IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

MISC. CIVIL CAUSE NO. 44 OF 2006

BETWEEN

FRANCIS MBEPULA …….…….. APPLICANT

AND

THE ATTORNEY GENERAL ……..……... RESPONDENT

CORAM : CHOMBO, J.

: Mussa, Counsel for the Applicant
: Kachule, Counsel for the Respondent
: Mthunzi, Court Reporter
: Chulu, Court Interpreter

RULING

The applicant seeks court declaration that: (1) the decision to retire him on 20th March 2006 was unlawful and unreasonable as the authority acted ultra vires. (2) an order be made revoking the said retirement. (3) an order be made directing that the appellant continues in employment until he reaches age 60, and in the alternative that he be granted damages under O.53r.7 of the Rules of Supreme Court. (4) Costs of this action.

The brief history of proceedings is that the applicant was employed in the Civil Service and his retirement age was 55 years. At the time he reached

age 55 he was Chief Accountant in the Ministry of Information and Tourism and having the Accountant General as his responsible officer.

He received a letter dated 7th February 2006 emanating from the office of his Controlling Officer reminding him of his impending retirement on 20th March 2006. According to the appellant a twofold irregularity had been committed in that the said letter should have been written three months before the date of the retirement and should have been written by the Accountant General. The said letter also contained erroneous information in that the applicant's date of retirement was recorded as 19th March 2006. It is contended therefore that the said notice was not effective.

A circular upgrading the retirement age took effect from 28 April 2006. The circular went further to provide that all officers for whom approval to retire was given by the effective date of the circular would be deemed to have retired on the date they reached age 55. The applicant was notified by his responsible officer that he could not continue working as he had been effectively retired. The applicant was aggrieved with this decision, thus this application.

Originally the matter was initiated by way of a summons but when the case came to court on 13 July 2007, the court directed that the same be by judicial review; consequently the appropriate documents were filed. The respondent filed an affidavit in opposition and the applicant filed a response to the affidavit in opposition.

The respondent, among other things, submitted that the respondent is the wrong party to the proceedings as the decision to retire the applicant was never made by the respondent. It was contended by the respondent's counsel that judicial reviews are wholly governed by O.53 and therefore the applicant, by making the respondent a party thereto, has cited the wrong party and the application must fail on that basis.

The respondent further depones that by operation of the law the applicant had retired at 55 and therefore the question of notices is clearly not an issue. The respondent submits further that the Controlling Officer penned the applicant in February advising him about the impending retirement, and in May 2006 advising the applicant to complete certain forms pertaining to the same retirement. There was at that time no objection from the applicant about the letters coming from the wrong quarters. This is because the applicant was aware of the retirement age. The applicant only raised dust in July 2006, through his lawyer after the issuance of the circular extending the retirement age.

The circular of 16 May 2006 that raised the retirement age to 60 came after the effective date of retirement for the applicant and he cannot therefore rely on it; so submitted the respondent.

The questions that this court must now determine are:

1. Is the Attorney General a party in these proceedings?
2. Was the applicant given adequate and effective notice about his retirement in accordance with the MPSR?

3. Does the applicant have a legitimate expectation?
4. Did the respondent act unreasonably?
5. Was the act of the respondent unconstitutional and Ultra Vires?
6. Can or should the employment of the applicant be allowed to continue until he is 60 years?

1. Is the Attorney General a Party

The respondent's counsel submitted that judicial reviews are governed by Order 53 of the Rules of Supreme Court and in accordance with that Order the Attorney General is not a party to these proceedings. The applicant contends that since these proceedings were initiated as originating summons then the Attorney General must be the right party to respond to the issues herein. In order to determine this point it is necessary to dig a little deep into the genesis of this matter.

It is on record, and both parties concede, that the matter came to court on an originating summons. On 2 February 2007 when my sister Judge looked at the case and the issue raised therein, she was of the view that the matter fell under judicial review by its nature. Consequently she ordered, allowing the applicant to make an application out of time, that the matter proceed by way of judicial review. My sister Judge generously advised that

"Applicant to clearly articulate issues and relief sought"

Judicial reviews, in accordance with the Rules of Supreme Court are comprehensively governed by Order 53. The order provides the particular

parties to an application for judicial review – the respondent according to O.53/14/25 specifically provides that judicial reviews will lie against public persons or bodies which perform public functions or which have taken an administrative action which action has aggrieved the applicant (underlining supplied for emphasis)

It is clear from the submissions that the Attorney General was not party to the decision that has resulted in this action. When the court ordered that the matter be converted to a judicial review it meant transforming the whole application to meet the requirements of a judicial review. If the procedure for judicial review was properly followed then Counsel should have known who the parties are in judicial review proceedings. What we now have before court is a hybrid. The Attorney General was therefore not supposed to be a party to these proceedings. Be that as it may the whole application will not be thrown out purely because the wrong party was sued.

