IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
JUDICIAL REVIEW NO. 22 OF 2018

BETWEEN

THE STATE (ON THE APPLICATION OF JAMISON CHAKUMA AND 16 OTHERS **CLAIMANTS**

-and-

JUDICIAL SERVICE COMMISSION ..... **1ST DEFENDANT**

THE CHIEF JUSTICE ..... **2ND DEFENDANT**

CORAM: **HON. JUSTICE ZIONE NTABA**
Mr. C. Gondwe, Counsel for the Claimants
Mr. Chuma, Counsel for the Defendants
Mr D. Banda, Court Clerk

JUDGMENT

1.0 APPLICATION

1.1 On 17th April, 2018 the Claimants filed and made an *ex parte* application for leave to apply for judicial review under Order 53 (1) of the 1999 Rules of the Supreme Court and Order 10(1) of the Courts Act (High Court)(Civil Procedure) Rules (hereinafter referred to as "the CPR"). The application was supported by sworn statements filed by Jamison Chakuma, Henry Zimba, Joseph Muweta, Mike Lungu and Issa Eddie Salanje as well as skeleton arguments however this Court on 18th April, 2018 ruled that the matter be brought *inter partes* with both parties addressing it on whether the matter could be subject to judicial review. The Claimants were granted leave to apply for judicial review on 25th March, 2018. The judicial review was heard on 26th June, 2018 and judgment was reserved. When judgment was being reserved, the court required of the parties to provide information on the appointments pattern for the third grade magistrates from 2007 to 2018.

1.2 The Claimants' claim before this court, was that they are seeking a judgment, order, decision or other proceeding in respect of which relief was sought as follows –

1.2.1 a decision by the Judicial Service Commission(hereinafter referred to as 'the JSC') to nominate/recommend the appointment of new Third Grade Magistrates (hereinafter referred to as 'TGMs') in contravention of Regulation 13(1)(a) of the Malawi Public Service Commission Regulations (hereinafter referred to as "the Regulations");

1.2.2 a decision by the Judicial Service Commission to recommend filling of vacancies of TGMs by inviting applications from outside the Judicial Service when there were qualified and suitable officers to fill the said vacancies in line with Regulation 13(1)(a) of the Regulations;

1.2.3 a decision by the Chief Justice to appoint new TGMs contrary to Regulation 13(1)(a) of the Regulations thereby violating the Claimants' legitimate expectations as provided for under section 43(b) of the Constitution;

1.2.4 a decision by the Chief Justice not to appoint the Claimants to the position of TGMs when they have suitable qualifications in terms of Regulation 13(1)(a) of the Regulations and section 34(b) of the Courts Act.

1.3 The Claimants sought the following reliefs –

1.3.1 a quashing order quashing the decision by the Judicial Service Commission to nominate/recommend the appointment of new TGMs in contravention with Regulation 13(1)(a) of the Regulations and contrary to the Claimants legitimate expectations that the appointment of new TGMs would take into account the provisions of Regulation 13(1)(a) of the Regulations;

1.3.2 an order quashing the decision by the Judicial Service Commission to recommend filling of vacancies of TGMs by inviting application from outside the Judicial Service when there were qualified and suitable officers to fill the said vacancies in line with Regulation 13(1)(a) of the Regulations;

1.3.3 an order of certiorari/quashing order quashing the decision by the Chief Justice to appoint new TGMs contrary to Regulation 13(1)(a) of the Regulations and in breach of the Claimant's right to legitimate expectations as provided for under section 43(b) of the Constitution; and

1.3.4 an order akin to mandamus compelling the Chief Justice to appoint the Claimants as TGMs pursuant to Regulation 13(1)(a) of the Regulations and section 34(b) of the Courts Act;

1.3.5 if permission is granted a direction that the hearing of the application for judicial review be expedited;

1.3.6 an order of interlocutory injunction restraining the Defendants either by themselves or their servants, agents or whosoever otherwise from implementing the their decision to appoint new TGMs contrary to Regulation 13(1)(a) of the Regulations or doing anything with the like effect until the determination of this matter or further order of the court; and

1.3.7 an order for costs and that all necessary and consequential directions be given.

1.4 The Claimants argued that their application arises from a decision by the Defendants made between 9th and 13th April, 2018 to appoint new TGMs and that successful applicants had been communicated to orally. They argued that they are directly affected by the decision as they are serving members of the Judiciary. All claimants are currently serving as court clerks of different grades who had obtained diplomas in law from the University of Malawi, Chancellor College. They further averred that the 1st Defendant's Chief Human Resources Officer had informed them that they would be considered for the TGM posts as per Regulation 13 of the Regulations as well as section 34(b) of the Courts Act. It was their contention that the decision by the 1st Defendant to hold an open recruitment for the above posts was contrary to the above legal provisions as well as a violation of the rights to development, administrative justice and economic activity. They also averred that the Defendants' conduct was repugnant and went against settled practice on recruitment of judicial officers as such affected their legitimate expectations.

