



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CASE NO. 3 OF 2018**



BETWEEN:

THE STATE

-AND-

**ELECTRICITY SUPPLY CORPORATION
OF MALAWI LIMITED DEFENDANT**

EX-PARTE:

JACK THABWA AND 26 OTHERS CLAIMANTS

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mapemba, of Counsel, for the Claimants

Mr. Ulaya (on brief), of Counsel, for the Defendant

Mrs. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

The Claimants have made an ex-parte application under O. 19, r. 20(3) of the Courts (High Court) (Civil Procedure) Rules (CPR) to obtain permission of this Court for them to apply for judicial review in respect of a certain decision said to have been taken by the Defendant regarding its transport (motor vehicle) policy on entitlement to and disposal of motor vehicles [Hereinafter referred to as the “application”].

The decision which the Claimants seek to be judicially reviewed [hereinafter referred to as the “challenged decision”] and the reliefs being sought have been stated as follows:

<p><i>The, Order, decision or other proceedings in respect of which relief is sought.</i></p>	<p><i>The decision of the Defendant to withdraw motor vehicles from the Claimants in sheer abandonment of its transport (motor vehicle) policy on entitlement to and disposal of motor vehicles; and in its place, implementing directives from the Department of Statutory Corporation before and without domesticating such directives within its existing transport (motor vehicle) policy; and further, misapplication of the said directives with threats of disciplinary action against the Claimants (collectively, the Decision):</i></p> <ul style="list-style-type: none"> <i>(i) without any basis at law and in utter contravention of the established policies of the Defendant;</i> <i>(ii) Retrospectively disentitling the Claimants their vested rights and legitimate expectations;</i> <i>(iii) Without according the claimants an opportunity to be heard on deprivation of vested rights; and</i> <i>(iv) Depriving the Claimant's right to fair administrative justice.</i>
<p><i>Relief Sought</i></p>	<ol style="list-style-type: none"> <i>1. A declaration or order setting aside the decision for being unlawful and therefore void ad initio;</i> <i>2. A declaration or order setting aside the decision for being unreasonable in the Wednesbury sense;</i> <i>3. A declaration or order setting aside the Decision for being a flagrant violation of the Claimants' constitutional right to a fair administrative justice;</i> <i>4. A like Order to certiorari quashing the Decision of the Defendant;</i> <i>5. If permission is granted, an Order staying the Decision</i>

	<p>6. <i>If permission is granted, an Order of interlocutory injunction restraining the Defendant from withdrawing the motor vehicles and also from instituting disciplinary action in furtherance of the said Decision</i></p> <p>7. <i>If permission is granted, a direction that hearing of the application for judicial review be expedited;</i></p> <p>8. <i>Further or other relief;</i></p> <p>9. <i>An Order for costs; and</i></p> <p>10. <i>All necessary and consequential directions be given.</i></p>
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The grounds on which reliefs are sought are divided into six parts. Part 1 sets out the “*The Issue*” as follows:

- 1.1 *Whether the decision is in tandem with the prevailing Transport Policy of the Defendant in so far as it seeks to negate the Claimant’s vested rights and legitimate expectations.*
- 1.2 *Whether the decision of the Defendant and more particularly ordering a withdrawal and surrender of vehicles that are already in use by the Claimants is an affront to the rules of natural justice and the right to fair administrative justice.*
- 1.3 *Whether the decision and more particularly the retrospective application and implementation of an alleged directive from the Department of Statutory Corporations is procedurally fair and lawful within the realm of the Constitution of the Republic of Malawi*
- 1.4 *Whether the Defendant’s decision and more particularly the threat of disciplinary action is procedurally fair and lawful.*
- 1.5 *Whether the conduct of the Defendant in making the Decision was so unreasonable that no reasonable person properly directing himself would have arrived at such a Decision.*
- 1.6 *Whether in circumstances, the Defendant is acting unreasonably, illegally and unconstitutionally.”*

Part 2 is headed “Context of the Decision” and it is couched in the following terms:

- “2.1 Pursuant to the Defendant’s own transport policy, the Defendant procured motor vehicle of the make of Toyota Fortuner for use by its senior managers and the majority of senior managers are in fact using Toyota Fortuner models.*
- 2.2 On 26th January, 2018 the Defendant had a meeting with the claimants where a number of grievances were tabled including the failure of the Defendant to abide by the Transport Policy.*
- 2.3 On 30th January, 2018 the Defendant caused the Transport Manager (who is also one of the claimants in this matter) to issue a Withdraw Notice for all vehicles in the model of Toyota Fortuner from the Senior Managers. The vehicles were to be withdrawn and reallocated. The defendant went on further to restrict the withdraw directive to vehicles that were recently bought and allocated to the Senior Managers.*
- 2.4 On 19th February, 2018 the defendant sent an email instructing some of the Claimant’s to surrender their vehicles in the model of Toyota Fortuner not later than 23rd February, 2018 or else face disciplinary action.*
- 2.5 On 22nd February, 2018 the Defendant’s Board Chair responded and cited consultations with the Department of Statutory Corporations. Effectively, he directed that the cars (Toyota Fortuner models) be returned and the defendant should look for other models.”*

