IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 122 OF 2016

BETWEEN:

COLUMBIA COMMONWEALTH UNIVERSITY LTD **PLAINTIFF**

AND

NATIONAL COUNCIL FOR HIGHER EDUCATION **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO,

Gondwe, Counsel for the Plaintiff

Chigoneka, Counsel for the Defendant

Mtegha, Official Court Interpreter

ORDER

This is this Court's order on the plaintiff's application for an order of injunction restraining the defendant from publishing the results of an accreditation process of the plaintiff university pending determination of the summons for an injunction restraining the defendant from withdrawing the accreditation of the plaintiff university. And also for an injunction restraining the defendant from withdrawing the accreditation of the plaintiff university.

The application was contested by the defendant.

The defendant is a public authority vested with the power to accredit institutions of higher learning in this country and is created under the National Council for Higher Education Act. The plaintiff is one of the institutions of higher learning that is subject to the mandate of the defendant in terms of accreditation.

The defendant is empowered to announce to the public as to which universities have been accredited by the Government to offer higher education in this country. Accreditation informs the public that the qualifications obtained from accredited institutions will be recognized as meeting the requisite standards for such qualifications.

By originating summons dated 14th April, 2017, the plaintiff commenced proceedings seeking the following orders and declarations:

1. A declaration that the defendant has no prescribed quality assurance standards to govern the performance operations and general conduct of higher education which would be the basis for withdraw of an accreditation status and as such the withdrawal of the plaintiff's accreditation is wrong and illegal.

2. An order/declaration that the defendant is under a legal obligation under the provisions of the National Council for Higher Education Act to give the concerned party/plaintiff the actual scores on each parameter to justify its verdict.

3. An order/declaration that the defendant's conduct of withdrawing the accreditation status of the plaintiff University without informing it of the specific steps to be taken towards the attainment of the quality standards is illegal in terms of section 27(5) of the National Council for Higher Education Act and thereby lacks legal basis.

4. A permanent order of an injunction be granted restraining the defendant from withdrawing its accreditation status of the plaintiff University.

5. Any order or relief that the Court deems to be fit in the circumstances.

The remedy sought by the plaintiff is a permanent order of injunction restraining the defendant from withdrawing the accreditation status of the plaintiff University.

The action arose from the defendant's decision to withdraw the accreditation of the plaintiff University following what the defendant says was the plaintiff's failure to meet/comply with the minimum requirements for accreditation.

The plaintiff mainly argued that the defendant's minimum standards for accreditation are not well defined and that in fact there are no minimum standards that have been communicated by the defendant to the plaintiff.

This Court was concerned with the alleged state of affairs and specifically asked counsel for the plaintiff if indeed this country does not have minimum standards for university accreditation and he changed to say that there are minimum standards that were agreed between the defendant and universities in this country. The plaintiff's counsel however submitted that there are no assessment criteria that was communicated to the plaintiff as an institution that is subject to assessment.

The defendant agreed that there are minimum standards that were communicated to all universities but that the assessment criteria is confidential and is not communicated to the plaintiff or other universities.

The Government, before the establishment of the defendant, had initially withdrawn the plaintiff's accreditation in 2010 following the plaintiff's failure to meet minimum standards since its accreditation by Government in 2001. The accreditation was restored to the plaintiff by the Government in July, 2012 whilst noting that not all issues leading to withdrawal of accreditation had been addressed by the plaintiff.

Then when the defendant was established it carried out an institutional audit of the plaintiff between 13th July and 6th August, 2015. A report of the audit was made available to the plaintiff, dated 23rd October, 2015, indicating areas that the plaintiff was supposed to work on in order to meet the minimum standards for accreditation with the defendant.

In paragraph iii of the institutional audit report under directives by the defendant, the defendant clearly directed the plaintiff, within three months, to submit a six to nine months' improvement plan addressing the various weaknesses identified in the report. Further, in paragraph iv of the same report the defendant indicated to the plaintiff that, in case the plaintiff is unable to provide an improvement plan within three months or where the proposed plan in not adequate or unrealistic and unattained the defendant would recommend to the Minister of Education that the plaintiff's registration be withdrawn.

On 20th October, 2015 the defendant had suspended the recruitment of new students by the plaintiff.

In response to the audit report the plaintiff presented an improvement plan as required. By letter dated 1st April, 2016 the defendant approved the plaintiff's improvement plan with a direction for a further verification exercise of the same by the defendant. The validation of the improvement plan was done on 5th July, 2016. The validation exercise was to focus on specific areas that were clearly communicated to the plaintiff. The defendant also by the same letter maintained that suspension of recruitment of students by the plaintiff would subsist until the defendant conducted a verification of the plaintiff's proposed improvements.