1.5 The Defendants filed three sworn statements in opposition to the application through by Justice Dr. Chifundo Kachale and Evans Lora. They also filed skeleton arguments. The Defendants argued that the matter be dismissed as the Claimants had no arguable claim as the matter is not a public law matter but a private law one, that is, an employment issue. Accordingly, the right forum for the matter was the Industrial Relations Court. They cited ***R v British Broadcasting Corporation ex parte Lavelle*** (1983) All ER 241. They further argued that this position is what is present in Malawi as held in ***Chikosa v Southern Region Water Board***, Misc. Civ. Cause No. 47 of 2003 which stated 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.

1.6 The Defendants also argued that there had been inordinate delay in terms of the claim as it related to the advertisement for vacancies which was made on 2nd September, 2017 and not in April, 2018 as per Order 19 rule 20(5) of the CPR. Therefore the filing of the claim on 17th April, 2018 meant that they were beyond the three (3) months' timeframe. Furthermore, they contended that the Claimants had made their claim on

non-existent law in Malawi as Order 53 of the RSC was repealed. They were superseded by the Courts Act (High Court)(Civil Procedure) Rules which came into force on 3rd October, 2017.

1.7 Lastly, they argued that the post of TGMs is an entry post which requires local and not internal advertisement. They stated that section 4 of the Public Service Act (hereinafter referred to as 'the PSA') supports their argument that there should opportunity for all to participate in the recruitment process and not limit to internal advertisement. It was their contention that the Claimants were also afforded opportunity as mandated by section 12 of the Public Service Act. Therefore they would only have a legitimate expectation if they had been vying for a senior clerk position and not a TGM one. Therefore they prayed that the action be dismissed with costs.

2.0 LAW AND FINDINGS

2.1 The main issue in contention herein lies in section 111 of the Constitution but in particular section 111(3) which states –

> Magistrates and persons appointed to other judicial offices shall be appointed by the Chief Justice on the recommendation of the Judicial Service Commission and shall hold office until the age of seventy unless sooner removed by the Chief Justice on the recommendation of the Judicial Service Commission.

2.2 Secondly, it is prudent to highlight that the powers of the Judicial Service Commission are provided for in section 118 of the Constitution -

> The Judicial Service Commission shall have the authority to—
> (a) nominate persons for judicial office;
> (b) exercise such disciplinary powers in relation to persons in judicial office as shall be prescribed by an Act of Parliament, subject to this Constitution;
> (c) recommend, subject to section 119, the removal of a person from judicial office;
> (d) subject to this Constitution, make such representations to the President as may be prescribed by an Act of Parliament; and
> (e) exercise such other powers as are conferred on it by this Constitution or as are reasonably necessary for the performance of its duties:
> Provided that nothing in this section shall prejudice the right of any person in judicial office who was the subject of any decision by the Judicial Service Commission to appeal to the High Court against that decision.

2.3 Notably, both Parties have relied on the PSA in terms of their cases. It should be noted that section 2 of the said Act states that the Act shall apply with respect to the administration of the public service save as otherwise provided under any written law with respect to any part of the public service. Interestingly, Claimants argued that in terms of the recruitment of the TGMs, this Court should bear in mind section 4 of the PSA which provides that entry into and advancement within the public service shall be

determined solely on the basis of merit, namely, relative ability, knowledge, skill and aptitude after fair and open competition which assures that all citizens receive equal opportunity. They further argued that section 12 of the PSA created a duty for the appointing authorities, in this case the Defendants, to help them realize the said right. Therefore since the Claimants herein, having upgraded their education and therefore being eligible for appointment to become TGMs, had the right enshrined in Section 12 hereof. They further argued that Regulation 13 (1)(a) of the Regulations provides that in exercising its powers in connection with the appointment and promotion of officers, the Commission shall have regard to the maintenance of the high standard of efficiency necessary in the public service and subject thereto shall where, in the opinion of the Commission, an officer is qualified and suitable to fill a vacancy, give preference to that officer over any person not in the public service. Accordingly, the Defendants' conduct of depriving the Claimants herein of the said right did offend the provision of the said Section 12 of the Public Service Act thus making the same *ultra vires* and contrary to the law and thus illegal.

2.4 The Defendants argued that the Claimants were misguided and this was not a promotion in the service as per section 12 which provides that all public officers shall be accorded opportunity for career advancement and self-development through promotions and appropriate available training. Thereby, it not being a promotion, regulation 3 of the Regulations was invoked since the TGMs post was an entry point position. Therefore it was lawfully advertised locally and not internally to give opportunity to all citizens. The Claimants being Court Clerks would only have a legitimate claim for promotion to Senior Court Clerk by using an internal advertisement because it is not an entry point. They stressed that the TGMs is an entry point for Judicial Officers as such it had to be advertised locally in compliance with section 4 of the Public Service Act.

