



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CAUSE NO:42 OF 2020

BETWEEN

THE STATE

(ON APPLICATION OF GETRUDE HIWA SC)CLAIMANT

AND

OFFICE OF THE PRESIDENT AND CABINET.....1st DEFENDANT

SECRETARY TO THE PRESIDENT AND CABINET.....2nd DEFENDANT

CORUM : JUSTICE R.M CHINANGWA

Shabir Latif Counsel for the Claimant

Okota Counsel for the Respondent

Nyirenda Court Clerk

RULING

1. Introduction

The Claimant filed two applications in this matter. First is an application for leave for judicial review and second, is an application for an interlocutory injunction. In the first application the Claimant seeks for permission to apply for judicial review of the defendant's decision dated 3rd

August 2020 posting the Claimant from the position of Solicitor General and Secretary for Justice in the Ministry of Justice to the Office of President and Cabinet to serve as Chief Director (Good Governance), Grade B with immediate effect. On the second application, the Claimant seeks an order of injunction restraining the defendants, their servants or agents or whomsoever on their behalf from implementing the decision they made on 3rd August 2020 posting the Claimant from the position of Solicitor General and Secretary for Justice in the Ministry of Justice to the Office of President and Cabinet to serve as Chief Director (Good Governance), Grade B with immediate effect pending the determination of the substantive matter in the form of judicial review. The Defendants appose both applications. The applications were heard interpartes.

In support of their respective positions on the applications, the parties filed sworn statements as summarized below.

2. Sworn Statements

In support of the application for judicial review and interlocutory injunction the Claimant filed an affidavit. In summary, for purposes of brevity of this ruling, the Claimant states that she has been an employee of government for 28 years and was holding the position of Solicitor General and Secretary for Justice until the decision on 3rd August 2020 was made. She argues that the decision to post her to the Office and President and Cabinet is amenable for judicial review for the following reasons a) no reason was given for the decision b) the Claimant was not given an opportunity to be heard before the decision was made c) the post of Chief Director is not an established post; does not exist and the position holder would not function as controlling officer and does nothing in the said office despite the salary and benefits remaining the same d) the post of Solicitor General and the position holder is a controlling officer; is second in rank to the office of the Attorney General; is higher in status and responsibility; holds a position in the boards of many statutory corporations; e) the posting is a demotion f) the posting is motivated by political considerations and not exigencies of services g) the posting amounts to defamation as the Claimant has not been disciplined in her 28 year career.

In the Claimants prayer for an interlocutory injunction, the Claimant largely makes the same arguments as summarized in the application for judicial review. In addition, the Claimant argues that interests of justice weigh in favour of granting the interlocutory injunction; that there are serious questions to be tried on the lawfulness, procedural fairness, discriminatory

nature and bath faith of the decision in view of the Constitution; Public Service Act, Employment Act and Malawi Public Service Regulations; that the matter is of extreme urgency as the posting was with immediate effect; that the risk of damages to the defendants is greatly outweighed by the risk of injustice to the Claimant; that the Claimant undertakes to pay damages if the injunction is wrongly obtained; and that damages would not suffice as an appropriate remedy since the case relates to violation of human rights.

In opposition the respondents, in the affidavit filed by Mr Zanga Zanga D. Chikhosi., Secretary to the Office of President and Cabinet, it is argued that the relationship between the parties is that of employer and employee hence the matter falls within the ambit of employment law being private law and not public law; there are available remedies for the Claimant like lodging a complaint to the Minister Responsible for Public Service or Industrial Relations Court which has jurisdiction to deal with issues of fairness that may arise in an employment relationship; that the posting is not an appointment hence there is no requirement that there be an established position, a vacancy, and a budget; the posting is not a transfer which would require an employee to be heard; the posting is within the powers of the 2nd Defendant as Responsible officer; good governance in OPC has a wider scope covering all ministries and government departments than that under the Ministry of Justice; the posting is not a demotion as the Claimant has been posted at the same grade with same benefits, with wider responsibilities within the public service and not confined to the Ministry of Justice, Chief Director can attend to matters in public boards on delegated capacity; membership to public boards is not an entitlement to an individual but to the office.

3. Issue for Determination

This court has to determine whether or not to grant

- a) leave for judicial review
- b) an interlocutory injunction.

These will be dealt with in turn.

4. Analysis of Law and Evidence

- a) **Should leave for judicial review be granted or not.**

Where the court is faced with an application for judicial review the court has to consider **Order 19 rule 20 of the Courts High Court Civil Procedure Rules 2017** which provides that :

(1) Judicial review shall cover the review of__

(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 Claimant is affected or threatened.

(2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.

(3) Subject to sub-rule (3), an application for judicial review shall be commenced ex-parte with the permission of the Court.

(4) The Court may upon hearing an ex parte hearing direct an inter-partes hearing.

(5) Subject to sub-rule (6), an application for judicial review under subrule (3) shall be filed promptly and shall be made not later than 3 months of the decision.

(6) The Court may extend the period under sub-rule (5).