The issue of locus standi is the subject matter of Part 3:

- “3.1 The Claimant have sufficient interest being the Managers that have either been allocated motor vehicles in the model of Toyota Fortuner or affected by the changes in the transport (Motor Vehicle) Policy.*
- 3.2 The Claimants have been directly affected by the decision as their vested rights and legitimate expectations have been affected.*
- 3.3 Both under section 15 of the Constitution of the Republic of Malawi [the Constitution] and Order 19 of the Courts [High Court] Civil Procedure Rules, 2017 [the Rules], the Claimant has the right to file these proceedings.”*

Part 4 states that the Claimants do not have alternative remedies.

The Claimants state, in Part 5, that the Defendant owes the Claimants the constitutional and statutory duty to uphold the right to lawful and procedurally fair administrative action and that deviation from the said duties warrants the intervention of the Court by way of judicial review.

Part 6 deals with interim relief and it reads:

- “5.1 In view of the foregoing, there is need in the interim for the court to issue an interim relief staying the Decision of the Defendant.*
- 5.2 The status quo ante must remain. Motor vehicles in the make of Toyota Fortuner must not be withdrawn from the Claimants.*
- 5.3 The defendant should not institute any disciplinary action on account of failure to surrender the Toyota Fortuner vehicles.*
- 5.4 Other than squashing the decision of the defendant, the court may issue any other interim relief as it deems fit.”*

The application is supported by a sworn statement verifying facts relied upon. For reasons which appear presently, it is necessary to reproduce the sworn statement *in extenso*:

- “2. We are Managers and senior Managers holding different portfolios on the employee of the defendant. For a complete designation of our portfolios and those of the other Claimants we exhibit hereto a list of the Managers and their designation and mark it “MA1”*
- 3. All matters of fact to which we depose in this sworn statement are either from our personal knowledge or have been passed on to us from the other Claimants and from the course of our duty with the defendant and we verily believe in the truth thereof*
- 4. We have read the Statement of Grounds upon which relief is sought and can confirm that the facts therein are true to the best of our knowledge and belief.*
- 5. As Managers and Senior Managers in the employ of the Defendant, we are entitled to a motor vehicle and more particular a Toyota Fortuner or its equivalent with maximum engine capacity of 3000 cc. We exhibit hereto a copy of the defendant’s Transport Policy which was last revised in September 2011 and Mark it “MA 2”*

6. *Pursuant to transport policy exhibited hereto an “MA 2” the defendant has procured motor vehicle of the make of Toyota Fortuner for use by its senior managers and the majority of senior managers are in fact using Toyota Fortuner models.*
7. *The Transport policy exhibited hereto as “MA 2” has not been revised to date.*
8. *On 12th January, 2018 the Claimant sent Communication to the defendant’s Board Chair citing a number of grievances pertaining to implementation and adherence of the Transport Policy referenced herein as “MA2 (a)”*
9. *On 26th January, 2018 the Defendant had a meeting with the Claimants where a number of grievances were tabled including the failure of the Defendant to abide by the Transport Policy exhibited herein as “MA 2”. We exhibit hereto a copy of the minutes for the meeting and mark them “MA3”*
10. *On 30th January, 2018 the Defendant caused the Transport Manager (who is also one of the claimant in this matter) to issue a Withdraw Notice for all vehicles in the model of Toyota Fortuner from the Senior Manager. The vehicles were to be withdrawn and reallocated. The defendant went on further to restrict the withdraw directive to vehicles that were recently bought and allocated to the Senior Managers. We exhibit hereto a copy of the said Memorandum and mark it “MA 4”*
11. *On 19th February, 2018 the defendant sent an email instructing some of the Claimant’s to surrender their vehicles in the model of Toyota Fortuner not later than 23rd February 2018 or else face disciplinary action. We exhibit hereto a copy of the email and mark it “MA 5”*
12. *On 20th February, 2018 the Claimant wrote an email to the Defendant’s Board Chair seeking clarification and response to the outcome of the meeting of 26th January, 2018 as per exhibit “MA 3”. The email is exhibited hereto as part of an email trail and mark it “MA 5”*
13. *On 22nd February, 2018 the Claimant further wrote an email to the Defendant’s Board Chair prompting a response to the earlier email. We exhibit hereto the email as part of the email trail marked “MA 5”*
14. *On 22nd February, 2018 the Defendants Board Chair responded and cited consultations with the Department of Statutory Corporations. Effectively, he directed that the cars (Toyota Fortuner models) be returned and the defendant*

should look for other models. We exhibit hereto the email as part of the email trial marked “MA 5”.