2.5 Arguably, the Defendants have continued to argue that their relationship with the Claimants is governed by a contract and therefore by private law. The Claimants claim is to enforce rights protected under private law and as such they should do so under a private law suit and not under a public law suit, that is, the Employment Act, the Regulations and PSA that are governed by private law and not public law. The mere fact that their employment relationship is governed by the Regulations and PSA does not entail that all rights enshrined therein can be enforced by public law. Additionally, it would be a serious infringement of section 4 of the PSA to recruit the Claimants on the basis of special preference as they have argued against what they have termed "outsiders". The principle of special preference or priority is used when there is a tie on the score card with those who are not in the public service. That situation is not tenable in this matter as the Claimants have not produced evidence to that effect. This Court has from the beginning, insisted that the issues herein go beyond private law issues because they are not only about employment rights issues. They are issues about the interpretation of the law governing the appointment or recruitment into the judiciary and the decision by the

Defendants to invoke regulation 3 as opposed to regulation 13(1)(a) of the Regulations.

2.6 Judicial review is a remedy that lies against a public body or office and it can be granted on a number of reasons for instance want or excess of jurisdiction and failure to comply with rules of natural justice to mention a few. In ***State v Director of Public Prosecutions and Another ex Parte Chilumpha,*** Constitutional Cause No. 5 of 2006 where Justices Chipeta, Potani and Kamwambe held as follows –

> *"Judicial review, as currently understood and accepted, is a procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions. (See Practice note 53/1-14/1 under order 53 rules 1 to 14 of the Rules of Supreme Court). As aptly put by Lord Hailsham L.C. in Chief Constable of North Wales Police vs Evans (1982) I WLR 1155 at 1160, judicial review is concerned with reviewing, not the merits of the decision the application relates to, but rather the decision – making process. (See: note 53/1 – 14/6). In the application before us, to avoid reviewing what the law forbids us to so review, we should really be looking for proceedings and/or decisions, conducted or made by inferior courts or tribunals or by persons or bodies performing public duties or functions, and only when we find such should we check whether the decision-making process in them calls for the proposed review.*

2.7 Consequently, the crux of the issue is what this Court is concerned with, that is the circumstances surrounding the entire decision of the JSC from departing from its own practice of appointment of TGMs. This Court's views are supported by Lord Templeman's views in ***Re Preston*** [1985] AC 835 at 862 –

> *"Judicial review is available where a decision making authority exceeds it powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers."*

2.8 Furthermore the sentiments of Justice Tembo (as he was then) in ***Kalumo v Attorney General*** [1995] 2 MLR 669 at 671-672 offer valuable wisdom –

> *"Let me pause for a moment to consider to consider the law on the question of judicial review. 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, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or injunction or otherwise. See **O'Reilly v Mackan [1983] 2 AC 237**. If a public authority charged with a public duty acts without jurisdiction or exceeds his jurisdiction judicial review will lie. Thus, where a decision of an administrative authority is founded, wholly or partly on an error of law, the authority has acted outside its jurisdiction and accordingly its decision is liable to be quashed. See **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147**. Where the rules of natural justice apply and the decision has been reached in breach*

of those rules judicial review will lie. See ***Ridge v Baldwin [1964] AC 40.*** *Broadly, the rules of natural justice embody a duty to act fairly. Whether those rules apply and the extent of the duty depends upon a particular type of case concerned. The rules of natural justice or fairness are not cut and dried. They vary infinitely. They will normally apply where the decision concerned affects a person's rights, for example, where the property is taken by compulsory purchase or he is dismissed from a public office. See* ***R v Home Secretary, ex parte Santllo [1981] QB 778; Ridge v Baldwin*** *(cited above).*

Besides the foregoing, let me also note that judicial review is concerned with reviewing not the merits of the decision in respect in which the application is made, but the decision-making process itself. Indeed the purpose of the remedy of judicial review is to ensure that the plaintiff is given fair treatment by the Army Commander. I have no right to substitute my opinion on the matter for that of the Army Commander, otherwise the court would, under the guise of preventing the abuse of power, be itself guilty of usurping the power of the Army Commander. Thus, the court in judicial review will only interfere with the decision of a public authority, such as the Army Commander, where the authority; has acted without jurisdiction or failed to comply with rules of natural justice."

2.8 The Defendants also argued that there is no provision for internal advertisement for entry positions as alleged by the Claimants and that they were guided by the law and therefore they acted *intra-vires*. However, this Court's considered position is that this is a wrong interpretation of the PSA and its subsidiary legislation because the issue of an internal vacancy is created by the provisions of regulation 13(1)(a) of the Regulations and as such their lack of not having taken into consideration the said regulation and only relied on regulation 3 can for all intents and purpose be considered *ultra virès*. This is more so, if one looks at the provisions of section 14 of the PSA -

> The management of the public service shall be based on modern and appropriate human management concepts and techniques within a framework which meets the basic requirements for—
> (a) efficient and effective delivery of service to the public;
> (b) concern for the welfare of public officers, as employees;
> (c) adherence to law;
> (d) administration of staff regulations with sensitivity to the social and economical impact of such administration on the individual public officer.

