



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

MISCELLANEOUS CIVIL CAUSE NO 1 of 2012

BETWEEN

THE STATE

-AND-

COUNCIL OF MZUZU UNIVERSITY

RESPONDENTS

EX-PARTE : ALICK NYOZOMO GONDWE and 5 OTHERS

APPLICANTS

CORAM: HON. Mr. JUSTICE D.T.K. MADISE

Mr. G.J. Kazipatike Counsel for the Applicants

Mr. M. Amidu Counsel for the Respondents

Mr. C. Chawinga Official Interpreter

Mrs. F. Silavwe Court Reporter

Madise, J.

JUDGMENT

Introduction

Six Applicants sought leave from the Court under Order 53 to move for judicial review against the decision of the Respondents to expel them from Mzuzu University for having been found with academic reference materials in an examination room against regulations. The six are challenging the manner and process in which the decision was made and not the merits of the actual decision. The Respondents have disputed the claim.

Preliminary Issues.

What is Judicial Review?

Judicial Review is the most effective means by which courts control administrative actions by public bodies. (including inferior courts and tribunals.) It is a supervisory jurisdiction which reviews administrative action rather being an appellate jurisdiction. For judicial review proceedings to be entertained by courts the follows preliminary issues must be satisfied.

Public Law

Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law. On the issue of public law and judicial review **Lord Diplock** stated in O'Reilly vs. Mackman [1983] 2 AC 237.

It would in my view as a general rule be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which

he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions (governing judicial review) for the protection of such authority.

In the present case, the Applicants duly took process under the head of judicial review and the relevant law is the Republican Constitution and disciplinary regulations made under the Mzuzu University Act No:12 of 1997.

The Parties

Judicial review can and must not be brought by or at the instance of the government. In general, judicial review lies against any body charged with the performance of a public duty. In this matter before me, the Respondents are the Council of Mzuzu University which is a public body charged with the responsibility of overseeing the management of Mzuzu University in providing educational services to duly enrolled students. The authority of the Council of Mzuzu University is derived from the Mzuzu University Act of 1997 and subsidiary legislation made there under. In this matter the proceeding for judicial review were properly instituted against a public body to wit council of the Mzuzu University.

Locus Standi

An Applicant in a judicial review proceeding must have "*sufficient interest*" in the matter. The purpose is to exclude the so called busy bodies. There must be a direct or personal interest. Whether a general interest qualifies within the meaning of *locus standi* is a question of law and fact. However courts have in recent times adopted a much broader and more flexible approach. The more important the issue and the stronger the merits, the more readily will a court

grant permission notwithstanding the limited personal involvement of the Applicant.

In Inland Revenue Commissioners vs. National Federation of Self Employed & Small Business Ltd [1982] AC 617 HL, it was held that a group of taxpayers did not have standing to impugn the Inland Revenue Commissioners dealings with other taxpayers. The above notwithstanding the court may grant a relief if the same can be effectively enforced.

In this matter the Applicants are duly registered students of the Mzuzu University pursuing Bachelor's Degrees in their respective disciplines. The Applicants were invited to write examinations as part of their continued assessment for the fulfillment of the Bachelor's Degree in their respective fields. It was alleged they had brought into the examination room academic reference materials without the sanction of the examiners or the University. They were caught trying to seek the aid of the academic reference materials against university regulations. They were summoned before a Senate Academic Disciplinary Committee and the final decision was expulsion. They are now challenging the manner in which the Disciplinary Committee was constituted citing the absence of the Vice Chancellor during the greater part of the hearing and the witnesses contrary to Regulations. I find that they have *locus standi*.

The Grounds

Judicial review proceedings must not issue merely because the decision maker has made a mistake. The Applicant must show that there has been a departure from accepted norms. That the decision making process has been characterized by illegality, procedural impropriety and irrationality. This is called the tripartite distinction. Based on the above this court is convinced that this is a suitable case for judicial review.

The Evidence

It has been presented before this Court that the six Applicants were invited to write examinations as part of their continued assessment for the attainment of a Bachelor's Degree in their respective fields. It is alleged they sought the aid of academic reference materials against Mzuzu University Regulations. As to whether indeed this offence was committed is neither here nor there. That question is not for this Court to decide as it is outside the ambit of judicial review. This Court has been called upon to decide as to the irrationality or procedural impropriety of the decision making process. The questions are:

- 1) What the decision making process within the law of fair administrative practice?
- 2) Was the disciplinary committee properly constituted as per Regulations?
- 3) Was the decision rational?

