

**IN THE HIGH COURT OF MALAWI
ZOMBA/ MISCELLANEOUS : NO. 1 OF 2015**



THE STATE

VS

**COUNCIL OF THE UNIVERSITY OF MALAWI (UNIMA).....
RESPONDENT**

EX PARTE:

**UNIVERSITY OF MALAWI WORKERS TRADE
UNION (UWTU).....
APPLICANT**

**CORAM: HON. JUSTICE RE KAPINDU
: E. Banda, Counsel for the Applicant
: T. Roka, Counsel for the Respondent
: A. Nkhwazi, Official Interpreter**

RULING

Kapindu, J

1. INTRODUCTION

1.1. This is the Court's decision on an application brought by the Respondent for the discharge of an Order of leave to apply for judicial review that this Court granted to the Applicant on the 26th day of January 2015. It is brought under Order 53 of the Rules of the Supreme Court. The Application is supported by an Affidavit sworn by Counsel McHarven Ngwata of Kalekeni Kaphale Lawyers, legal practitioners for the Respondent.

1.2. I must quickly point out that both parties, on the record, are represented. The Applicants are represented by Counsel Edwin Banda of Veritas Chambers based in Blantyre, whereas the Respondent is represented by Messrs Kalekeni Kaphale Lawyers also based in Blantyre. However, during the hearing of the application, Counsel Edwin Banda was absent. There was an explanation that Counsel Roka advanced. He told the Court that Counsel Edwin Banda had earlier

called him informing him that he was having difficulties to come to Court because his child had locked the car keys inside the car. He informed the Court that for this reason, Counsel Banda had asked for an adjournment. However, Counsel Roka formed the strong view that Counsel Banda was being insincere and that his request was being made in bad faith. He pointed out that Counsel for the Applicants had not complied with the directions given by the Court, and it was his view that the Applicants' Counsel just wanted to buy time as he was not ready. Counsel Roka buttressed his contention by arguing that even though the Applicants' Counsel had been served with the Notice of Intention to Apply for the Discharge of Leave several days earlier, Counsel for the Applicants had not filed anything up to the date of the hearing.

- 1.3.** Counsel therefore prayed for the dismissal of the Judicial Review application, ostensibly for want of prosecution; or in the alternative that the hearing of the application for discharge of leave had to proceed.
- 1.4.** The Court, upon analysis of the facts, concluded that there were no plausible grounds for concluding that Counsel Banda had been insincere in his request for an adjournment. The Court therefore decided to allow the adjournment, in respect of the substantive motion for judicial review, to a date to be fixed by the Court, on an expedited basis, and that costs for the adjournment be awarded to the Respondent.
- 1.5.** The Court however concluded, based on the fact that even though there was proof that Notice of the Application for the Application to Discharge Leave was served on the Applicants' Counsel on 10 February 2015, the Applicants' Counsel had filed nothing in response on the date of hearing, i.e 16 February 2015, that the Applicants had indeed demonstrated lack of sufficient seriousness to the matter and therefore ordered that the Application for the discharge of leave could proceed in the absence of the Applicants' Counsel.
- 1.6.** Counsel Roka stated that the Application to discharge leave had been brought under Order 53, rule 14 of the Rules of the Supreme Court (RSC).
- 1.7.** I must immediately set out the provisions under the Practice Notes in Supreme Court Practice, 1999 (Sweet & Maxwell), commenting on the effect of Order 53, Rule 14 of the RSC, in so far as they relate to the discharge of an order of leave to apply for judicial review. According to Practice Note 53/14/4:

It is open to a respondent (where leave to move for judicial review has been granted ex parte) to apply for the grant of leave to be set aside (see paras 53/14/62 to 53/14/64, below); but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail.