2.8 Arguably, the 1st Defendant is the recruiting arm of the Judiciary and is legally bound to undertake any appointment, nomination or recruitment of judicial officers based on the Constitution as well as any other written law. Notably, the Judicial Service Commission as per section 5 of the Judicature Administration Act (hereinafter referred to as the 'JAA') to have –

> The Commission may—
> (a) subject to sections 118 and 119 of the Constitution, make regulations for—

(i) the nomination of persons for judicial office;
(ii) the exercise of disciplinary powers in relation to persons holding judicial office;
(b) make regulations for—
(i) the appointment of members of staff of the judiciary;
(ii) the exercise of disciplinary powers in relation to members of staff of the judiciary;
(iii) with the approval of the Minister responsible for finance, the terms and the conditions of service for members of staff of the judiciary; and
(c) make regulations for the general administration of the judiciary.

2.9 Accordingly, due to the 1st Defendant not having developed its own regulations for use in appointment or recruitment, relies on the Regulations. Therefore, their reliance on these Regulations were to be to the whole of the aspects of the Regulations when making decisions on recruitment and not to only part of them. Accordingly, when noting that both regulation 3 and regulation 13(1)(a) were applicable, the JSC should have appropriately made decisions which should have taken into consideration both circumstances to ensure that the interests of the Claimants as well as other citizens were balanced especially taking into consideration that the system did in some way favour those already in the public service. It is trite law that decision makers have to be rational and reasonable in their decision making so as to come up with reasonable decisions. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably' as held in ***Associated Provincial Pictures v Wednesbury Corporation*** (1947) ALL ER 680) and Lord Green MR further stated that the decisions of persons or bodies performing 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 considering 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. Therefore, the JSC should have made its decision reasonably so as to be in line with the principles of section 13 of the PSA which was uphold that all public officers shall be accorded facilities for staff welfare, job satisfaction, higher quality of working life, rewards and incentives through the establishment and institution of appropriate schemes and mechanisms. It would be important to raise a very interesting issue which this Court has observed despite its views above.

2.10 The Constitution of Malawi is clear that a magistrate 'of whatever grade' is considered a 'judicial officer'; their appointment by the Chief Justice may only take place on the recommendation of the JSC. A judicial officer's employment (appointment, promotion, suspension, remuneration etc) is regulated by the said Constitution. Both the Claimants and Defendants have argued that they are public servants, but a thorough examination of the PSA as stipulated in section 3 is that it applies to the public service being the service implementing the executive functions of

government. Further that the PSA applies only to the 'administration of the public service' and sections 5 and 12 pertain to the criteria to be applied by decision-makers considering appointments and promotions only to ***posts in the public service (my own emphasis)***. As established above, the post of Third Grade Magistrate is not a post in the public service but a judicial office. All things being equal, there would have been no requirement on the JSC to take the PSA into account when deciding how to advertise such posts. Moreover, the decision by the JSC to advertise the posts externally, rather than internally would not have been subject to procedural judicial review other than by the fact that the JSC had argued that they have been applying the principles of the PSA and not adopted them as principles for the itself in its own regulations as stipulated in section 5 of the JAA. However, it should be noted that despite this interesting twist, the decision of JSC is reviewable by direct application of section 43 of the Constitution as will be noted in the paragraphs below.

2.11 At this point, it is highly crucial, that this Court discusses, the far reaching implications of why this case goes beyond the procedural judicial review which has been highly and ably argued by both parties. By virtue of sections 12 (vi) and 43 of the Constitution, which entrench the principle of the rule law and the right to administrative justice respectively, the basis for judicial review is grounded in the Constitution. It is not just grounded in the English law concept of the inherent powers of court nor is it limited to the *ultra vires* doctrine. Interestingly, Danwood Chirwa in his article 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' (2011) published in 55(1) *Journal of African Law* 105 at 107 stressed this position. He further argued that section 43 also recognizes the ground of procedural fairness, which is broader in scope than the traditional rules of natural justice. The common law rules expressed under Order 19 of the CPR or the old Order 53 of the RSC are valid for the procedural judicial review, but are subservient to the Constitution. It is important to note that constitutional supremacy as per sections 4, 5, 8 and 48(2) of the Constitution means that the courts have an obligation to ensure that administrators and others who hold public power not only act within powers granted to them but also 'function in accordance with the laws enacted by the legislature as well as with the ethos, values, principles and edicts espoused by the Constitution.

2.12 As already pointed above, there are several grounds upon which judicial review may be conducted. These grounds include the principle of legality and the right to administrative justice. Judicial review on the ground of the right to administrative justice can only be conducted if the party seeking the review can prove that the decision/conduct to be reviewed constitutes 'administrative action'. This Court has already indicated that arguments of both Claimants and Defendants in this case, have paid little attention to the issues of legality or the administrative action because in Malawian case law, courts have typically relied on Order 19 of the CPR or Order 53 (then) of the RSC as the basis for judicial review, which does not require the Claimant to show that the action being challenged constitutes administrative action as stated in ***Chisa v Attorney General*** [1996] 19 MLR 80 where Mwaungulu J (as he then was) relied on Order 53 to

conclude that judicial review lies against ***persons or bodies with judicial, quasi-judicial and administrative functions (my emphasis).*** Interestingly, in ***Chawani v Attorney General,*** MCSA Civil Appeal no 18 of 2000, the Supreme Court of Appeal stated per Tambala JA held that judicial review is available to situations where there is an abuse [by an] executive arm of government and no more.

