IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW NUMBER 67 OF 2015

BETWEEN:

THE STATE

AND

COUNCIL OF THE UNIVERSITY OF MALAWI **RESPONDENT**

EX PARTE

DANIEL MKWAILA **APPLICANT**

Coram: JUSTICE M.A. TEMBO,

Hara, Counsel for the Applicant

Mauluka, Counsel for the Respondent

Mtegha, Official Court Interpreter

ORDER

This is this court's order on the applicant's application that the judicial review proceedings herein be converted into a writ of summons proceedings as provided under Order 53 rule 9 (5) Rules of Supreme Court and give consequential directions by analogy as under Order 28 rule 8 Rules of Supreme Court when converting originating summons proceedings to writ proceedings.

The applicant sought leave ex parte to commence judicial review proceedings.

The case of the applicant is basically that he failed to graduate in the 2012/2013 academic year after failing to complete his final year project module or dissertation when he was a student at the Polytechnic, one of the colleges of the respondent. He indicated that he had not been formally informed of his result in that academic year.

In the 2013/2014 academic year, the applicant was told that he had to re-do the project module. By then the academic year had already started. The applicant was also working at Blantyre Print so he decided to defer the project to the next academic year.

In the 2014/2015 academic year, the applicant sought to be re-registered to do his dissertation. His case is that he was authorized to do so. Later the applicant could not graduate because the respondent ruled that he embarked on the dissertation without authorization and that he had in fact voluntarily withdrawn from the Polytechnic and therefore could not be allowed to graduate.

The applicant sought leave for judicial review of the putative respondent's decision of granting authorization to do the dissertation and then refusing to assess the applicant on account of voluntary withdrawal.

If leave were granted the applicant will seek a declaration that the putative respondent acted irrationally, in bad faith and unreasonably in the *Wednesbury* sense. He also will seek a like order to certiorari quashing the putative respondent's decision for being unreasonable.

This Court perused the applicant's papers and was not sure whether to grant or refuse the leave sought. As per the procedure, this Court ordered the application for leave to be made inter partes. See Note 53/14/ 55 to Order 53 rule 14 Rules of Supreme Court.

The putative respondent was served notice of hearing of the inter partes summons for leave.

At the hearing the applicant did not proceed to apply for leave but sought an order of this Court that the judicial review proceedings herein be converted into a writ of

summons proceedings as provided under Order 53 rule 9 (5) Rules of Supreme Court and that this Court give consequential directions by analogy as under Order 28 rule 8 Rules of Supreme Court when converting originating summons proceedings to writ proceedings.

The applicant indicated that he sought the order converting the proceedings because he was of the view that the matter should be reviewed holistically on the merits.

The putative respondent objected to this course of action and instead insisted that the leave hearing proceed since no proper reason was given for the conversion of the proceedings sought by the applicant.

This Court agrees with the applicant that it has power to indeed to order conversion of judicial review proceedings to writ proceedings as provided under Order 53 rule 9 (5) Rules of Supreme Court.

However, this Court notes that it can order the conversion sought where the application for judicial review seeks relief in the form of a declaration, an injunction or damages, if this Court considers that such relief should not be granted in an application for judicial review, but might have been granted if it had been sought in an action begun by writ. See Note 53/14/87 to Order 53 Rule 14 Rules of Supreme Court.

A good example of conversion of judicial review proceedings to writ proceedings is afforded by the case of *Chisa v Attorney General* [1996] MLR 80, in which the Court ordered that the matter proceed by writ after the remedy of judicial review was deemed inappropriate because the plaintiff was challenging the decision of the defendant which affected the plaintiff's rights under private law as opposed to public law. The respondent in that case did not owe the applicant any public law duties.

There is however no indication to this Court in the circumstances of the present case that the reliefs that the applicant seeks to obtain from this Court should not be granted on an application for judicial review. The applicant's intended reliefs are perfectly within the realm of judicial review on the facts of the case. The applicant is properly seeking to challenge the decision of the respondent in exercising its

powers under public law as it discharges its mandate under the University of Malawi Act.

In the case of Chisa v Attorney General, Mwaungulu JA, as he then was, noted at page 92-93 that,

> There is a further reason why judicial review should be refused in this case. There are countermanding affidavits which point to disputation of facts on the matter. These disputations can be best resolved by trial of the action. A judicial review is appropriate where the facts are accepted. The remarks of Woolf LJ in R v Derbyshire County Council; ex parte Noble [1990] ICR 808 were cited by Lord Lowry in Roy v Kensington and Chelsea FPC. Woolf LJ said:
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> "Although at this stage the court is not concerned with the merits of the application, but the question as to whether or not it was a matter which could be appropriately dealt with on an application for judicial review, it is right that I should indicate that an affidavit was filed on behalf of the council by Mr Eric Cobb, who was the director and treasurer of Derbyshire County Council and county director from 1987 to April 1988 and who is now a consultant of the council, in which he purports to give an explanation on behalf of the council as to why it has adhered to its decision. I draw attention to that affidavit because, at least it can be said, having regard to the contents of the affidavit, that the present application is one which is unsuitable for disposal on an application for judicial review – unsuitable because it clearly involves a conflict of fact and a conflict of evidence which would require investigation and would involve discovery and cross-examination.
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> Cross-examination and discovery can take place on an application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those proceedings."
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> Lord Lowry's comments on this statement are humbling:
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> "The concluding observations, by a Judge who is an acknowledged authority on the subject, remind us that oral evidence and discovery, although catered for by the rules, are not part of the ordinary stock-in-trade of the prerogative jurisdiction."

There is no indication on the present matter that there is going to be a need for discovery or cross-examination to warrant the proposed abandonment of the judicial review procedure. In fact, counsel for the applicant remarked during oral argument that the facts on this matter are not really in dispute.

Therefore, the only issue is whether leave should be granted or not in view of the state of the applicant's papers on the ex parte application for leave.

The application by the applicant that the matter should be reviewed holistically on the merits is therefore not well taken as it is not well supported in the circumstances to deny the putative respondent protection of the leave procedure.

For that reason, this Court agrees with the putative respondent that this matter must proceed with the inter partes hearing for leave to apply for judicial review.

Made in chambers at Blantyre this 12th May 2017.

M.A. Tembo
JUDGE