1.8. Counsel submitted that the decision of the Respondent complained of was not amenable to judicial review. According to the Applicants' Notice of Application for Leave to Apply for Judicial Review, in the Form of Form 86A under the RSC, the Applicants seek to challenge the following decisions of the Respondent:

- (a) The decision to withhold the pay of the members of the Applicant who were on strike;
- (b) The decision to refuse the Applicant the right to appeal or the act or omission on the part of the respondent that resulted in failure to hold the appeal hearing;
- (c) The decision of the respondent that members of UWTU were on an illegal strike;
- (d) The finding by the respondent that the strike was illegal;
- (e) The finding of the respondent that the employees on strike were absent from work; and
- (f) The finding that the employees on strike were not entitled to pay or that the respondent was entitled to deduct and withhold their pay.

1.9. Counsel Roka, in his argument, stated that the Respondent deducted pay from the Applicants' members "for the days that the applicants' [members] did not work when the applicants' were on 'strike' or 'sit in'." He proceeded to state that "I say that because the strike was not just deemed but certified illegal, not only by the respondents, but also by the Ministry of Labour." He went on to say: "there are actually a number of exhibits to the affidavit that will actually show what I say."

1.10. The Applicants invite this Court to decide that:

- (a) The decision by the Respondent to declare the strike as illegal is clearly ultra vires in that the Respondent has no power to make the decision under law;
- (b) The Respondent usurped the function and power of the Industrial Relations Court (IRC) and acted as a court, being also the prosecutor and judge at the same time;
- (c) The Respondent violated a decision of the court. The IRC in the case of **Singano, Borman & Others -vs- G4 Security Services Ltd**, Matter No. IRC PR 344/143 of 2006 that: "the question was

whether or not a strike is illegal or not by virtue of not complying with the requisite procedures is to be determined by the IRC which has powers to order an injunction against any intended or actual strike that was perpetuated without following proper procedures. See Section 54(1) LRA.”

- (d) The finding that the employees on strike were absent from work or that they did not do work is absurd, the legal absurdity of which is embarrassing and defeats the enjoyment of freedom to strike and actually takes away the right to strike.
- (e) The Respondent’s resolution that salaries should be deducted and withheld and to continue withholding salaries in that manner is unreasonable and is such that no reasonable public authority acting reasonably would arrive at that decision.
- (f) The withholding of pay in the circumstances is illegal.

1.11. Counsel Roka argued that: “despite being warned of the illegality of their strike, the applicants still proceeded with the strike.” He stated that: “The Respondent decided that since the strike was illegal, that was tantamount to absenteeism with no valid or reasonable excuse. A decision was therefore taken to deduct on the days the applicants did not work. That was well within the Respondent’s power as an employer. It is not just a matter of right, but also a matter of law. The Respondent must deduct from the salary or pay where the employee did not work. That is very clear from Section 56 of the Employment Act.”

1.12. Counsel Roka therefore argued that it was clear that this was purely an employment law matter, that it was purely a contractual matter between employer and employee. He contended that although the Respondent is a public body, this decision was made in exercise of its private law functions. It was Counsel Roka’s submission that judicial review applies to public bodies in their exercise of public law functions. He stated that if this for instance was an issue pertaining to the admission of a student, or the procurement of services, that would be amenable to judicial review. He submitted that however, the decision to deduct pay was not a public law function. As such, it could not be challenged by way of judicial review. He contended that such a decision could only be challenged by recourse to ordinary action.

1.13. Counsel Roka further argued that the right forum for bringing such action would have been the Industrial Relations Court on a claim of the withheld wages, and not this Court.

1.14. It was on this basis that Counsel for the Respondent moved this Court to order a discharge of its earlier order to grant the applicants leave to apply for judicial review.