2.13 Thus, in determining whether conduct is administrative action or not, the court must assess the nature of the impugned decision/conduct and establish if the decision/conduct can be characterized as 'administrative action'. Stimulatingly, the term 'administrative action' has no universally accepted definition, although it has long been employed in the administrative laws of many countries such as Germany, Australia, Namibia and South Africa. For instance in South Africa neither the Constitutional Court nor the Promotion of Administrative Justice Act, Act No. 3 of 2000 provide a comprehensive definition. The South African Supreme Court of Appeal stated in ***Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Other,*** 2005 (6) SA 313 (SCA) para 24 and ***Minister of Home Affairs and Others v Scalabrini Centre and Others,*** 2013 (6) SA 421 (SCA) paras 54-57 that conduct of an 'administrative' nature is generally understood as 'the conduct of the bureaucracy ... in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law. This approach has been confirmed by the Constitutional Court, which added in ***Minister of Defence and Military Veterans v Motau and Others,*** 2014 (5) SA 69 (CC) para 29 and 34 that 'administrative powers usually entail the application for formulated policy to particular factual circumstances' and that the 'exercise of administrative powers is policy brought into effect'.

2.14 Malawian courts have continued to grapple with what constitutes administrative action in Malawian law, Danwood Chirwa observed in the article cited above that the Malawian courts have to date not appreciated the central role of section 43 of the Constitution as the source of the power of judicial review and as a result have not considered the definition systematically. For instance in ***The State and Director of Public Prosecutions ex parte Gift Trapence et al,*** Constitutional Cause No. 1 of 2017 (Unrep) where the court held that there was a public duty owed by the Director of Public Prosecutions under section 43 but it opined that the specific duties enshrined in section 99(2) were hardly subject to the requirements of the said section 43 because they do not fall under administrative actions. However, the court acknowledged that despite the powers not being administrative, section 43 did provide for judicial review of administrative actions.

2.15 As long as administration action entails a decision taken or a failure to take a decision while exercising a public function. Such decisions are ostensibly taken under empowering provisions in law for the fulfilling of the function of state administration. Furthermore, it is also aimed at consequences outside of the administration, although formality should not divert attention from the substantive question of administrative justice. What is

critical to this determination is whether the action in this case was 'administrative' in the nature is of the function in issue? In determining the nature of the function, guidance may be sought from the source of the function. For instance, the ***Chisa*** decision where Mwaungulu J (as he then was) held that the existence of a contract is [usually but not always] an indication of the existence of private rights'. On the other hand, powers emanating from statute and subsidiary legislation will invariably give rise to administrative action as held in the British case of ***R v Panel on Take-overs and Mergers, ex parte Datafin Plc*** [1987] QB 815, 847 paras A-B per Lloyd LJ.

2.16 Following the discussion of the principles, it is critical to identify what decision of the JSC and Chief Justice is being challenged, in order to determine whether that decision was 'administrative action' thereby rendering it amenable to review under section 43 of the Constitution. The Claimants do not explicitly characterize the impugned action, beyond referring to the entire 'decision making process or processes. The Defendants stated that the impugned decision was that of the JSC to advertise the post of third grade magistrate in the newspaper, as opposed to solely advertising internally. This characterization was challenged by the Claimants when they argued the Defendants contravened of Regulation 13(1)(a) as well as the JSC's own conduct in its appointment or recruitment over the years. Therefore, this Court has to answer whether the decisions pertaining to judicial appointment or recruitment be considered an administrative action.

2.17 It is trite that decisions taken by the JSC in connection with judicial appointments are typically 'administrative action' because those decisions are made by an organ of the state (the JSC) as part of exercising public authority in terms of an empowering law, in this case, the Constitution. In South Africa, such decisions are administrative in nature but section 1(gg) of the Promotion of Administrative Justice Act specifically excludes review of 'a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law'. Thus, such decisions by the JSC are by their nature administrative conduct but they cannot be reviewed in terms of the test provided in Promotion of Administrative Justice Act. However, where the decisions of the JSC do not pertain to the nomination, selection or appointment of a judicial officer, they do constitute administrative action that is reviewable in terms of Promotion of Administrative Justice Act. For instance, decisions relating to its procedure, are reviewable as administrative action in terms of Promotion of Administrative Justice Act. This was decided in ***Mail & Guardian Limited v Judicial Service Commission; e.tv (Pty) Ltd v Judicial Service Commission,*** 2010 1 All SA 148 (GSJ); 2010 6 BCLR 615 (GSJ) par 15. In this matter the court considered whether the JSC's decision not to open its hearing to the public and the media was lawful under Promotion of Administrative Justice Act. Equally this has not seemed to constrain judicial review of JSC decisions on the grounds of the principle of legality as per ***Cape Bar Council v Judicial Service Commission and Others*** [2012] 2 All SA 143 (WCC) at 59-60 where the Western Cape High Court