The Claim

Alick Nyozomo Gondwe filed an affidavit on his own behalf and on behalf of the other Applicants. For the purposes of this case he stated that there were no witnesses to back up the allegations of cheating and as a matter of law those witnesses were supposed to be present in order to testify at the hearing. That this was a requirement under Regulation 4.1.11(iii) of the Mzuzu University Students Handbook.

That the Senate Academic Disciplinary Committee was illegally constituted as it was never chaired continuously by the Director of studies, and that the other Deans and Heads of Departments were absent as required by Regulation 4.1.11(i) of the Students Handbook. Mr. Alick Gondwe further alleged that the Applicants were not given adequate notice to prepare their cases and this amounted to a breach of their right to be heard. The Applicants seek to

challenge the decision of the Respondent as being based on illegality procedural impropriety, unreasonableness and unconstitutionality. They seek the following orders.

1. A declaration that the decision of the Respondent dismissing the Applicants from Mzuzu University is unlawful and unconstitutional as it was made by a committee that was illegally constituted.
2. A declaration that the Respondent's decision is procedurally improper for having been made without affording the Applicants adequate notice, thus breaching the Applicants' right to be heard.
3. A declaration that the dismissals were illegal as there was no evidence taken on the scene by the invigilator, and there were no witnesses called to testify against the Applicant as is required by Mzuzu University Regulations.
4. A declaration that the Respondent's decision is unreasonable as it was made without regard to the provision for lesser punishments as contained in the University Regulations.
5. A declaration that the Respondent's decision is illegal and violation of the right to education as it was not based on valid grounds as there was no proof of any cheating during examinations.
6. A like order to Certiorari quashing the Respondent's decision dismissing the Applicants from Mzuzu University.
7. A like order to Mandamus compelling the Respondent to re-admit the Applicants into college.
8. An order of stay of the said decision pending determination of the matter and an order of injunction restraining the Respondent, its agents, servants, or whosoever from dismissing the Applicants on the same subject matter of these proceedings until determination of this matter.
9. An order for costs.

The Response

Ms. Chiamiko Chimkwita Phiri Acting Senior Assistant Registrar at Mzuzu University swore an affidavit in which she deposed among other things as follows: That on 8 November 2011 in the University hall where respective examinations were being written, the Applicants were found in possession and did in fact use reference materials in the following examination.

1. TRS 1203 – Hebrew 1 examination - exhibit copy of the said reference materials – CCP 1. Student: Alick Gondwe.
2. ETR 1203 – History for Christian Thought examination – exhibit copy of the said reference material – CCP 2. Student: Mercy Migoza.
3. ESWRMD 3603 – GIS sensing Applications examination – exhibit copy of the said reference materials – CCP 3. Student: Noel Chiutula.
4. ETR 1205 – History for Christian Thought examinations – exhibit copy of the said reference materials CCP 4. Student: Clement Ganizani
5. LMCAD 2401 – Cadastral Studies examination – exhibit copy of the said reference materials CCP 5. Student: Ezekiel Nyirenda.
6. TRS 1203 – Hebrew examinations – exhibit copy of the said reference materials – CCP 6. Student: Rodgers Mpinganjira.

Ms. Phiri stated that after the Applicants were caught with the reference materials, the witnesses to the cheating who were invigilators compiled a report of the circumstances and attached the evidence of the cheating (see CCP 7.)

A Disciplinary Committee was then constituted and the members were as follows:

- a) Professor Joseph J. Utah – Acting Deputy Vice Chancellor
Chairperson of the committee.

- b) Miss Lydia Kishindo - Deputy Dean of the Faculty of Education.
- c) Assoc. Prof. Golden Msilimba - Dean of the Faculty of Education.
- d) Mr. Luke Mwale - Representative to the Dean of the Information Science and Communications.
- e) Mr. Maxon L. Chitawo - The Dean of the Faculty of Environmental Sciences.
- f) Mr. Bright Nyirenda - Dean of Faculty of Tourism and Hospitality Management.

On 29 December 2011 the Respondents called the Applicants to a disciplinary hearing by way of notice and the said hearing was scheduled for 10 January 2012 (see CCP 8 a-f). Ms Phiri stated that the Applicants were given adequate notice.

After the hearing the Disciplinary Committee found as a fact that the allegations were substantiated and noted that academic fraud was a serious matter and they invoked *section 4, Regulation on the Control and Conduct of Examination and Presentation of Academic Work*. She further cited *Regulation 4:2:2 and 4:2:4* which provides for Violations and Penalties. Under 4:2:4 (ii) it is provided that:

“In the case of cheating in the examinations, expulsion from the university will be mandatory.”

In conclusion Ms Phiri stated that there was no procedural irregularity and called upon the Court to dismiss the motion for judicial review with costs.