2. THE LAW

2.1. Judicial Review “*is the most effective means by which courts control administrative actions by public functions*” See **The State vs Attorney General (Ministry of Agriculture and Food Security), Ex Parte McWilson Qongwane & Others**, Miscellaneous Civil Cause No. 36 of 2012 (HC – Mzuzu), per **Madise, J.** It “*is a supervisory jurisdiction which reviews administrative action rather than an appellate jurisdiction*”, *Ibid.* Judicial review of administrative action lies in four categories of cases:

- (a) Where there is want or excess of jurisdiction by the decision maker. In other words, where the decision maker has acted *ultra-vires* his or her powers. See *Supreme Court Practice, 1999 Practice Note 53/14/28A*;
- (b) Judicial review will lie where there is an error of law on the face of the record. See **R. v. Northumberland Compensation Appeal Tribunal** [1952] 1 K.B. 338; **Baldwin and Francis Limited v. Patents Appeal Tribunal** [1959] A.C. 663; [1959] 2 All E.R. 433, HL). See also *Supreme Court Practice, 1999 Practice Note 53/14/29*;
- (c) Where there has been failure to comply with the rules of natural justice. See *Supreme Court Practice, 1999 Practice Note 53/14/30*; and
- (d) Where the decision-maker has acted unreasonably in the sense expressed in what is commonly referred to as the *Wednesbury* principle. According to this principle, decisions of persons or bodies which perform 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 the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. See **Associated Provincial Picture Houses Limited v. Wednesbury Corporation** [1948] 1 K.B. 223; [1947] 2 All E.R. 680, per **Lord Green M.R.** See also *Supreme Court Practice, 1999 Practice Note 53/14/31*.

2.2. One of the important factors that courts consider when granting leave to apply for judicial review is whether, in substance, the remedy sought is based on private or public law principles. Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he or she must, as a

general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise. See **O'Reilly v. Mackman** [1983] 2 A.C. 237; [1982] 3 All E.R. 1124, HL). As a corollary, where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under private law he or she must, as a general rule, proceed by way of an ordinary action whether for a declaration or an injunction or otherwise. For instance, it was held in **R. v. East Berkshire Health Authority, ex p. Walsh** [1985] Q.B. 152; [1984] 3 All E.R. 425, CA that a claim in connection with the dismissal of an employee from an employment with a public authority, where the conditions of employment are governed by a statutory instrument, is nevertheless a matter of private, not public, law. See *Supreme Court Practice*, 1999 *Practice Note* 53/14/33. In the case of **The State vs Malawi Housing Corporation, Ex Parte Nathan Mpinganjira**, Miscellaneous Civil Cause No. 63 of 2003 (HC, PR), **Kapanda, J** (as he then was), stated, in this regard that:

It was submitted on behalf of the *ex-parte* Applicant that since the Respondent is a public company then the public law remedy of Judicial Review should be available to the applicant to remedy a wrong committed against him. I do not agree with this argument. The relationship between the claimant and the Respondent is a private one notwithstanding that the Respondent is a public body. If there is breach of any of the terms of the contract of employment, between the Applicant and the Respondent, the remedy should be found in a legal suit under private law...I wish to put it here that in as much as any wrong invariably involves a breach of a fundamental right or freedom, it is not correct to say that the process to be taken to remedy the wrong will always be through judicial review.

2.3. The Court further held, in the **Mpinganjira case** (above), that:

[T]he position at law is that the remedy of judicial review will not be entertained in all employment cases: **The State -vs- The Southern Region Water Board ex-parte Richard Willard Jones Chikoja** Misc. Civil Cause No. 47 of 2003 (High Court) (unreported decision of Chimasula Phiri, J. of 20th May 2003). I entirely agree with the views of my

learned brother judge in the above-mentioned decision. If we allow that the remedy of judicial should be used in all employment cases willy-nilly then this court will soon replace management of companies or the boards of companies. I hold the view that the Applicant does not have an arguable case for judicial review. The dominant factor in this case is that the Applicant wants to enforce private rights under the private law of employment.

- 2.4.** The Court proceeded even further in the **Mpinganjira case**, to wisely state the main principle based on which a Court is to decide whether or not to allow recourse by way of judicial review in an employment matter. It stated that:

It is trite knowledge that Judicial Review is about reviewing the decision making process of public authorities or bodies. Further, as I understand it, this procedure is used in proceedings where a person wants to establish that a decision of a person exercising public power or a decision of a public body infringes rights which are entitled to protection under public law.

