**JUDICIARY**
**IN THE HIGH COURT OF MALAWI**
**PRINCIPAL REGISTRY**
**JUDICIAL REVIEW CAUSE NO. 129 OF 2018**

**BETWEEN**

**HORACE PHIRI ……..…….…….…. 1ST APPLICANT**

**FRANCIS MAGUZA-TEMBO ……..……..…. 2ND APPLICANT**

**MOSES LIMUWA ……..……...…….……..…. 3RD APPLICANT**

**AND**

**COUNCIL OF LILONGWE UNIVERSITY**
**OF AGRICULTURE AND NATURAL RESOURCES ……. RESPONDENT**

**CORAM**: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
**Mr. Chitukula, of Counsel, for the Applicants**
**Mrs. Chijere, of Counsel, for Respondent**
**Mr. D. K. Itai, Court Clerk**

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**RULING**

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*Kenyatta Nyirenda, J.*

This is this Court's ruling on preliminary objections raised by the Respondent.

A brief outline of the background to this matter is as follows. The Applicants filed with the Court an ex-parte application for permission to apply for judicial review of four decisions of the Respondent as follows:

(a) introducing an academic policy of "whitelist" of journals that was made *ultra vires* the LUANAR Act;

(b) rejecting the Applicants' applications for promotion;

(c) calling for fresh applications for promotion before concluding similar process from the previous year; and

(d) executing an unlawful and discriminatory policy of rejecting the Applicants' application for promotion on the basis that their articles were not published in peer-reviewed journals while promoting other academic staff based on articles published in the very same journals.

The four decisions being challenged (challenged decisions) arise out of the following facts. The Applicants are employees of the Respondent working as lectures and research associates ("academics"). It was a condition of their employment that promotion to higher ranks would be governed by the University of Malawi Criteria for Promotion of Academic Staff Reference No. 1/12/3/6/1 Paper 2 (revised) and the University of Malawi Criteria for Promotion of Research Staff Reference No. 1/12/3/6/1 Paper 3 (Revised) dated May 1996).

The key requirements for promotion is a demonstration by the candidate that he or she has published a given number of articles depending on the rank applied for in referred journals and given number of papers in conference proceedings. "Refereed journal" means or is understood by academics to mean that the journal in question has a procedure of reviewing material submitted for publication by peers of the putative author who are generally experts in the field.

On or around 24th June 2017, the Respondents invited applications from suitably qualified candidates for promotion and award of meritorious increment closing on 20th July 2018. The Applicants submitted their respective applications within time.

On 13th September 2017, the Respondent's Librarian and Director of Research and Outreach provided a policy on journals that members of the academic staff in the university must publish their works with and introduced the concept of "whitelist" and recommended that the Respondent should use lists developed by the Department of Higher Education and Training of the Republic of South Africa (RSA) except RSA local journals.

On or about 16th April 2018, the Respondent informed the Applicants that their applications were unsuccessful as determined by the Appointments Committee of the LUANAR Council on the grounds that the Applicants had not published the required number of articles in the referred journals papers in conference proceedings.

The Applicants appealed against the decision by the Respondent. On or about 13th November 2018, the Respondent informed the Applicants that the decision of the Appointment Committee had been upheld by the Appeals Committee for the same reasons given by the Appointments Committee.

It is the case of the Applicants that (a) the academic policy of LUANAR has to be made by the Respondent and not the Librarian and Director of Research and Outreach, (b) the refereed journals also published articles for other academic staff which articles were allowed by the Respondent and the said academic staff were promoted on the basis of the same and (c) the reason given by the Appeals Committee that the articles by the Applicants were published in journals that had been blacklisted on Beall's List lacks merit in that the UNIMA Criteria does not mention the Beall's List or any other list: the requirement being simply publication of journal articles in peer reviewed journals.

The Applicants also applied for an interim relief, namely, suspension of the decision by the Respondent calling for fresh applications for promotion and award of meritorious increment and/or consideration of the same by the Respondent.

The Court granted the Applicants permission to apply for judicial review but ordered that the application for interim relief should come by way of inter-partes hearing.