By letter dated 11th August, 2016 the defendant advised the plaintiff that the defendant had noted that the plaintiff had significantly implemented the resolutions of the defendant. The defendant directed the plaintiff to embrace a culture of quality and continuous improvement, ensure appropriate governance structures are in place and functioning and establish a special office for quality assurance and enhancement. Further, that based on the validation exercise and the three preceding directions the plaintiff could resume recruitment of students. Further, that the defendant would continue to monitor compliance by the plaintiff with its own improvement plan and the defendant's minimum standards. The defendant added that at any point in time it may revoke the status of the plaintiff if it appears that the improvement plan had been violated.

The defendant during argument indicated that it has no record that it advised the plaintiff to resume recruitment of students save for the purpose of assessing the admission practices of the plaintiff. However, there is clear communication authorizing resumption of recruitment of students by the plaintiff from the defendant's Dr Golden Msilimba in the form of letter dated 11th August, 2015.

Then on 31st October, 2016 the defendant wrote the plaintiff advising that at its meeting on 24th and 25th October, 2016, it had considered the accreditation report for the plaintiff and directed a re-assessment in order to clarify some issues.

The defendant then carried out an accreditation re-assessment of the plaintiff between 16th and 20th January, 2017. The results of this re-assessment were communicated to the plaintiff by the defendant by letter dated 7th April, 2017.

The result of the accreditation re-assessment was the withdrawal of the accreditation of the plaintiff because the plaintiff failed to meet the minimum standards set by the defendant. The defendant then indicated that the plaintiff had also failed to implement its own improvement plan.

The defendant gave a detailed list of areas that the plaintiff must look into and make representations on to the defendant as the defendant was in the process of de-registering the plaintiff. The list is long and one of the issues that appears there is the failure of the plaintiff to meet the required ratio of part -time to full-time staff.

The plaintiff however contends that this re-assessment was based on the allegation that the plaintiff misrepresented certain matters to the defendant. And that the misrepresented matters were not communicated to the plaintiff. To the contrary, this allegation is unsupported by the communication advising about the re-assessment itself, being letter dated 31st October, 2016.

The plaintiff's main complaint is also that it does not know how it scored on each of the minimum standards and therefore its view is that the process followed in withdrawal of its accreditation is unfair and not lawful.

On its part the defendant argued mainly that the plaintiff has been notified of the need to comply with its own improvement plan and that failure to do so would result in withdrawal of accreditation. Consequently, that at every point the plaintiff was warned of the consequences of a failure to implement its own improvement plan.

This Court is aware of the applicable law on interim injunctions as submitted by both the plaintiff and the defendant. The court will grant an interim injunction where the applicant discloses a good arguable claim to the right he seeks to protect. The court will not try to determine the issues on affidavit evidence but it will be enough if the plaintiff shows that there is a serious question to be tried.

The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

If the plaintiff has shown that he has a good arguable claim and that there is a serious question to be tried, then the court will consider the question whether damages would be an adequate remedy to either party if the injunction is granted or vice versa and it turns out later that the court should have arrived at a different decision on the granting of the injunction. Where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of plaintiff's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

Where there is an arguable case and damages are not an adequate remedy, the court will then have to consider whether the balance of convenience favours the granting of the interim order of injunction. See *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *American Cynamid Co. v Ethicon Ltd* [1975] 2 WLR 316.

The first question this Court has to resolve is whether the plaintiff has disclosed a good arguable claim to the right it seeks to protect.

The plaintiff's initial complaint is that there are no minimum standards that it is supposed to meet or that the same are not fairly defined. The plaintiff however admitted that there are minimum standards on what the plaintiff must do as it offers higher education. These standards have been agreed between the defendant and providers of higher education.

The main claim of the plaintiff is however that there was no evaluation criteria with regard to the scores that the plaintiff got on the accreditation re-assessment herein.

The defendant argued that it had notified the defendant that all the while the accreditation of the plaintiff would be withdrawn if the plaintiff failed to meet the minimum standards and its own improvement plan towards meeting the minimum standards.

The defendant however conceded that its evaluation criteria is confidential and is used during the defendant's meetings.

This Court does not agree with the plaintiff that on the affidavit evidence there is a triable issue to go to trial in relation to the plaintiffs' right to a fair accreditation process which the plaintiff seeks to protect. Rather this Court agrees with the defendant that there are no triable issues in this matter.

The affidavit evidence is clear that the plaintiff was seriously wanting in its set up that it was necessary to withdraw its accreditation in 2010. And in 2015 student recruitment was suspended. The accreditation was restored on condition that the plaintiff improves its set up so as to meet the minimum standards that have been set by the defendant in consultation with the plaintiff and other higher education institutions.