3. ANALYSIS OF FACTS AND LAW

- 3.1.** I have carefully considered the arguments made by Counsel. I must remind myself here that the Order that is being challenged is simply the decision of this Court to grant leave for the Applicant to apply for Judicial review. The Respondent wishes to have that Order discharged. The rules state that such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail. See Practice Note 53/14/4, *Supreme Court Practice*, 1999. In order for me to discharge the order of leave, the Respondent must show that this Court's decision to grant leave to apply for judicial review, which is another way of stating that the case herein is fit for further consideration at a substantive judicial review hearing, was plainly wrong. See Practice Note 53/14/64.
- 3.2.** I must also mention however, that, as the case of **The State vs Malawi Housing Corporation, Ex Parte Nathan Mpinganjiran (above)** illustrates, the mere fact that a decision has been made by a public authority, such as the Council of the University of Malawi, does not entail that such decision is, *ipso facto*, amenable to the process of judicial review of administrative action.

3.3. As the same decision clarifies however, where a decision has been taken by a public authority or body, judicial review will lie where the Applicant wants to establish that a decision of a person or body exercising public power infringes his or her rights, which rights are entitled to protection under public law. Where there is an apparent mix of public and private law issues falling for determination, one must look for the dominant factor. If the dominant factor or dominant issue or the dominant question as it were, falls within private law, then proceedings in judicial review are incompetent. If, however, the dominant factor, issue or question lies in public law, then judicial review is the wisest course to adopt. In the **Mpinganjira case** (above), the Court held that:

I hold the view that the Applicant does not have an arguable case for judicial review. **The dominant factor** in this case is that the Applicant wants to enforce private rights under the private law of employment. (Emphasis supplied)

3.4. It is notable that the main thrust of Counsel Roka's argument is that the instant matter is not amenable to judicial review because it only relates to a private contractual matter, relating to the contract of employment between the Respondent and the Applicant's members. During oral argument, the Court drew to the Respondent's Counsel's attention the various decisions that the Applicants are challenging, and also the various decisions that the Applicants are inviting this Court to make. In response, Counsel stated that the other decisions were not made by the Respondent and that the only decision in issue was the Respondent's decision to deduct pay for the days that the Applicants' members did not work. When pushed by the Court to explain his understanding of the various issues raised by the Applicants, including the challenge that the Respondent's decision to declare the strike illegal was contrary to law; he responded that the Respondent never made such a decision.

3.5. In considering my decision on the narrow issue of discharge of leave before me, I have reminded myself of the importance of ensuring that I only deal with that narrow issue (of discharge) and wherever practicable, refrain from making decisions that might obviate the essence of the judicial review herein, in the event that I decide to dismiss the application for discharge.

3.6. Pausing there, I must observe that employment law can be split into public employment law and private employment law. Public employment law comprises a set of rules of law that provide the

public regulatory framework within which private employment contracts operate. The employment contract itself would have specific terms and conditions on such issues as the rate of remuneration and the method of calculating remuneration; the intervals at which remuneration is paid; the nature of the work to be performed; any provision for the termination of the contract other than those provided by the Employment Act; and any disciplinary rule applicable to the employee, among others.¹ Where a dispute arises between the parties as regards such contents of the contract, normally the law the parties will have recourse to is the private law of employment contracts, as a sub-set of the general law of contract, which falls into the arena of private law. Thus where a decision relates to the public regulatory framework within which employment contracts operate, the issues are public law issues that are clearly amenable to the judicial review process. Where however the issues simply relate to a dispute arising out of the specific provisions of the employment contract itself, the issue falls within the realm of private employment law and the decision generally ought not to be amenable to judicial review.