Before the inter-partes hearing could take place, the Defendant filed with the Court a Notice of Preliminary Objections. The preliminary objections are worded thus:

> *"1. The applicants' application for judicial review against the respondent's academic policy of 'white list' of journals has been brought out of time;*
>
> *2. The respondent's decision rejecting the applicants' application for promotions is not amenable to judicial review the same being an issue of private/employment law between the applicants as employees and the respondent as employer;*
>
> *3. The respondent's decision to call for fresh applications for promotion is not amenable to judicial review the same being a private arrangement between the respondent and its employees."*

There is a sworn statement in support of the preliminary objections and the statement is couched in the following terms:

> *"3. The applicants commenced the present proceedings on 20th December 2018 in which they would like the court to review the following decisions by the respondent;*
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> *i. The decision to introduce an academic 'white list' of journals*
>
> *ii. The decision rejecting the applicants' applications for promotion*
>
> *iii. The decision calling for fresh applications for promotion*

iv. *The decision executing a policy of rejecting the applicants' applications for promotions on the basis that their articles were not published in peer-reviewed journals while promoting other academic staff based on articles published in the very same journals.*

4. *The said academic policy of 'white list' which the applicants would like to be reviewed in essence does not recognize for purposes of promotion all articles published by members of staff in predatory/suspicious journals.*

5. *This academic policy was made by Council of the Lilongwe University of Agriculture and Natural Resources on 5th May 2017 and was communicated to all academic staff including the applicants on 19th June 2017. I exhibit hereto a copy of the Memo from the University Registrar to all academic staff communicating the new academic policy marked as "MC 1".*

6. *I verily believe that under the law, the applicants had three months within which to challenge the academic policy by way of judicial review if they believed that it was unlawful or reasonable.*

7. *It is now over a year since the academic policy was made and communicated to the applicants and the applicants have not sought the court's permission to allow them to apply for judicial review out of time.*

8. *I also verily believe that the court does not have jurisdiction to review decisions falling within the domain of private/employment law like the decision by an employer not to promote its employee(s).*

9. *I believe that if the applicants strongly believe that they have been unfairly treated by the respondent, they can commence an action in the Industrial Relations Court for unfair labour practices.*

10. *I accordingly pray that the applicants' application for interim reliefs and the leave for judicial review which was granted to the applicants should be dismissed and discharged respectively."*

The Applicants are opposed to the preliminary objections and there is a statement in that regard sworn by Mr. Abison Chitukula which reads:

*"4.* ***THAT*** *the decisions the subject of challenge by the Applicants are not limited to the academic policy of "white list" of journals purportedly made by the Respondent as alleged in paragraphs 3 and 4 of the said Sworn Statement in Support of Preliminary Objections but also the retrospective application of the policy to the Applicants; the discriminatory and thus unlawful application of the said policy; and also that it is not the Council of the University that made the policy in the first place.*

5. ***THAT*** *I refer to paragraph 5 of the said Sworn Statement in Support of Preliminary Objections and state that the Memo referred to was issued way after*

*the Applicants had lodged their applications and reasonably expected that the application of the "policy" will be prospective and will not affect the journal articles that the Applicants had already published in same journals that the Respondent had recognized by promoting other lecturers who published their articles therein.*

6. ***THAT*** *I refer to paragraphs 6 and 7 of the Sworn Statement in Support of Preliminary Objections and state that since the Applicants were prevented from commencing action before the Appeals Committee had made its determination, and that the issue of the "whitelist" of journals was raised in the Grounds of their Appeals, and further that the Respondent only made its decision in dismissing the Applicants' appeals on 13th November 2018, it is not correct that the application for permission to apply for judicial review was made way out time as alleged but instead it was within the three (3) months stipulated in the rules of civil procedure.*

7. ***THAT*** *I refer to paragraph 6 herein and paragraph 7 of the Sworn Statement in Support of Preliminary Objections and state that there was no need to apply for extension of time within which to apply for permission to apply for judicial review since from the date a final decision of the Respondent was made to the date of making the application aforesaid, three (3) months had not elapsed.*

8. ***THAT*** *I refer to paragraph 8 of the Sworn Statement in Support of Preliminary Objections and aver that decisions of bodies exercising public functions are amenable to judicial review and that the decisions being challenged by the Applicants herein do not fall within the domain of private/employment law as alleged but rather that the said challenge is in relation to the lawfulness, procedural fairness, the justifications of the reasons provided by the Respondent as well as the bad faith in the exercise of the Respondent's actions where the rights, freedoms, interests and legitimate expectations of the Applicants are affected.*

9. ***THAT*** *the dominant issues raised by the Applicants touch on the public law functions exercised by the Respondent through its various committees and officers and thus the private law issues, if any, are therefore dwarfed such that the appropriate procedure in the instant case is to have recourse to judicial review.*

