JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 495 OF 2016

BETWEEN

OUSMAN KENNEDY (On his own behalf and as President of the Blantyre International University Students' Union Representing all Students of Blantyre International University) ..... **PLAINTIFF**

AND

BLANTYRE INTERNATIONAL UNIVERSITY ..... 1ST DEFENDANT

NATIONAL COUNCIL FOR HIGHER EDUCATION ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Chinkango, of Counsel, for the Plaintiff
Mr. Msiska, of Counsel, for the 1st Defendant
Mr. Khonyongwa, of Counsel, for the 2nd Defendant
Mr. O. Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

This is this Court's ruling on a preliminary objection raised by the 2nd Defendant.

On 23rd December 2016, the Plaintiff commenced the present action against the Defendants by originating summons wherein the Plaintiff seeks the following declarations and orders:

1. *A declaration that the 1st defendant University where the plaintiffs enrolled in various degree programmes is a duly registered and an accredited institution;*

2. *A declaration that the conduct of the 1st defendant in refusing to render services to the plaintiffs following the 2nd defendant's purported declaration of the 1st defendant's programmes on which the plaintiffs "enrolled" "unaccredited" amounts to breach of contract;*

3. *A declaration that the Minister responsible never promulgated standards for accrediting higher education institutions and that the decision of the 2nd defendant in revoking the 1st defendant's 'accreditation certificate' for failure to meet non–existent requirements is wrong and unlawful;*

4. *A declaration that the 2nd defendant's conduct in forcing the 1st defendant to suspend offering programmes before the end of the academic cycle is unlawful.*

5. *A declaration that the 2nd defendant failed to follow procedures laid down in the NCHE Act before revoking the 1st defendant's accreditation certificate.*

6. *An order that the 1st defendant continue offering the accredited programmes to the plaintiffs.*

7. *An order that the 2nd defendant suspends its order declaring the 1st defendant and/or its programmes not accredited.*

8. *Alternatively, an order that the order declaring the 1st defendant not accredited should not apply retrospectively to us who enrolled with the 1st defendant before the declaration.*

9. *Any order of declaration the Court will deem fit.*

10. *An order of costs."*

The 2nd Defendant is a statutory body whose functions include the registration and accreditation of institutions of higher education. It objects to these proceedings on the alleged ground that the case was commenced using the wrong mode of commencement. It is contended that the action herein ought to have been commenced by way of judicial review and not by writ of summons. In trying to get a full appreciation of the 2nd Defendant's argument, it might be useful to set out in full the relevant parts of the Defendants' written submissions:

> *"3.1.7 A body acting under statute is considered as exercising public power and its actions and decisions are thus amenable to judicial review. See* ***In The Matter of the Ministry of Finance Ex Parte SGS Malawi Limited*** *above.*

3.1.8 It cannot be disputed that the defendant has been acting in pursuance of its mandate under the National Council for Higher Education Act and the Plaintiffs also acknowledge this fact.

3.1.9 The Plaintiffs claim is not based on the Act in itself so as to entitle the Plaintiffs to commence this action by way of originating summons. It is based on the Conduct of the Defendant body and its performance of the powers and functions conferred on it by the Act.

3.1.10 Clearly, the appropriate mode of commencement for the claims herein against the 2nd Defendant would have been judicial review and not originating summons.

3.1.11 We note that if a matter is instituted by way of judicial review, the Court can only examine the procedure adopted and would not be at risk of usurpation of the powers of the Defendant.

3.1.12 In effect, the permanent injunction being sought seeks to indulge the court to make a determination that Blantyre University should not have its accreditation status withdrawn.

3.1.13 The Court does not have the power or even the technical knowledge to make that decision. That is a decision which should be made on merit rather than on procedural technicalities such as those pleaded by the Plaintiff.

3.1.14 If the matter were to be heard as judicial review, the Court would limit itself to the procedures and refrain from commenting on the merits of the decision which is protection that the Defendant would not have in a private action such as this one.

3.1.15 The issues that have been raised in the originating summons all relate to the conduct of the Defendant in the exercise of its public functions and the subsequent decision reached thereon. It is clear from a reading of the affidavit in support of the originating summons that the Plaintiff feels that they were treated unfairly and that the decision to withdraw their accreditation status was therefore flawed.

3.1.16 The plaintiff seeks some declaratory orders and remedies being sought are also available at judicial review.

3.1.17 The Plaintiff raises no private law rights that have been purportedly violated by the 2nd Defendant.

3.1.18 It is our submission that the Defendant is a public body and that the decision the plaintiff complains of was made in exercise of public powers and is as such this subject to judicial review. The proceedings herein therefore, ought to have been commenced through judicial Review."