held that certain conduct may be excluded from the definition of administrative action in Promotion of Administrative Justice Act and thus not be reviewable on the wider grounds provided for in Promotion of Administrative Justice Act, but this does not mean, if it involves the exercise of a public power, that the same conduct, even if not reviewable in terms of Promotion of Administrative Justice Act for example due to it being excluded from the definition of "administrative action", it is not reviewable in accordance with the principle of legality. ... The conduct of the JSC in failing to fill the two vacancies is reviewable on the principle of legality and then specifically on the grounds that as a body enjoined with the constitutional function of making recommendations regarding the appointment of Judges, it must be accountable for its failure to do so in a transparent manner to demonstrate that its failure was not arbitrary or irrational.

2.18 Turning to the issues herein, the JSC, in advertising the post of Third Grade Magistrate, can rightly be held to be an exercise of a public function in terms of section 111 of the Constitution. Markedly, their powers emanate from the Constitution, which is a factor indicating towards characterization as 'administrative action' rather than private action. The JSC's decision-making power to nominate judicial officers could be said to 'entail the application of formulated policy to particular factual circumstances' as held in the ***Motau*** case. Thus the impugned decision by the JSC (to advertise the post externally as opposed to internally) is an administrative action. Consequently, this decision by the JSC is reviewable in terms of section 43 of the Constitution as well. Unlike in South Africa, conduct of this nature by the JSC is not excluded from review under the right to administrative justice in Malawi.

2.19 This Court will now interrogate the issue of legitimate expectation as argued by the parties. The legitimate expectations doctrine requires that where a decision-maker leads a person affected by a decision legitimately to expect either that a particular procedure will be followed in reaching a decision or that a particular (and generally favourable) decision will be made (and such a decision would be within his powers), then, **save where there is an overriding public interest, the legitimate expectation must be protected (my own emphasis)**. The trust that the individual has placed in the decision-maker should not be betrayed: and if it is betrayed the decision will be quashed in judicial review proceedings as held in ***Attorney General of Hong Kong v Ng Yuen Shiu*** [1983] UKPC 2; [1983] 2 ALL ER 346 (PC).

2.20 The doctrine of legitimate expectation comes from the English law, where it was first pronounced by Lord Denning in *obiter* in the case of ***Schmidt v Secretary of State for Home Affairs*** [1969] 2 Ch 149 (CA). In that case, Lord Denning observed that a 'legitimate expectation' existed which entitled the complainants to be heard before an adverse decision was made against them. Early academic and judicial reflection on the doctrine tended to ascribe it to the rules of natural justice, particularly the requirement to hear the other side as observed by M A Ikhariale in 'The Doctrine of Legitimate Expectations: Prospects and Problems in Constitutional

Litigation in South Africa' (2001) 45(1) *Journal of African Law* 1, 4 citing generally Caldwell, T L, 'Legitimate expectation and the rules of natural justice' (1983) 2 *Canterbury Law Review* 45. He stated further that the doctrine was 'unwittingly confined to the realm of procedure'. Since then, the doctrine has grown to be accepted as containing both procedural and substantive applications as held in of ***McInnes v Onslow Fane*** [1978] 1 WLR 1520. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken, while a substantive legitimate expectation arises where an authority makes a lawful representation that an individual will receive or continue to receive some kind of substantive benefit.

2.21 Further, section 43 of the Constitution provides that every person shall have the right to –

> (a) lawful and procedural fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
> (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known.

2.22 In ***Council of Civil Service Union v Minister for the Civil Service*** [1984] 3 ALL ER 935, it was decided that if a public authority's conduct creates a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation particularly if he acted on it. The Claimants argued that they had a legitimate expectation that they would be nominated for the position of TGMs because the Chief Human Resources Officer for the Judiciary told them that the posts would be recruited from 'serving members of the judiciary' despite this being denied by Evans Lora in a sworn statement. Mr Lora also denied that it had been the practice in previous years that court clerks who obtained the basic legal qualifications necessary for the TGM post were considered by the JSC and were appointed to those positions. Notably, both parties have addressed this legal basis by invoking section 43 of the Constitution. As noted, section 43 of the Constitution states that persons who have legitimate expectations of being selected and appointed as judicial officers have a right to a lawful and procedurally fair judicial selection and appointment process, and they have a right to be given adequate reasons.