2. Was the applicant given adequate and effective notice about his retirement.

According to the applicant's submission he should have been given notice 3 months before the date of his retirement. This would have meant a letter issued in December 2005, and the said letter should have been written by the Applicant's Responsible Officer and not his Controlling Officer. The respondent opposes this stance and submits that with or without the said notice the applicant was due to retire on 20 March 2006. To settle this question there is need to go back to the main documents that provide for the retirement in the Civil Service.

The MPSR provides the procedure in a number of documents. The mother document, and one important paragraph is 1.184, which, for some un explained reasons has not been included in "KJ4" but it provides that unless the Minister directs that his period of service be extended, every Civil Servant shall retire from Public Service on attaining the age of 55 years. (underlining supplied for emphasis).
The use of the word shall leaves no room for negotiation.

Paragraph 1:185 provides and it is also important to quote this provision in full,

1. A permanent officer may, not less than three months prior to his reaching the limit for retirement specified in Regulation 1:184(1), apply to his responsible officer for permission to continue his service for a further period not exceeding two years.

The applicant did not apply for the said extension and therefore both he and his Responsible Officer were aware of the fact that on 20th March 2006 the applicant will have reached the mandatory retirement age of 55, which factor the applicant needed no reminder. The MPSR has been supplemented with the Human Resource Management Manuals. The purpose of these manuals is *"to facilitate (Department of Human Resource Management – and Development) (DHRMD) efforts to decentralize the administration and execution of Civil Service Human Resource Management functions and to delegate greater decision – making authority to HRM officers in the line*

Ministries in order to increase the efficiency of the Civil Service".
(underlining supplied for emphasis). This means that the Responsible Officer is given latitude to delegate to Controlling Officers, or any other officers under them for purposes of increasing efficiency of the Civil Service.

These instruments took effect from 1st July 2002 according to exhibit marked "LMD". It is providing in this exhibit in para (h) that:

> *"Approvals of retirements of Common Service will be the responsibility of their Responsible officers; however, Responsible Officers should keep this office informed about retirements of officers in grades S4/P4 and above."*

Whilst the passage states that *"approvals of retirements --- will be the responsibility of their Responsible officers"* in my view, this does not, as submitted by the applicant, mean that the said notice shall be penned by the Responsible Officer alone. In my view it means that the Responsible Officer can delegate the responsibility of writing or informing the particular officer about the date of retirement as provided for in the DHRMD (passage quoted above). This, I find to be the same spirit that reigns in exhibit "LMD" which provides that the aim is to decentralize the administration and execution. Where action is taken by the Controlling Officer such action is binding on the Responsible Officer. If indeed the Controlling Officer was acting without the nod of the Responsible Officer then the very first letter, exhibit "LMZ" written to the applicant copied to the Responsible Officer, would have received a negative response or some reaction to the contrary. By the

silence the Responsible Officer had adopted the Controlling Officer's letter – a reminder of the applicant's impending retirement. The question therefore is whether the applicant had received the said notice or not. It is not disputed that the applicant received the said notification.

The second part of the question is whether this notice was effective. The question of effective notice will very much depend on the interpretation of paragraph 1.181(1) which provides as follows:

> *"A Civil Servant shall not have his probationary appointment terminated or, if he is confirmed in his appointment, be retired from the Public Service without being given due notice in writing by his Responsible Officer on the direction of the appropriate commission."*

And para 1.181(2) provides that

> *"for purposes of this Regulation"due notice" means notice of the length of the period specified in his case in sub-regulation (1) of the last preceding regulation."*

It is evident that in respect of the applicant the due notice is 3 months. Because the applicant was retiring on 20th March 2006 the letter of notice should therefore have been issued on 20 January 2006. By issuing the letter on 8th February 2006 the applicant's Responsible Officer failed to meet the requirement specified under the MPSR. The regulations about due notice were specifically provided to prepare the employee about the impending retirement at the age of 55, notwithstanding the fact that, that is the

mandatory age of retirement. I find therefore that the applicant's employer fell short on this requirement. According to para 1:181(3) it is provided that