Counsel Khonyongwa cited a host of cases to buttress his submissions and these included three Malawian cases, namely, **The State v. Malawi Development Corporation ex-parte Nathan Mpinganjira, HC/PR Miscellaneous Civil Cause**

No. 63 of 2000 (unreported), Attorney General (Ministry of Education Ex Parte Amos Suluma and Others Miscellaneous Civil Cause No. 49 of 2006 and **In The Matter of the Ministry of Finance Ex Parte SGS Malawi Limited, HC/PR Misc. Civil Application No. 40 of 2003 (unreported)** and three English cases, namely, **Cocks v. Thanet District Council [1982] 3 All E.R. 1135, R v. Criminal Injuries Compensation Board, ex-parte Lain [1967] 2 All ER 770** and **Chief Constable of North Wales Police v. Evans** [1982] **1 W.L.R. 1155**.

The State v. Malawi Development Corporation exparte Nathan Mpinganjira, supra, was cited for the proposition that judicial review lies against a person or body carrying out public law functions and not private law functions and that private law rights cannot be enforced through judicial review.

Counsel Khonyongwa submitted that the court in **Cocks v. Thanet District Council**, supra, held that where an applicant is enforcing rights under private law the proper remedy was an action under private law. He also argued that where the action was on rights protected under private law the plaintiff could still proceed under remedies in private law even if there was a public law issue.

With respect to **Chief Constable of North Wales Police v. Evans**, supra, Counsel Khonyongwa drew the Court's attention to the observations at p. 1160:

> *"It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question" Judicial review is concerned with reviewing not the merits of the decision in respect of which the application is made, but the decision-making process itself. Therefore, the purpose of the remedy of judicial review is to ensure that the applicant is given fair treatment by the authority whose decision is subject to review. The court has no right to substitute its opinion on the matter for that of the public authority concerned, otherwise the court would, under the guise of preventing the abuse of power, be itself guilty of usurping power of the authority concerned."*

Based on the above submissions, Counsel Khonyongwa forcefully contended that the mode of commencement used by the Plaintiffs in the present action is so fundamentally different from judicial review such that the error cannot be rectified under Order 2 of the Rules of the Supreme Court.

Counsel Khonyongwa submitted that the general rule is as stated in **O'Reilly v. Mackman [1982] 3 All E.R. 1124**, namely, that 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 must proceed by way of judicial review and not by way of an

ordinary action whether for a declaration or an injunction or otherwise. The Court was specifically referred to the following dicta in **O'Reilly v. Mackman**, *supra*, by Lord Diplock at page 1134:

> *"it would in my view as a general rule be contrary to public policy, and as such 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."*

Counsel Khonyongwa further argued that the general rule is subject to one major exception. The argument was put thus:

> *"3.2.5 The only exception recognised to the general rule where there may be exceptions, particularly where the invalidity of the decision arises 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. See [1982] 3 All ER 1124 at 1134.*
>
> *3.2.6 Other exceptions, if any, should be decided on a case to case basis.*
>
> *3.2.7 One such exception is to be found in Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705, where it was held that;*
>
> > *although an issue which depended exclusively on the existence of a purely public law right should as a general rule be determined in judicial review proceedings and not otherwise, a litigant by way of claim or defence, was not barred from seeking to establish that right by action by the circumstance that the existence and extent of the private right asserted could incidentally involve asserting his entitlement to a subsisting private law right, whether the examination of a public law issue.*
> >
> > *...Accordingly, the court clearly had jurisdiction to entertain the respondent's action and ought to have entertained it either because the general rule that issues dependent on the existence of a public law right were to be determined in judicial review proceedings did not apply when private law rights were at stake or because the respondent's claim was an exception to the general rule because his private law rights dominated the proceedings."*

Additionally, Counsel Khonyongwa submitted that while the Court has the power to convert a matter which was began by judicial review to proceed as though it were began by writ, there is no converse power for the Court where a matter is commenced by means other than judicial review to proceed as though it were began by judicial review. He placed reliance on Practice Note 53/14/33 and the case of **Muluzi and Another v. Malawi Electoral Commission, Constitutional Cause No. 1 of 2009 (unreported)**. As Counsel Khonyongwa placed a great deal

of weight on this case, I deem it necessary to quote the relevant passage therefrom in full:

> *"Reverting to the business at hand, the first observation we want to make is that as a Court we fully appreciate the urgent nature of the matter before us. At the same time, however, we wish also to observe that in any type of proceedings that come before the Courts, issues concerning Mode of Commencement are fundamental. The Law, as all its Practitioners ought to appreciate, clearly makes the effort to classify proceedings that may be brought before Courts of Law either by the Cause of Action that gives rise to them, or by the subject-matter they relate to...*
>
> *Commencing proceedings in a correct manner, therefore, is like boarding the right bus or train when traveling, because it is capable of getting you to the destination you want. In like manner, commencing an action or proceedings in a wrong manner is like boarding the wrong bus or train, because it does not have prospects of getting you to the destination you desire, unless you disembark and restart the journey on the correct bus or train. It is important, therefore, that urgent as this matter is, we need at the outset to carry out a candid assessment of the preliminary objection raised against these proceedings, as argued and counter-argued before us with the rich arguments we have earlier adverted to.*
>
> *..Finding therefore, as we have just done, that the Plaintiffs utilized a wrong mode of commencement for their action, a question that immediately arises is whether their error is at all curable or not curable. We are mindful that under Order 2 rule 1(3) of the Rules of Supreme Court, 1999, on which the application to strike out is based, a Court ought not to rush to wholly set aside proceedings, or their Originating Process, on the ground that the proceedings were required to be begun by a different Originating process, if that can be helped. A Court, in our understanding of this provision, is only supposed to take such drastic step, if the irregularity committed is so fundamental and serious, that it renders the proceedings in which it has occurred, a nullity. See: Practice Note 2/1/3 under Order 2 rule 1 of the Rules of Supreme Court on this. Further, a reading of the Practice Notes under this rule, informs us that taken as a whole, from the existing authorities, Order 2 rule 1 ought to be applied liberally by the Courts in order, so far as reasonable and proper, to prevent injustice being caused to one party by undue adherence to technicalities. Among the considerations to be taken into account, therefore, when employing this Order and Rule, we are aware, are questions such as whether the other side has suffered prejudice as a direct consequence of the irregularity applicable, in this instance prejudice as a result of wrong mode of commencement of the case..*
>
> *..In deciding the fate of the present wrongly commenced proceedings, we have incidentally noted that the question of prejudice does not really arise... we hold that no prejudice has in fact been suffered.*
>
> *..In terms of applying Order 2 rule 1(3) of the Rules of Supreme Court in a manner befitting the practice we have alluded to, however, we stumble across a number of complications, if we were to employ the saving provisions on amendment or conversion of the matter from its Originating Summons process mode to Judicial Review mode. Now,*

since the Judicial Review manner of commencing proceedings mentioned in Section 76(5) of the Constitution would, in the Rules of Supreme Court, fall under Order 53, we have also perused that Order and its rules, as well as the Practice Notes thereunder, in determining this matter. We note that whereas Order 53 of the Rules of Supreme Court 1999, requires that a party, before commencing such proceedings, ought first to seek the leave of the Court ex-parte, in Originating Summons matters there is no such preliminary requirement. Converting this matter just like that, therefore, to Judicial Review procedure, would have the effect of side-stepping the requirement for advance leave. Further, we note that Judicial Review proceedings in their unique feature allow parties using their procedure, apart from the reliefs the Plaintiffs can and have in this case brought under the Originating Summons procedure, to additionally pray for like Orders as Mandamus, Prohibition, and Certiorari. A plain conversion of an Originating Summons matter to a Judicial Review, we observe, cannot accommodate these types of Orders, in case the Plaintiffs would have asked for them had they initially resorted to this mode of commencement of their action.

The bottom line in, our judgment, is that the Originating Summons procedure employed in these proceedings, is so fundamentally different from the Judicial Review procedure that should have been employed, that the two cannot easily just exchange places for the case to proceed without experiencing hitches...

..we find that we cannot set aside these proceedings in part only. The procedure that was adopted by the Plaintiffs, of commencing this action in Originating Summons style cannot be converted by our Order into the desired form, as at this stage we are not the forum that would deal with issues of leave, and as certain prayers could be cut off the action if the correct procedure is not allowed resorted to right from its beginning. On these grounds therefore... we must, and we hereby do, strike off the Originating Summons with costs."

Counsel Khonyongwa concluded by submitting that (a) there are no private rights in this matter, (b) it is clearly not one of the exceptions to the general rule that matters of public law rights against a public body must be brought by way of judicial review, (c) a matter began by originating summons cannot be converted to one commenced by judicial review or cured as the two processes are so fundamentally different that they cannot be interchangeable and (d) this action is an abuse of court process and must be dismissed with costs.