2.23 Observably, a South African Constitutional Court case on legitimate expectations provides some guidance. In ***Premier, Mpumalanga, and Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal*** 1999 (2) SA (CC) 91 at 107-108, O'Regan J observed –

> *"The concept of 'legitimate expectation' employed in section 24 of the interim Constitution needs to be interpreted in the light of the concept of 'legitimate expectation' that sprang from Lord Denning's judgment in Schmidt and that has been adopted in a*

wide variety of jurisdictions. ... Expectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind. There are indeed circumstances in which a legitimate expectation will arise which has interrelated substantive and procedural elements, as Corbett CJ also recognized in Traub. Once a person establishes that a legitimate expectation has arisen, it is clear from the language of section 24(b) of the interim Constitution that he or she will be entitled to procedural fairness in relation to administrative action that may affect or threaten that expectation. It is not necessary for us to decide in this case in what circumstances, if any, a legitimate expectation will confer a right to substantive relief beyond that ordinarily contemplated by a duty to act fairly."

2.24 Notably, Lord Fraser in ***Council for Civil Service Case*** also said that legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Such expectations may give rise to a form of estoppel as decided in ***R v Secretary of State for the Home Department, ex parte Asif Mahmood Khan*** [1984] 1 WLR 1337. In ***Attorney-General of Hong Kong v Ng Yuen Shiu*** 21 [1983] AC 629 (PC), the Privy Council held that even though natural justice did not apply to the consideration of immigration claims, if an assurance had been given to the effect that it did, then the immigration authority would be estopped from resiling from that position on the ground that a legitimate expectation would have arisen in favour of the immigrant. It was not a defence that the immigration authority was acting within the scope of its discretionary powers. Therefore, if a public authority or body sets out some criteria and later unilaterally decides to alter them mid-way to the detriment of those who would have complied with them, the discretionary powers of the body will be ignored for the simple reason that a legitimate expectation had been created that the rules would not be changed in the course of the transaction as pronounced in the ***Khan*** case as well as ***R. Liverpool v. Corporation, ex parte Liverpool Taxi Fleet Operators Association*** [1975] 1 All ER 379.

2.25 C Forsyth in The Provenance and Protection of Legitimate Expectation: A Confusion of Concepts, [1980] Camb LJ 238, 241 asserted that the judicial motivation for seeking to protect expectations such as these is based on the logic that 'if the executive undertakes, expressly or by past practice, to behave in a particular way the subject expects that undertaking to be complied with. The case of ***Ex Parte Muluzi and Another, In Re: S v Electoral Commission***, (No. 2 of 2009) [2009] MWHC 8 (16 May 2009) is instructive in the formulation and application of the doctrine of legitimate expectations in Malawi. In this case the applicants argued that they had a legitimate expectation of entitlement to be heard before the respondent made a determination on the eligibility of the 1st applicant as a presidential nominee. The respondents, however, argued that they complied with the Constitution and the statute in that they did what they were required to do and provided the reasons for the determination in

writing. Twea J (as he then was) observed that the question remains how one acquires a legitimate expectation.

2.26 Importantly, a legitimate or reasonable expectation may arise from a statutory instrument or be induced by the decision maker or from the existence of a regular practice which the claimant can reasonably expect to have as per the ***Council of Civil Service Union*** decision at page 404 as well as ***Khrishna Vishnu Patel, Kamal Vishnu Patel and the State and The Minister of Home Affairs,*** Misc. Civil Cause 24 of 2001. This Court has also taken into account the views of the learned author Clive Lewis in Judicial Remedies in Public Law, Sweet and Maxwell London, 1992, page 97 that -

> *"In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or a representation made by a public body, or from a previous practice of a public body. The promise of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken..."*

2.27 The concept of legitimate expectation was also considered in the Malawian case of ***Ex Parte Mhango and Others; In Re: S v Minister of Finance and Another,***(163 of 2008) [2009] MWHC 2 (05 March 2009) in which funds were earmarked for a certain purpose in a government budget. When those funds were not disbursed, the court held that the applicants had the rights to legitimately expect that funds would be disbursed, especially because no lawful reasons were advanced for non-disbursement.

2.28 The Claimants' case rests on two grounds - that they had a legitimate expectation that a procedure of offering the posts to internal candidates first. Secondly, the Defendants would be followed based on a clear and unambiguous promise by the decision-maker and consistent treatment (with previous law clerk appointees). The landmark Australian case of ***Attorney-General for New South Wales v Quin*** (1990) 170 CLR 1 decided on the above principles and on the issues above, that is, clear and unambiguous promise and consistent treatment. It is a strikingly analogous case to the present one, though with one meaningful difference. In that case, the New South Wales Courts of Petty Sessions were abolished and replaced by Local Courts. The relevant legislation provided that when the magistrate positions in the Courts of Petty Sessions were extinguished, the magistrates would 'accede' to magistrate positions in the new Local Courts. Ninety five (95) of the former magistrates of the Courts of Petty Sessions were appointed to the new Local Courts, however six were not due to concerns about their fitness for the office. Some of those magistrates' commenced proceedings seeking an order that they be appointed as magistrates on the basis of their legitimate expectation of procedural fairness, which was violated by the lack of hearing granted to them by the committee in charge of appointments. Before that issue was resolved, the Attorney-General's policy of appointment subsequently

changed, and a competitive merit-based appointment process was introduced. The claimants brought the case for judicial review on the basis that their applications for appointment should not be considered on equal merit-based footing with external applicants, but that they ought to be appointed on the basis of their legitimate expectation created by the original legislation. The High Court of Australia (Australia's apex court)[1] found in favour of the Attorney-General, ruling that the courts were not able to overrule government policy, that is, on the appointment of magistrates as that role belongs to the executive. Brennan J on page 26 held that –