> *"In any case where a Civil Servant is entitled under the provisions of this regulation to receive due notice, the Government may instead of giving him due notice, pay him a sum equal to –*
>
> (b) *In the case of a permanent officers or contract officers------ three months' salary if he receives less than 30 days' written notice, two months salary if he receives at least 30 days but less than 60 days' written notice, or one months' salary if he receives at least 60 days but less than 90 days' written notice."*

According to the notice sent to the applicant he received at least 30 days notice but less than 60 days. The applicant is therefore entitled to two months salary in lieu of notice.

3. **Does the applicant have a legitimate expectation.** What is meant by legitimate expectation? In my view legitimate expectation cannot be applied to an unknown situation. As at 20th March, the date of the applicant's mandatory retirement, long after he had already received the letter from his Controlling Officer it was not known that there would be a circular that would extend the retirement age to 60 years. As far as the applicant is concerned therefore he could not or can not lay claim to something that happened long after he should

have moved out of office. If, for some reason the Controlling Officer had failed to issue the 8th February letter MAYBE the applicant could have laid some claim to some legitimate expectation but definitely not after the notice/reminder had already been issued. The memo extending the retirement age of 16th May 2006 came almost two months after the mandatory retirement age of the applicant though its effective date is 28th April 2006. But even back-dating to the effective date of the memo does not give the applicant any legitimate expectation that his retirement would be pushed to 60 years because this would still fall on a date after the effective date of mandatory retirement for the applicant. I am afraid the applicant must fail on this head.

4. **Did the respondent act unreasonably?** The employer gave notice/reminder of the retirement of the applicant, though the notice was not adequate, but it did serve the purpose anyway. After this notice there was no communication from the applicant complaining about the authorship of the letters or expressing dissatisfaction with the decision to retire him. The employer would have been in serious breach if the employer had failed to give the said notice or had infringed any rights of the applicant. The only infringement I have found is the failure to give "due notice" as provided for by the regulations. I do not agree with the applicant that the employer acted unreasonably, and I must again dismiss that claim.

5. Was the **act of the respondent unconstitutional and Ultra Vires?** After what has already been stated herein before, I fail to find the basis of the alleged unconstitutionality that the applicant now is trying to prove. It must be borne in mind that the mandatory age of retirement was not applicable singularly to the applicant – but to all Civil Servants who had attained that age. Indeed if, maybe, the applicant had applied for extension of time under para 1:184 three months before his retirement and without giving him any grounds for such an application being turned down and the retirement machinery was put in place; I might have considered the situation otherwise, in this respect therefore I must find that there was nothing unconstitutional that the employer did.

6. **Finally the court must decide whether the employment of the applicant should be allowed to continue until he is 60 years. My answer is definitely in the negative.** As already explained earlier, by the time the circular of 16th May 2006 was published the applicant had constructively retired already. He may still have been in the office, for whatever reason, but he had effectively retired on 20 March 2006. Indeed there were errors of dates from the Controlling Officer who put the retirement date to 19 March and not 20th March. I do not find it necessary to split hairs about the date being 19 or 20 March. Suffice to say that the letter of February 2006 gave notice of the retirement of the applicant. Indeed if the date of retirement was of such great significance to the applicant he should have written to the Controlling Officer drawing attention to the same. But the first letter on the so called anomalies was only written on 25 July 2006, in my view, when it

became apparent to the applicant that he would not benefit from the extended retirement age. I find that the applicant was duly notified, at least a month in advance about his mandatory retirement of 20th March 2006. Because the applicant had not put in any application to extend his employment as is required by par 1:184(1) he could not have benefited from the circular of 16 May 2006 revising the retirement age. I must find that the applicant did not intend to stay on after age 55 and he must now not be allowed to retreat on his intention purely because of the revised age limited.

The applicant has succeeded in showing that the notice of the respondent was not adequate.

Although the applicant did not specifically put in a claim for failure to abide to the regulation of due notice, the court felt that nobody would get hurt by awarding him the two months notice in lieu of notice. Otherwise, the applicant's claims have failed on all forms and I must dismiss the application with costs

MADE in Open Court this 14th November, 2007 at Lilongwe District Registry.

E.J. Chombo
J U D G E