10. ***THAT*** *the grounds relied upon and the remedies being sought by the Applicants can only lawfully be determined and granted (or refused) respectively by the High*

*Court and not the Industrial Relations Court as alleged in paragraph 9 of the Sworn Statement in Support of Preliminary Objections.*

***WHEREFORE*** *I pray that the Respondent's preliminary objections should be dismissed in their entirety with costs as they lack any merit whatsoever."*

There are basically two issues for determination of the Court, namely, whether or not:

*(a) the application for judicial review was brought within the prescribed time?*

*(b) the decisions by the Respondent in rejecting the Applicants' application for promotions and calling for fresh applications for promotion and award of meritorious increments are amenable to judicial review?*

I wish to deal with the first issue first because if the Court were to find that the present action was brought out of time, then the other issue would fall off automatically.

Whether or not the application was brought within the prescribed time?

It is the case of the Defendant that by the present action was brought out of time. The submissions on this issue are covered in paragraph 4.0 of the Defendants' Skeleton Arguments and the relevant part of the paragraph is couched in the following terms:

*"4.1 The law is clear that an application for judicial review should be made promptly, not later than 3 months from the date the decision which is the subject of the application is made.*

*4.2 In the present case, the decision to introduce an academic policy of a white list of refereed journals which the applicants are challenging was made in May 2017 and was communicated to the applicants on 19th June 2017.*

*4.3 It is therefore our submission that the application for judicial review in respect of the decision introducing the academic policy of a white list of refereed journals has been made way out of time."*

As correctly observed in the Applicants' sworn statement, the Applicants could not commence proceedings until a definitive final decision was made by the Respondent on the issue and the same was made by the Appeals Committee. The decision by the Appeals Committee was made on 13th November 2018. In this regard, the application for permission to apply for judicial review was made within the three months of the challenged decision.

Whether or not the decisions by the Respondent in rejecting the Applicants' application for promotions and calling for fresh applications for promotion and award of meritorious increments are amenable to judicial review?

The Respondent contends that the application for judicial review against the decisions by the Respondent in rejecting the Applicants' applications for promotion and calling for fresh applications for promotion are not amenable to judicial review because they relate to employment matters. The contention was put thus in the Respondent's Submissions:

> *"4.3 The law is also clear that the remedy of judicial review only covers the review of a decision, action or failure to act in relation to the exercise of a public function and not in respect of enforcement of private rights, as in the case of employment matters.*
>
> *4.4 In the present case, the applicants are the respondent's employees and the decision to reject the applicants' applications for promotion, which the applicants are challenging does not fall within the realm of public law, but rather private /employment law.*
>
> *4.5 The respondent's decision to call for fresh applications for promotion from its employees is also within the realm of private law and not public law."*

The position of the Applicants is that the Respondent's decisions are amenable to judicial review because the said decisions are unlawful and the procedure taken in reaching them was flawed. This is to be found in paragraphs 3.5 to 3.7 of the Claimant's statement and these paragraphs read as follows:

> *"3.5 In **Chatsika v Blantyre City Assembly [2005] MLR 34** the High Court dismissed an application for leave for judicial review on the ground that although the action complained of had been done by a public body, the subject matter of the case before the court was the private law enforcement of a contract.*
>
> *3.6 In **The State v Council of the University of Malawi ex parte University of Malawi Workers Trade Union (UWTU), Miscellaneous Civil Cause No. 1 of 2015 (High Court, Zomba District Registry)** (UWTU case) it was held that where an application for judicial review raises a mixture of private and public law, the court ought to make an assessment of whether the dominant issues fall within the former or the latter domain of law. The court opined thus:*
>
> > ***3.2.** I must also mention however, that, as the case of **The State vs Malawi Housing Corporation, Ex Parte Nathan Mpinganjira (above)** illustrates, the mere fact that a decision has been made by a public authority, such as the Council of the University of*

*Malawi, does not entail that such decision is,* ipso facto*, amenable to the process of judicial review of administrative action.*

***3.3.*** *As the same decision clarifies however, where a decision has been taken by a public authority or body, judicial review will lie where the Applicant wants to establish that a decision of a person or body exercising public power infringes his or her rights, which rights are entitled to protection under public law. Where there is an apparent mix of public and private law issues falling for determination, one must look for the dominant factor. If the* ***dominant factor or dominant issue or the dominant question*** *as it were, falls within private law, then proceedings in judicial review are incompetent. If, however, the dominant factor, issue or question lies in public law, then judicial review is the wisest course to adopt. In the* ***Mpinganjira case*** *(above), the Court held that:*