- 3.7.** By the very nature of private employment contracts, the issues of dispute arising thereunder must be addressed at the individual level. Each employee has a separate contract with the employer and where issues of breach of such contract for instance emanate, the employer must address those issues at the individual level. Issues of a public regulatory nature, by contrast, will generally apply to a group of people systemically; without descending into the specificities of each employment contract. If both public employment law and private employment law issues or questions are raised, this Court will have to decide on what is the dominant issue or question, and such dominant issue or question will determine whether judicial review proceedings are competent or not.
- 3.8.** When I look at the issues and question as raised by the Applicant in the papers in this case, the Applicants have raised clear public law questions. They outline various decisions that the Respondent made which they seek to challenge. The Respondent's Counsel claims such other decisions, apart from the decision to deduct pay, were not made by the Respondent. To my mind, this is not the stage to resolve that dispute. All I can mention is that the questions as to whether the Applicant's members were absent from work or not, and if they were absent whether it was lawful to deduct their wages, could generally be issues of private employment law. It is therefore evident that this is a matter where we have a mixture of public employment law and

¹ See Section 27(3) of the Employment Act (Cap 55:02 of the Laws of Malawi)

private employment law issues and questions for determination by the Court.

3.9. I opine that the crux of the instant matter lies in (a) whether the strike herein was legal or illegal within the framework of the Labour Relations Act; (b) whether indeed the strike was declared illegal on the facts of this case, (c) if so who declared the strike illegal, and (d) in any event who or which institution, in law, has the power to declare a strike illegal. These are the issues that are paramount for the substantive determination of this matter. These in turn are clear public law issues or questions that are amenable to the jurisdiction of this Court through the avenue of judicial review. The issues as to whether the Applicant's members were absent from duty during the days of the disputed strike, and the legality of the deduction of pay, are ancillary to the clear public law questions that call for this Court's determination. In this respect I conclude that the dominant issues and questions for determination are clearly in the domain of public rather than private law.

3.10. I must also reiterate that for the Respondent to succeed in having the order granting leave to apply for judicial review discharged, it had to show that the issues raised by the Applicants, as judicial review matters, were completely out of place in the domain of judicial review; or that any public law issues or questions that might have been raised were clearly dwarfed by private law issues or questions, and that generally the judicial review motion would clearly fail. The Respondent had to show that my decision to grant leave to apply for judicial review was plainly wrong. As shown above, the law discourages applications for discharge of leave to apply for judicial review.

3.11. The other issue relates to whether this matter ought not to have been brought before the Industrial Relations Court at first instance. It could well be that the IRC had jurisdiction to hear this matter. However, firstly, it is the clear position of our constitutional law under Section 108(1) of the Constitution that this Court has jurisdiction to entertain this matter. In saying that, I am mindful that it is a wise approach that matters in respect of which the Industrial Relations Court has jurisdiction ought to be brought before that Court as a general rule. This is important because, among other things, if it were not so, it would defeat the intention of the framers of the Constitution and the Labour Relations Act to set up the Industrial Relations Court. Further, such an approach, as a general rule, has the disadvantage of denying one layer of appeal open to the parties in the event of an adverse decision. There could be more justifications.

3.12. However, the same framers of the Constitution had good reason to confer on this Court unlimited original jurisdiction under Section 108(1). This obviously includes exercising original jurisdiction over labour matters. This suggests that in practically all matters that can competently be dealt with by subordinate courts at first instance, the High Court has concurrent jurisdiction. Such concurrent jurisdiction notwithstanding, judicial policy and practice requires that the High Court should only exercise its original jurisdiction in such cases sparingly, in instances where there is good and justifiable cause. Thus for instance, there are matters that will raise unique or particularly important questions or issues of law, such that there is justification for this Court to assume original jurisdiction (at first instance). A determination as to whether a matter qualifies in this regard is made by the High Court on a case by case basis, depending on the peculiar circumstances and facts of each case. I find this to be one such case. In particular, the key question as to which institution or institutions, body or bodies, person or persons, has or have the power to declare a strike illegal in this country is of such importance as to merit the exercise of this Court's original jurisdiction, at first instance, over the same.

3.13. All in all, therefore, I am not persuaded by the Respondent's submissions in support of the discharge of leave to apply for judicial review. The Application to discharge leave to apply for judicial review herein is therefore hereby dismissed with costs to the Applicants.

Made in Open Court this 2nd Day of March 2015

RE Kapindu, PhD
JUDGE