From the above rule the court has to consider the following issues in an application for leave for judicial review:

- i. There must be a law, an action or a decision of the Government or a public officer for conformity with the Constitution where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened, or*
- ii. A decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided,*

if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened.

- iii. *A person making an application for judicial review should have sufficient interest in the matter to which the application relates.*
- iv. *an application for judicial review should be filed promptly and shall be made not later than 3 months of the decision.*

In addition to the above, case law has developed additional principles upon which leave for judicial review should be considered. These include are :

- i. judicial review is not available in cases where other remedies exist and have not been used: **The State and Industrial Relations Court exparte Malawi Communications Regulatory Authority and Charles Nsaliwa**, Judicial Review Cause No. 30 of 2017,
- ii. Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. In **The State and The State President, The Attorney General Exparte Enock Chihana and 3 Others**, Misc Civil Cause No. 86 Of 2015,
- iii. 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. **Council Of The University Of Malawi (Unima) Ex Parte: University Of Malawi Workers Trade Union (Uwtu) Miscellaneous Civil Cause No. 1 Of 2015.**

It should be noted at the outset that, at the stage of applying for leave for judicial review the court is not concerned with determining the merits of the case. This was explained in **The State, Lilongwe Water Board, Minister Of Agriculture, Irrigation and Water Development , The Director Of Environmental Affairs, The Minister Of Natural**

Resources Energy And Mining, Ex Parte: The Malawi Law Society Judicial Review Cause No.16 of 2017) [2017] MWHC 135 (21 April 2017); Justice Kapindu stated that :

I remind myself that the application before me is for leave to apply for judicial review. According to Practice Note 53/14/55 in SCP 1999:

The purpose of the requirement of leave is: (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless, and (b) to ensure that an Claimant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" (R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 at 642; [1981] 2 All E.R. 93 at 105, per Lord Diplock). Leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Claimant (ibid., at 644/106).

In considering this application these will be looked at in turn to determine whether leave should be granted or not.

- 1. Is there a law, an action or a decision of the Government or a public officer which is not in conformity with the Constitution where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened?**

On the face of this requirement, on the first part, a decision of government can be the subject of judicial review. The rule is silent on whether it is every decision of the government or a public officer ,irrespective of the capacity in which Government or the public officer was making the decision in question, is amenable to judicial review. This will be dealt with in the discussion below as to whether judicial review is amenable to decisions or actions of government or public officers in private or public law.

It is not in dispute that Government made a decision to post the Claimant in a letter dated 3rd August, 2020. This on its own makes that decision amenable for judicial review. On the second part, the question is, is this decision not in conformity with the Constitution? The Claimant argues that sections 20 and 43 of the Constitution have been violated in that she has been discriminated and was not heard prior to the decision being made. The respondent argues that there was no hearing because in a posting there is no requirement to hear the parties and challenge the alleged Constitutional violations. Again, on the face of the arguments, without considering the merits, the issue questions whether Government conformed with the constitution. The court is aware that not every claim of a violation of the Constitution is a matter questioning conformity with the Constitution. As will be discussed below, the constitutional rights alleged to have been infringed are provided for as fundamental rights in section 5 of the Employment Act.

- 2. A decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened.**

It is noted from the reading of rule 20 (1) (a) and (b), that the Claimant need not satisfy both requirements. Following the discussion above and for brevity of this judgement and to avoid an academic exercise, this court would not analyze this requirement in view of the discussion above.

- 3. A person making an application for judicial review should have sufficient interest in the matter to which the application relates.**

An Claimant in a judicial review proceeding must have “sufficient interest” in the matter which is the subject of the application. This means that there must be a direct or personal interest that the Claimant has in the matter. The Claimant has a direct interest being the subject matter in the posting decision made by Government on 3rd August 2020, therefore she has sufficient interest.

- 4. an application for judicial review should be filed promptly and shall be made not later than 3 months of the decision.**

The decision of Government posting the Claimant was made on 3rd August 2020. The Claimant commenced this action on 20th August 2020. The Claimant thus satisfied the requirement that the application be made not later than 3 months of the decision, therefore the application was made promptly.

5. judicial review is not available in cases where other remedies exist and have not been used: The State and Industrial Relations Court *ex parte* Malawi Communications Regulatory Authority and Charles Nsaliwa, Judicial Review Cause No. 30 of 2017.

The question in this part is whether there is an available remedy outside judicial review. Claimants argue that there is no available remedy as the issues raised do not pertain to contractual terms or employment terms simpliciter. On the other hand the respondents argue that a remedy exists under the Employment Act; Industrial Relations Court and before Responsible Minister.

The summary of the Claimants claim is that

- a. the posting was without a hearing; to a non-established post
- b. the Claimant has been discriminated
- c. the Claimant has been demoted
- d. the Claimant has been victimized and defamed.
- e. The decision was based on political and other considerations

A close scrutiny of the above claims will show that the claims are attainable in the Employment Act and at the Industrial Relations Court. Section 5 (1) of the employment Act states as follows:

No person shall discriminate against any employee or prospective employee on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital status or family responsibilities in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

A grievance on a posting, victimization, political consideration and defamation would fall under a claim for unfair labor practices . See the case of **Jana v Attorney General (IRC 312of**

20055) [2006] MWIRC 123 (03 October 2006) where the court dealt with such claims commenced as employment claims; a claim for discrimination falls under sections 5 and 7 of the Employment Act; see also **Jana Case** cited above ; a claim for demotions falls under section 56 of the Employment Act; see also **Malawi Posts Corporation v Kambiliya (29 of 2015) [2016] MWHC 513 (15 July 2016)** where the court dealt with such claims commenced as employment claims. This being the case it is clear that the Claimant has an available remedy at the Industrial Relations Court.

The remedies available under the Employment Act are found in section 7 of the Employment Act :

Where a complaint alleging infringement of rights contained in this Part has been proved, the Court shall make such order as it deems necessary to ensure compliance with the provisions of this Part, including an order for reinstatement of an employee, the restoration to him of a benefit or advantage and an order for the payment of compensation.

The provision provides for a number of remedies where violations of rights have been proved including orders for reinstatement, restoration benefits or advantage and an order for the payment of compensation. Further the provision gives the court wide latitude to make orders as it deems necessary to ensure compliance with the law. In the present matter in a nutshell, considering the part on Relief Sought, some of the orders the Claimant is seeking are declaratory orders setting aside the decision for being unlawful, procedurally unfair, discriminatory, without justification and in bad faith; an order quashing the decision, other reliefs and consequential directions. The consequential directions would in my view include restoration of benefits and advantages including reinstatement of some sort.

These remedies on the face of it are remedies that could be available to the Claimant herein under the Employment Act under section 7 which would be obtainable in the Industrial Relations Court. There is nothing in the Employment Act which precludes her from seeking and being awarded these remedies from a reading of the Employment Act or even the submission she has made.

6. Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review.

In this part the discussion will center around whether the decision to post the Claimant is a public law or private law matter. The question is whether the decision made was in public or private law? In **The State and The State President, The Attorney General Ex parte Enock Chihana And 3 Others**, Misc Civil Cause No. 86 Of 2015 Justice Madise had this to say on the matter:

“Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law...” (emphasis added).

The question what is the exception to the general rule? **Council of The University of Malawi (Unima) Ex Parte: University Of Malawi Workers Trade Union (Uwtu) Miscellaneous Civil Cause No. 1 Of 2015**, the court held that ‘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’.

The follow-up question is thus where there is a mix of public and private law matters? In this court’s view the answer is in the negative, as explained in the preceeding part. The Claimants claims are tenable under the Employment Act which govern the employment relationship between an employer and employee. Secondly the Claimants posting falls within the Public Service Act and attendant regulations which essentially are conditions of service for government employees in the main civil service. Third the government in this court’s view was acting within its capacity as an employer and its decision affected an employee, in the arena of employment law as between an employer and employee.

This court observes that there are a plethora of cases in the High Court where leave for judicial review has been granted in employment matters involving civil servants. Unfortunately, it is noted that most decisions granting leave are not handed down as full judgements which would enable the reasoning behind the decisions to be understood. Some of the decisions that are before the court are those where the actual judicial review hearing was determined. These include in **John Mwandenga v Secretary for Health and Population** Civil Cause No. 9 of 2003, leave for judicial review was granted following a decision posting the Claimant to Dowa District Hospital and suspending payment of his salary. In its judgement the court held that

where an employee feels that posting instruction is not dictated by the exigencies of duty or is somehow inappropriate, an employee would be entitled to be heard at a judicial hearing review. In **S v Judicial Service Commission and Another** (Judicial Review No. 22 of 2018) [2019] MWHC 34 (04 February 2019) leave for judicial review was granted where the decision of the Judicial Service Commission in recruiting and appointing Third Grade Magistrates was in issue.

The view of this court remains that where the matter is purely fixed in employment law it is a private law matter not amenable to judicial review, and this matter is one of such.

7. 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.

The preceding discussion has discussed this requirement and the same will not be repeated for brevity of this ruling.

In conclusion this court is of the view that the application for leave for judicial fails because the Claimant has a remedy at the Industrial Relations Court and the decision of Government made on 3rd August 2020 is a private law matter.

b) Whether an interlocutory injunction should be granted?

Order 19 rule 22 of the Courts High Court Civil Procedure Rules 2017 provides that :

An application for a declaration or an injunction shall be made with an application to the Court for judicial review and the Court may grant a declaration or injunction where it considers that it would be in the interests of justice to do so having regard to __

(a) the nature of the matter in which relief may be granted by a mandatory order, a prohibiting order or a quashing order;

(b) the nature of the person or institution against whom relief may be granted by such an order; and

(c) all the circumstances of the case.

The above rule allows the court to grant an injunction where the interest of justice dictate so. Since the substantive application has fallen through, then the application for injunction falls away. However, this court notes that this relief is attainable in the Industrial Relations Court under rule 25(m) of the Industrial Relations Court Procedural Rules.

5. Finding

Leave for judicial review and an interlocutory injunction is dismissed. Each party is to bear its own costs.

Pronounced this 25th day of September 2020 at LILONGWE



R.M CHINANGWA

JUDGE