15. *It has come to our attention and knowledge that the Defendant has unilaterally abandoned the Transport Policy referenced herein as “MA 2” and has instead adopted alleged directive from the Department of Statutory Corporations.*

15.1 *The defendant has in the course of our deliberations referred to a circular from the Controller of Statutory Corporations of 29th August, 2012 exhibited hereto and marked “MA 6”*

15.2 *And a further communication of 18th July, 2017 from the department of statutory Corporations marked as “MA 7”*

15.3 *Communication from Memoranda from the defendant citing that it has adopted the Government’s Policy on the disposal of vehicles at 200,000 kilometers as opposed to the 150, 000 kilometers in the Defendant’s Transport Policy. We exhibit hereto such memoranda to some of the Claimants herein namely, Alfred Kuzamani and YD Kambauwa and mark them “MA 8” and “MA 9” respectively.*

16. *We verily believe that the defendant is obliged to enforce its Transport Policy referenced as “MA 2” as opposed to the directives from the Department of Statutory Corporations.*

17. *We verily believe that the alleged directives from the department of Statutory Corporations do not in any way apply to Senior Managers of the defendant.*

18. *We verily believe that unless otherwise restrained by an order of the court through an injunction, the defendant will proceed to withdraw the vehicle or met out disciplinary actions against the Claimants.*

19. *We verily believe that the defendant’s conduct is so unreasonable, discriminatory and unfair”*

Ordinarily, applications of this sort are dealt with in summary fashion, that is, the judge may determine the application for permission without a hearing and the judge need not sit in open court for that purpose: see O. 19, r.20(3), of CPR. However, having looked at the nature of the present application, I perceived that the best way to deal with it was by way of inter-parte hearing. I, accordingly, ordered an inter-parte hearing.

The Defendant opposes the application in its entirety and it has, to this end, filed a sworn statement by Mr. Ted Roka [hereinafter referred to as the “Defendant’s sworn statement”] in which he states the following:

- “a) *The defendant is a private limited company duly incorporated under the Companies Act. I attach and exhibit hereto a copy of the Certificate of Incorporation and Memorandum of Association...*
- b) *The Government of Malawi is a mere shareholder in the defendant Company.*
- c) *The Government of Malawi exercises its shareholder rights in the defendant Company through its Department of Statutory Corporation.*
- d) *The relationship between the claimants and the defendant is a private employment relationship governed by the employment contract and the labour laws of Malawi.”*

The Claimants filed a supplementary sworn statement in which it is deposed that:

- “3. *The defendant has since withdrawn my motor vehicle in the mode of Toyota Fortuner and replaced it with an older version of Toyota Fortuner...*
- 4. *We have also received a letter on disposal of personal to holder motor vehicles from the Department of Statutory Corporations. We exhibit a copy thereof and mark it “TK2”. We refer to “TK2” and note that the defendant has not yet revised the Asset Management Disposal Policy and as well Employment Contracts.” – Emphasis by underlining supplied*

My task at this stage is to determine whether I am satisfied that the Claimants have disclosed a case fit for further investigations at a full hearing of the substantive application for judicial review, for which the Claimants seeks permission: see **State and others; Ex parte Ziliro Qabaniso Chibambo [2007] MLR 372.**

It is the case of the Defendant that the challenged decision is not amenable to judicial review on four grounds. Firstly, Counsel Ulaya argued that the Defendant is not amenable to judicial review process since it is not a public body or institution.

Secondly, it was contended the relationship between the Claimants and the Defendant is not regulated by public law. It is regulated by private law, to be specific, employment law. Judicial review is about enforcement of public law rights as opposed to private law rights.

The third reason has to do with availability of alternative remedy. Counsel Ulaya submitted that the Claimants have an alternative remedy in the Industrial Relations Court, a court specially established to determine labour disputes such as the present one.

Fourthly, Counsel Ulaya submitted that it is trite learning that judicial review is about reviewing the decision making process and not the merits of the decision. In this regard, Counsel Ulaya invited the Court to note that the Claimants are asking the Court to look into the merits of the challenged decision.