> *"Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power' and that '[j]udicial review has undoubtedly been invoked ... to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only to the extent the purported exercise of power is excessive and or otherwise unlawful.'[1] The Court held that there is 'no justification for granting relief in a form which would compel the Executive to adhere to an approach to judicial appointment which it has discarded in favour of a different approach which, in the opinion of the Executive, is better calculated to serve the administration of justice and make it more effective. Generally speaking, the judicial branch of government should be extremely reluctant to intervene in the Executive process of appointing judicial officers."*

2.29 The main difference between the Australian case and the present one is that the Claimants here may seem to have a weaker expectation than that of the magistrates in ***Quin.*** In ***Quin***, the magistrates in question already held this office, legislation clearly provided that they should 'accede' to the new appointment, and close to 95% of their former colleagues were in fact appointed. In the present case, the Claimants had never been appointed, their expectation firstly arose on the basis of an alleged verbal exchange with a Human Resources officer. Therefore, one would question whether the said officer represented the JSC at the relevant time when making the alleged statement. Secondly, there was need for evidence as to whether that officer represented the JSC by virtue of the principle of agency and vicarious liability, and if so whether that officer, in making such a promise, acted beyond the scope of the powers given to him by the JSC. Since this was not interrogated by the Claimants by cross-examination, this Court is unable to determine this fact.

2.30 However, when the court required both parties to produce evidence of the recruitment processes followed by the JSC since 2007, it was evident that there was no formal policy of appointment decisions. In terms of how some former colleagues had been appointed in the past, there was strong evidence of a consistent pattern of appointment of internal candidates as noted below -

[1] (1990) 170 CLR 1, [23].

2.30.1 in 2007 - fifty (56) posts of TGMs were advertised locally and filled in August, 2009;

2.30.2 in January,2010 – three (3) posts of TGMS were offered to Mr Godfrey Chavula, Mr Kadammanja and Mr Chilomba as direct promotions. Mr Chavula and Mr. Kadammanja declined to take up the posts afterwards;

2.30.3 in January,2013 - sixty(60) posts of TGMs were advertised internally and were filled in 2014;

2.30.4 in June, 2013 - two (2) posts of TGMs were filled through direct promotions; and

2.30.5 in July, 2015 - twenty five(25) posts of TGMs were advertised locally (**which is the subject of this claim**).

2.31 It should be stressed that the reasoning and outcome in ***Quin*** indicated that the Claimants' expectations of appointment was not sufficient to warrant interference with the discretion of the executive both as to the procedure to be followed in making appointments, and to the substance of their decision regardless of the treatment of their peers. However, the case herein despite the Defendants arguing that there was no regular practice that once one gets a diploma in law they would be promoted to third grade magistrate position. Incidentally, the Defendants through the sworn statement of Evans Lora stated that the mode of recruitment of third grade magistrates has been changing over the years but what was evident was that a pattern and practice emerged as shown above that favoured internal recruitment for third grade magistrate or law clerk. The Defendants cannot now claim that they did not therefore create legitimate expectation of any officer within the Judiciary who qualified as per the criteria, that is, a holder of a diploma in law.

2.32 In conclusion, it should be stressed that it is this Court's considered opinion that the Chief Justice and Judicial Service Commission's conduct in terms of the appointment of the 24 TGMs was irregular and illegal taking into consideration the Constitution as well as the JAA. The fact that the JSC does not have a set and known human resources policy for the appointment or recruitment of judicial officers namely the magistrates including regulations including on how vacancies shall be advertised, that is, internally or externally. The lack of such is what has created this situation where decisions on the appointment or recruitment of magistrates is not clear, unambiguous nor consistent despite the recruitments being based on merit when conducted. This practice is in my considered view is wrong in law.

3.0 CONCLUSION

3.1 I therefore make the following orders –

3.1.1 the Claimants application for judicial review succeeds;

3.1.2 having succeeded in their claim, however this Court noting that these are judicial appointments and that the Public Service Act is not the right law to be followed but calls upon the Defendants to sit down and review the recruitment process in terms of this last cohort of TGMs and accordingly ensure that the legitimate expectations of the Claimants are taken into consideration as dictated by section 43 of the Constitution. However, this Court shall not be granting the reliefs prayed by the Claimants as they fall outside the realm of both procedural and Constitutional review and doing so would be substituting this Court's decision over that of the Defendants who under law are obligated to perform the function of appointing magistrates;

3.1.3 the 1st Defendant should develop its own regulations in terms of the appointment of magistrates as stated in section 118 and 119 the Constitution as well as section 5 of the Judicature Administration Act; and

3.1.4 costs for the Claimants.

Delivered on the 4th day of February, 2019 at Zomba.

Z.J.V Ntaba
JUDGE