As rightly submitted by the defendant, the defendant gave a chance to the plaintiff to come up with an improvement plan. The plaintiff came up with its own improvement plan. Then the plaintiff failed to implement its improvement plan. One of the areas the plaintiff failed to meet was the required ratio of part-time to full time staff. This is a critical issue with regard to the faculty at any university. This is issue comes up in all the correspondence resting with the last communication withdrawing accreditation on 7th April, 2017.

The argument by the plaintiff that it needs to be given a scoring criteria on the minimum standards does not appear convincing to this Court. This is because a scoring criteria is not relevant in this matter. Such a scoring criteria would be relevant if the universities were being rated.

Where a university must meet minimum standards it either meets them or fails to meet them. There is no need for scoring the same on a card or something as suggested by the plaintiff. So, for example on the issue of ratio of part-time to full time staff that was clearly pointed out to the plaintiff by the defendant as one area where the plaintiff failed to meet the minimum standards it is clear that the plaintiff failed to attain the required ratio and there is no need to rate the plaintiff's failure on a scale of any kind. The standard is minimum. One has to meet that standard to be accredited.

Since minimum standards have to be met the plaintiff, it cannot argue that the re-assessment herein ignored whatever strides the plaintiff had made towards realizing the minimum standards. The point is that the plaintiff failed to achieve the least that it was expected to achieve, among other examples, on the ratio of part-time to full time staff.

Since there is no triable issue raised by the plaintiff to go to trial the ex parte injunction cannot subsist and the application for injunction is dismissed with costs to the defendant as prayed for by the defendant. Consequently, the injunction that was granted by this Court in this matter is also vacated.

This Court will therefore not consider the question of adequacy of damages and balance of convenience in the circumstances.

The other issue that arose at the hearing was the propriety of the mode of commencement of the proceedings in this matter.

This Court noted that the matter herein involves the defendant's exercise of powers under public law being the National Council of Higher Education Act. As such, this Court asked the parties to address it on the propriety of proceeding by originating summons as opposed to by judicial review.

The plaintiff submitted that in this case it is claiming reliefs in the form of a declaratory judgement and that the law permits one to use the originating summons mode regardless of the nature of the respondent to the action.

The plaintiff then correctly submitted that according to *O'Reilly v Mackman* (1982) 3 AIIER 1124 the House of Lords in England as per Lord Diplock stated as follows with regard to mode of commencement of proceedings involving public law matters

> Now that those disadvantages to Applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for Judicial Review, as can also remedies for infringement of rights under private law if such infringements should be involved, it would in my view as a general rule be contrary to public policy and an abuse of the 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 of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule, for, though it may normally be appropriate to apply it by the summary process of striking out the action there may be exception paricularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the Plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should in my view, at this stage in the development of procedural law, be left to be decided on a case to case basis; a process that your Lordship will be continuing in the next case in which judgement is to be delivered today (see Cocks v Thanet DC [1982] 3AII ER 1135).

The plaintiff then submitted that, in the present case, the defendant did not raise a preliminary objection on the mode of commencement rather it was the Court that raised the issue. And that therefore this matter falls clearly within the exception as propounded by Lord Diplock in *O'Reilly v Mackman*. Particularly, because the defendant raised no objection as to the mode of commencement, rather it just followed and agreed with the observation of the court. And that this should compel

this Court to treat the same as an exception to the general rule and allow to preserve the action till the final determination of the same.

The defendant actually raised an objection to the mode of commencement following the observation of this Court. The defendant has filed submissions to the effect that it was wrong for the plaintiff to seek to challenge, by originating summons, the fairness of the decision of the defendant taken under public law.

This Court finds that the defendant objects to the continuation of the proceedings herein without following the safeguards of the judicial review process that are available to the defendant as a public body exercising its public law function in this matter.

The objection taken up by the defendant clearly takes this matter out of the exception to the general rule as described in *O Reilly v Mackman.*

In view of the defendant's objection the proceedings herein are found to have been improperly commenced by originating summons instead of by judicial review.

Contrary to the plaintiff's submission, this Court cannot convert originating summons proceedings into judicial review proceedings as rightly submitted by the defendant. The error in commencement cannot be cured under Order 2 Rules of the Supreme Court. See *Muluzi and Another v Malawi Electoral Commission* Constitutional Cause No. 1 of 2009 and practice Note *53/14/33.*

The originating summons is struck out and injunction also declined on the basis of improper commencement of the proceedings.

Costs normally follow the event and shall be for the defendant.

Made in chambers at Blantyre this 16th May 2017.

M.A. Tembo

JUDGE