The Defendant relied on the decision in **Taulo and Others v Attorney General and Another [1994] MLR 329** and the Editor's Summary thereof is as follows. The plaintiffs were employees of a company called Wico, which was wholly owned by the first defendant. The first defendant decided to sell Wico to the second defendant. The plaintiffs brought an action against the defendants for judicial review stating that the disposal and the sale of Wico was arbitrarily carried out, wrong, unjustified, in breach of the rules of natural justice and against the interest of the plaintiffs and the general public. In dismissing the action, the Court held, among other matters:

- “(1) It is not the purpose of judicial review to review the merits of a decision but the decision-making process.*
- (2) The second defendant was a private person and hence could not be a party to judicial review proceedings. The case against the second defendant was dismissed with costs.*
- (3) The employment relationship between the plaintiffs and the first defendant was governed by a contract of employment. As mere employees the plaintiffs had no rights to interfere with the decision made by the employer to dispose of the company. The plaintiffs thus did not have sufficient interest to warrant them bring an action for judicial review.”*

The Claimants are of the opposite view. They maintain that the case was properly commenced by way of judicial review. Counsel Mapemba argued that any entity performing public functions is amenable to judicial review and he cited the case of **Chioza v. Board of Governors of Marymount Secondary School [1996] MLR 109** [Hereinafter referred to as the “**Chioza Case**”] as authority in support of his argument.

A perusal of O. 19, r.20, of CPR shows that it answers the question “against whom does judicial review lie”. The Order provides as follows:

“20. *Judicial review shall cover-*

- (a) *a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or*
- (b) *a decision, action or failure to act in relation to the exercise of a public function in order to determine-*
 - (i) *its lawfulness;*
 - (ii) *its procedural fairness;*
 - (iii) *its justification of the reasons provided, if any; or*
 - (iv) *bad faith, if any,*

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.” – Emphasis by underlining supplied

It is clear from O. 19, r.20, of CPR that the remedy of judicial review may also lie against any person or body which performs public functions. What this means, therefore, is that the remedy will not only lie against public officers or institutions but even private institutions that exercise public functions.

Based on O.19, r.20, of CPR, the following propositions of law emerge:

- (a) judicial review lies against a person or a body carrying out public law functions: see **State vs MDC, exparte Mpinganjira, Civil cause Number 63 of 2000;**
- (b) judicial review cannot be used to enforce private law rights against a public authority and, as such, there would no case arguable in judicial review where the mechanism is sought to enforce an otherwise private right against a public authority: see **In Re SGS Case, Miscellaneous Civil Application Number 40 of 2003;** and
- (c) where an employee seeks to enforce private law rights against his or her employer who is a private entity, the employee has to proceed under remedies in private law, even where there is a public law issue: see **Cocks v. Thanet District Council, [1982] 3 ALL E.R. 1135.**

In the present case, the case of Claimants boils down to this: the Defendant seeks to implement the challenged decision before effecting appropriate amendments to the Asset Management Disposal Policy and the Employment Contracts: See paragraph 4 of the Claimants' supplementary sworn statement. Clearly such an action would not arise but for the respective contracts of employment between the Claimants and the Defendant. This is an obvious issue of private rights protected under private law even though there is a remote interlock with public law through the involvement of the Department of Statutory Corporations.

Chioza Case is distinguishable. In that 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

Unlike in the **Chioza Case**, the Claimants in the present case could not pinpoint public functions that the Defendant exercises in relation to their case. It has to be recalled the challenged decision relates to the withdrawal by the Defendant of motor vehicles from the Claimants. To my mind, the alleged withdrawal amounts to nothing more than a breach of the terms and conditions of service. The Claimants have advanced no reason at all as to why they cannot take this matter to Industrial Relations Court.

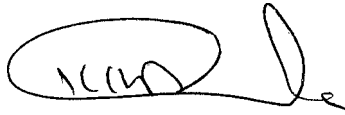
In the premises, it is my finding that the Claimants prematurely sought relief from this Court before resorting to the Industrial Relations Court. In short, it is my finding that the Claimants have not fully exhausted the alternative avenues available to them in respect of this matter.

In summary, for the various reasons given herein, this Court is of the clear view that the Claimants have failed to show a fit case for further investigation in the proposed judicial review. The application for permission to apply for judicial review is, accordingly.

As regards the application for an interlocutory injunction, it is trite that 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**). Permission to apply for judicial review having being denied, the application for an interlocutory injunction cannot be sustained. Accordingly, the application for permission to apply for judicial review has also to fall by the wayside.

Regarding costs, these normally follow the event and since the Defendant has succeeded, I order that the costs of these proceedings be borne by the Claimants. I so order.

Pronounced in Court this 22nd day of May 2018 at Blantyre in the Republic of Malawi.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a series of loops and a long horizontal stroke.

Kenyatta Nyirenda
JUDGE