To my surprise Ms. Chimkwita Phiri did not respond on the allegations that the witnesses were absent during the hearing and that the chairperson was absent during the greater part of the hearing. When the Applicants appealed to the Vice Chancellor their appeal was dismissed and the decision of the Disciplinary committee was upheld. The Vice Chancellor simply advised them to go to Court

Law and Evidence

Regulation 4.1.11 (v), Mzuzu University Regulations (Students Handbook) provide as follows:

“There shall be a Senate Academic Disciplinary Committee which shall be chaired by the Director of Studies and other members shall be the Deans and Heads of the Department concerned.

At Mzuzu University the Director of Studies is the Deputy Vice Chancellor. In this matter it was Professor Joseph Uta. The Applicants alleged the Director of studies only chaired the hearing for about 5 minutes and then left the meeting for good. Ms. Phiri in her affidavit did not dispute this claim. The Applicant stated that for this reason the Committee was not properly constituted.

Absence of Deans and Heads of Departments

The Applicants further alleged that some Deans and Heads of Departments were not present. They did not mention which ones were not present. Ms. Phiri stated and mentioned a list of Deans and Heads who attended the hearing. The onus was on the Applicants to mention specific Deans or Heads who were not present. The Court cannot just guess what they meant. I find that the Applicants have failed to substantiate this claim.

Adequate Notice

Secondly the Applicants alleged that they were not given adequate notice to prepare for the hearing as required by rules of natural justice and administrative law. The notices were written of 29 December 2011 and hearing was set for the 10th of January 2012. This was more than 7 clear days. I wonder how much time the Applicants needed. In all fairness they were given adequate notice and this claim has no merit and must fall.

Appointments to Committees

Counsel for the Applicants cited the case of Mpinganjira and 2 others Misc Civil Application No. 4 of 1994 (unreported) Principal Registry where it was held that appointments to a College Disciplinary Committee are personal and it was incumbent upon the members to attend meetings personally.

“The need for personal attendance arises from the fact that a disciplinary committee is a public body and exercises wide powers on the students of a college including suspension or even dismissal. The choice of senior officers to represent both the college administration and the students confirms the view that not everyone who has the remotest connection with the college can sit in judgment over the students.”

Conclusion

It is trite law that a Disciplinary Committee performs quasi judicial functions and an irregularly constituted committee goes to the very root of the composition of such a committee and the statute which created it. The Applicants have stated that the chairperson who was the Director of Studies left the hearing and never returned. No reasons were given for his departure. The Mzuzu University

Regulation 4:1:11 (i) specifically provides that the Director of Studies shall chair the Senate Academic Disciplinary Committee. The Regulation does not provide for an alternative. It does not say what happens when the Director of Studies is unable to attend. The Regulation does not provide for delegation.

As the Mpinganjira case rightly held such an appointment was personal to the Deputy Vice Chancellor and the living person holding that office at the material time and known to us was Professor J. Uta. Professor J. Uta left the hearing and never returned. For this reason whatever happened after he had left was null and void as the committee ceased to be legally constituted. It is not known exactly at what point he left. The Applicants alleged that it was after 5 minutes. The Respondents have not led evidence to dispute this claim or suggest otherwise or at least that other Applicants' cases were heard and determined while Professor J. Uta was present so as to legitimize the findings of the Committee during those given minutes.

It is therefore the finding of this court that the Senate Academic Disciplinary Committee was not properly constituted and therefore whatever decision they made was a total nullity thus without any force of law whatsoever.

Secondly the absence of witnesses was another violation of the Regulation 4:1:11 (iii) which provides as follows.

"The suspect shall be invited to present his side of the case to the committee where persons who witnessed the alleged cheating shall be present as witnesses."

Even if the Director of Studies Deputy Vice Chancellor was present, the decision of the Committee could have been a nullity for violating Regulation 4:1:11 (iii) of the Mzuzu University Students Handbook.

ORDER

It is the finding of this Court that no decision was made since the Disciplinary Committee was irregularly constituted. As I said earlier on, the question as to whether there was cheating or not is not for this forum. This was a judicial review hearing. I therefore order that all the Applicants should return back to the University to write a new set of examinations within 14 days. Marking and release of results shall be within 7 days making a total of 21 days.

If the Applicants pass they must proceed with their education regard being had to the rules and regulations governing the period of absence from studies. In the case that the Applicants fail they shall be dealt with according to rules and regulations governing the administration of examination at Mzuzu University and also the period of absence from studies in the case of those Applicants who will succeed after re-sitting for their examinations. This Judicial Review succeeds.

Costs

I award the Applicants costs of this action.

Pronounced in Open Court at Mzuzu in the Republic this 24th May 2012.

Hon. Justice D.T.K. Madise

JUDGE