> *I hold the view that the Applicant does not have an arguable case for judicial review.* ***The dominant factor*** *in this case is that the Applicant wants to enforce private rights under the private law of employment. (Emphasis supplied).*

*3.7 It was further held in the* ***UWTU case (supra)*** *that discharging permission ("leave" as was previously called) ought to be discouraged by the courts since at that stage the court would have been convinced that there is enough material to be determined by the court in the substantive application for judicial review. The issues raised must at this be left to be decided by way of trial and not through sworn statements.*

*3.8 In the instant case, the Applicants' argument is NOT that they have resorted to judicial review simply because the Respondent is a public body as was the case in* ***Chatsika v Blantyre City Assembly (supra)*** *but rather that the decisions made and actions taken were done by the latter when exercising its public law functions which are challenged as being unlawful and procedurally unfair administrative actions and that the reasons given by the Respondent are not justifiable and are instead unreasonable. The Applicants are not asking the court to enforce private law contracts of employment. Thus, the matters raised are amenable to judicial review since the dominant issues raised by Applicants fall within the gambit of public law. The reliefs and remedies that the Applicants are seeking can only be granted by the High Court and not the Industrial Relations Court."*

Having carefully considered the submissions by both parties, it is my holding that the contention by the Respondent cannot be sustained. Firstly, the Respondent advances no reason for its contention that the Respondent's *"decision to reject the applicants' applications for promotion, which the applicants are challenging does*

*not fall within the realm of public law, but rather private /employment law".* It has never been the position at law that a dispute relating to employment cannot be the subject of an application for judicial review. It was, therefore, incumbent on the Respondent to establish that the present case does not raise public law.

Secondly, it is trite that that matters concerning decision making process are amenable to judicial review. This principle applies whether or not the matter relates to employment matters. Two authorities will suffice. The first of those authorities is **Buliyani v. Malawi Book service [1994] MLR, 24**, wherein Chatsika, J. had this to say at page 27:

> *"The Appellant is saying that the decision to terminate his employment was taken unfairly, unjustly and did not follow the rules of natural justice in that he was not given a chance to be heard. That, in my view, is a matter of public law which governs the relationship between public authorities with their powers and duties with the public and with their employees. In so far as we are concerned with the manner in which a public authority exercised administrative function and that a member of the public or an employee of the public authority was affected, the matter was under public law and falls within the scope of judicial review. The manner in which the General Manager of Malawi Book Service performed his administrative duty in arriving at a decision to terminate the applicant's employment falls within the ambit of administrative law and is subject to review by the courts."* – Emphasis by underlining supplied

The second authority is that of **James Manyetera & Others v. Principal Secretary for Local Government and Rural Development and Another, HC/PR Misc. Civil Application No. 53 of 2013 (unreported)**. In this case, Kalembera, J. made the following pertinent observations:

> *"The Applicants are clearly challenging and questioning the decision – making process which led to their demotions. They are saying that the one who made the decision did not have the jurisdiction so to do that is, acted ultra vires; the rules of natural justice were not adhered to, that is they were not given an opportunity to be heard; the Respondents acted unfairly; and that the Respondents abused their office. These issues as stated in the Buliyani case are matters of public law which indeed governs the relationship between public authorities with their powers and duties with the public and with their employees. The purported exercise of and the manner in which the Respondent exercised their powers affected the Applicants employees of the Respondents, and the matter therefore falls under public law and not private law, and is a matter within the ambit of Judicial Review."* – Emphasis by underling supplied

In the present case, the Applicants are challenging the decision making process followed by the Respondent in making the challenged decisions. The Applicants

are also saying that the academic policy of LUANAR has to be made by the Respondent and not the Librarian and Director of Research and Outreach. The latter did not have the power so to do, that is, the entity acted *ultra vires*.

In the circumstances, I am very much persuaded and it is my decision that the Applicants are not asking the Court to enforce private law rights as such. In short, permission to commence judicial review was properly granted: the issues which the Court is being asked to determine can only be best addressed through judicial review.

Regarding costs, these normally follow the event and since the Defendant has failed in its application, I order that the costs of these proceedings be borne by the Defendant. I so order.

Pronounced in Chambers this 25th March 2019 at Lilongwe in the Republic of Malawi.

**Kenyatta Nyirenda**
**JUDGE**