existent at the time they initiated the Judicial review proceedings herein.

Actually looked at from a different angle it appears the Applicants seek the injunction so that through it the court may compel negotiations between the parties herein to start. If I indeed understand the Applicants correctly in this regard then they are really on the wrong track regarding the purpose and use of injunctions. Parties to an action, as I understand the law, can always step aside and negotiate with one another with a view to arriving at a settlement, but when they fail to make process and to achieve a solution, the way out is to come back to court and continue with their case. It really would be an abuse of the process for one party to use the force of the court to compel the other party to negotiate at all costs as if the matter is incapable of solution in court.

I have given this application long and anxious consideration. Testing it on the principles normally applicable on the granting of injunctions I find it quite wanting. The Applicants have the leave of the court to proceed to Judicial Review against the Respondents. Why they are not so proceeding is not clear. It now comes to light that they want an injunction to guard their

sit-in or strike when they have done nothing to explain how that strike or sit-in came about and why it should be assumed to be legal. Certainly the establishment of the *prima facie* legal status of this sit-in or strike has a direct bearing on the legitimacy or otherwise status of their claim that their right to negotiate should be protected even as the sit-in or strike continues. In the absence of foundation within the application and its supporting affidavit the court cannot just assume that the sit-in or strike is legitimate and that efforts to call it off are the ones that are illegitimate. This to me does not appear to provide sound basis for the court to invoke the provisions of Order 29 rule 1 by granting the injunction sought. On the evidence presented in support of the application the right the Applicants seek to assert is based on a weak and unsubstantiated foundation.

Merit eludes me in this application and so I decline to grant the relief sought. The summons herein thus stands dismissed.

Made in Chambers on 28th day of March, 2001 at Blantyre.

A.C. Chipeta
JUDGE