The Plaintiffs are of the opposite view. They maintain that the case was properly commenced by way of originating motion. The submissions by Counsel Chinkango were also concise and succinct and I cannot do better than quote them in full. They read as follows:

"3.0 ***LEGAL ISSUES***

3.1 *It is trite that judicial review lies against a person or a body carrying out public law functions – **State vs MDC, exparte Mpinganjira, Civil cause Number 63 of 2000.***

3.2 *Judicial review cannot be used to enforce private law rights against a public authority. **In Re SGS Case, Miscellaneous Civil Application Number 40 of 2003.***

3.3 *There would therefore be no case arguable in judicial review, where the mechanism is sought to enforce an otherwise private right against a public authority. **Re SGS, supra***

3.4 *In **Cocks vs Thanet District Council, [1982] 3 ALL E.R. 1135** it was held that where the action was based on the rights on the rights under private law, the plaintiff is allowed to proceed under remedies in private law, even where there is a public law issue.*

4.0 ARGUENDO

4.1 *The Plaintiff herein seeks to enforce a private law scheme under a contract, with the first defendant, which by extension also involves the second defendant. Such an action would not rise but for the contract between the plaintiff and the second defendant. This is an obvious issue of private rights protected under private law.*

4.2 *Even where there is an interlock with public law, vis a vis the statutory duties of the second defendant, this is not an issue enforceable under judicial review as it is purely a matter of private rights.*

5.0 CONCLUSION

The plaintiffs seeking to enforce private rights, cannot be said to have wrongly commenced the action, albeit against a public body. The action was rightly commenced by way of originating Summons.

6.0 PRAYER

It is our humble prayer that preliminary objection herein be dismissed with costs."

Having considered the preliminary objection raised by the 2nd Defendant and the submissions thereon by Counsel Khonyongwa and Counsel Chinkango, I find the cases of **Chioza v. Board of Governors of Marymount Secondary School [1996] MLR 109** [Hereinafter referred to as the **"Chioza Case"]** and **Koreai v. Designated Board Schools [1995] 2 MLR 649** [Hereinafter referred to as the **"Koreai Case"]** to be direct decisions on point.

In **Chioza Case**, the High Court held that:

> *"...the remedy for judicial review will not lie against those carrying out private duties. However, whilst the respondents may be performing certain private functions in the running of the school, they fall within the public domain when they perform such functions as the admission or expulsion of students from the school, thus rendering their decisions in the respect susceptible to judicial review."* – Emphasis supplied

Further, a perusal of Order 53/14/25 of the RSC shows that it answers the question "against whom does judicial review lie". In **Ridge v. Baldwin [1964] A.C 40**, the court stated that judicial review lies against an inferior court or tribunal, and against any persons or bodies which perform public duties or functions. The court went further to say that the remedy of judicial review may lie against any person or body which performs public duties or functions. What this means, therefore, is that the remedy will not only lie against public officers or institutions but even private institutions that carry out public duties or functions.

In **Koreai Case,** the Plaintiff commenced an action for a declaratory order and an injunction to restrain the defendants from acting on certain invoices and expelling pupils who had refused to pay the new tariff of tuition fees. On the same day, the Plaintiff was granted an interim injunction order, on an ex-parte summons, restraining the defendants from excluding the Plaintiff's children from school on the grounds of refusal to pay school fees.

In the course of its judgment, the Court dealt with the issue of whether or not the plaintiff had rightly commenced the proceedings by way of ordinary action and it remarked as follows, at page 651:

> *"The Defendant has submitted that under Order 53/1-14/15 of the Rules of the Supreme Court there is a provision that where a person seeks to establish that a decision of a private body infringes rights which are entitled to protection under public law he 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 (O'Reilly v Mackeman) [1982] All ER 1124). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process. It would, 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 or 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.*
>
> *The above exposition of the law in the submission of the defendant is correct."* -Emphasis by underlining supplied

It might not also be out of order to mention that I do not agree with Counsel Chinkango's characterization of this action as being more to do with enforcement of *"a private law scheme under a contract, with the first defendant"*. To my mind, the contrary is true: a perusal of the originating summons and the Plaintiff's affidavit dated 23rd December 2016 shows otherwise. The substantive part of the affidavit reads:

> *"3. The University is a private institution of Higher learning that offers different disciplines in accordance to the Laws of Malawi. Some of the Disciplines include, but not limited to:*
>
> *a. Bachelor of Accounting and Finance;*
>
> *b. Bachelor of Actuarial Science;*
>
> *c. Bachelor of Business Administration;*
>
> *d. Bachelor of Counselling Psychology;*
>
> *e. Bachelor of Entrepreneurship;*
>
> *f. Bachelor of Journalism;*
>
> *g. Bachelor of Banking and Finance;*
>
> *h. Bachelor of Economics;*
>
> *i. Bachelor of Information Technology; and*
>
> *j. Bachelor of Tourism and Hospitality Management;*
>
> *4. Further, the 2nd defendant has refused, neglected or avoided explaining if Bachelor of Laws programme is still accredited since students enrolled in it believing that it was duly accredited.*
>
> *5. In addition to the aforementioned, the 2nd defendant has refused to register or accredit the following programmes:*
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> *i. Bachelor of Public Administration and Political Science;*
>
> *ii. Bachelor of Early Childhood Education;*
>
> *iii. Bachelor of Education in Mathematical Sciences;*
>
> *iv. Master of Arts in Community Development;*
>
> *v. Master of Science in Economics;*
>
> *vi. Master of Business Administration; and*
>
> *vii. Master of Science in Finance.*

6. *Before enrolling with University, we took steps to establish if it was duly registered with the authorities and if indeed the above mentioned programmes were duly registered and accredited with the 2nd defendant. Our aim was to ensure that the degrees to be awarded to us will be recognized by the 2nd defendant as required by law and the society at large.*

7. *The 1st defendant assured us that we are going to be awarded with recognizable degrees on completion of our respective academic cycles as it touted the institution and the aforementioned degrees as '**accredited**'. I attach and exhibit hereto the 1st defendant's advert marked as **OU1** which clearly show that the 2nd defendant allowed the 1st defendant to enrol students to pursue studies at the 1st defendant institution.*

8. *The 2nd defendant also encouraged this belief by displaying in its website that the 1st defendant and the above mentioned programmes are accredited and this encouraged us to enrol with the university a copy of the said document is attached and exhibit hereto and is marked as **OU2**.*

9. *I also exhibit hereto what I term as 'certificate of accreditation' from the authorities marked **OU3** which also removed the doubts we had regarding accreditation of the 1st defendants and its programmes.*

10. *We were therefore surprised when the 2nd defendant released a statement in the local papers to the effect that the 1st defendant's aforementioned programmes were not accredited and that it is illegal for the 1st defendant to offer the above programmes/courses. The 1st defendant was also informed of the decision and I attach and exhibit hereto the said statement marked **OU4** in November, 2016.*

11. *We protested the 2nd defendant's decision and we were verbally informed that the decision will not affect students who graduated before the assessment but those graduating after the declaration.*

12. *This created confusion in all of us considering that some of us have just finished our programmes and we are awaiting award of degree certificates whilst others will be finishing within a semester, a year, 2 years or 3 years.*

13. *Due to the 2nd defendant's decision, the 1st defendant, on 20th December, 2016, indicated to us that it has stopped offering the above listed courses in compliance with the 2nd defendant's order and that we have been ordered to go home awaiting possible '**reaccreditation**' or '**deregistration**' of the institution at least after a year."* - Emphasis by underlining supplied

It is clear from the originating summons as read with underlined provisions of the Plaintiff's affidavit above that the case of the Plaintiffs is premised much more on the 2nd Defendant's exercise of its statutory duties. As such, the action ought to have been commenced by way of judicial review.

Finally, I wish to agree with Counsel Khonyongwa that error committed by the Plaintiffs in commencing the present action by way of an ordinary action cannot be rectified under Order 2 of the RSC: the Court cannot, instead of striking out the action, convert the writ of summons to a proper mode of commencement and give directions as to how the case can be proceeded with. I read and re-read the RSC and searched in vain for a provision therein allowing an action begun by originating summons to continue as if it were an application for judicial review. I am confirmed in this view by the apt observations by Lord Diplock in **O'Reilly v. Mackman,** supra, at page 1133:

> *"So Ord 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him. If what should emerge is that the complaint is not an infringement of any of his rights that are entitled to protection in pubic law, but may be an infringement of his rights in private law and thus not a proper subject of judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review."* – [Emphasis by underlining supplied]

In light of the foregoing, the Plaintiff's action is strike-out. As an interlocutory injunction is dependent upon there being a pre-existing cause of action (see the **Siskina (1979) A.C 21** and **Channel Tunnel Group Limited v Balfour Batty Construction Limited [1993] AC 334)**, the injunction granted to the Plaintiffs cannot stand. It is, accordingly, vacated.

On costs, the Court would exercise its discretion by ordering each party to bear its own costs incidental to this case

Pronounced in Chambers this 5th day of September 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE