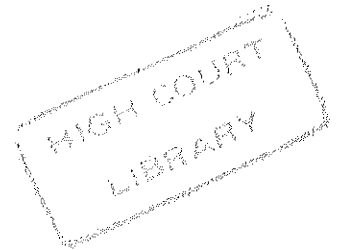




The Republic of Malawi



**IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
LILONGWE DISTRICT REGISTRY
JUDICIAL REVIEW CASE NO. 727 OF 2020**

BETWEEN

THE STATE APPLICANT

VS

THE WORKERS COMPENSATION COMMISSIONER..... RESPONDENT

EX-PARTE SAVE THE CHILDREN INTERNATIONAL

CORAM Honourable Justice William Y. Msiska
 Mr. Sitima, of Counsel, for the ex Parte Applicant
 Defendant Present, unrepresented
 Mr. Matope, Court Clerk

JUDGMENT

Introduction

1 The Ex-parte Applicant herein, Save the Children International was on 18th August, 2020 granted permission to apply for judicial review to compel the Respondent to refer the matter or issue which was a bone of contention between the parties to the High Court for a determination of a

point of law pursuant to section 46 of the Workers' Compensation Act, Cap 55:03 of the Laws of Malawi.

Factual Background

- 2 The facts leading to these proceedings are contained in the sworn statement in support of the application by Mr. Valentine Bandawe, the Human Resource Manager in the employ of the *ex Parte* Applicant. Mr. Bandawe states that Mr. Hyghten Mungoni was employed by *ex parte* Applicant in 2016 as a Senior Manager Child-Poverty and he worked in that position until 30th September, 2019.

- 3 On 7th June 2018 Mr. Mungoni sustained a fracture on his left leg when he missed a step as he was coming out Crossroads Hotel where he was attending a Conference organised by the *ex-parte* Applicant. As a result of the injury, Mr Mungoni was unable to report for duties for a period of 2 months. During that period, Mr. Mungoni was earning his salary together with all benefits accruing to him. He therefore lost no earnings or earning capacity.

- 4 The degree of incapacity of Mr. Mungoni was assessed at 30% and consequently, the defendant assessed compensation at K50,946,861.60. The *ex-parte* Applicant objected on the degree of incapacity and had Mr. Mungoni undergo re-assessment where the degree of incapacity was put at 12% with the corresponding re-assessed compensation at K20,378,744.64.

- 5 The *ex parte* Applicant had issues with the legality of the award made by the Respondent and on 3rd June 2020. The *ex parte* Applicant registered its objections to the award. The basis of the objection to the award was

that a question of law has arisen in the matter that required the Respondent to refer to the High Court pursuant to section 46 of the Workers Compensation Act. The question of law that the *ex parte* Applicant requested the Respondent to refer to the High Court was **“whether or not an employee who is injured in the course of his employment, but does not lose any earnings following such injury is entitled to compensation under the Act”**.

6 The Respondent never heeded to the request to refer the matter to the High Court. However, the Respondent invited the *ex Parte* Applicant to a meeting which took place on 4th August, 2020. At that meeting the Respondent verbally refused to refer the question of law to the High Court but went ahead to advise the *ex Parte* Applicant to lodge an appeal in the High Court if dissatisfied by his determination.

7 The *ex Parte* Applicant therefore applied to Court for the following reliefs -

(a) *A declaration that the Defendant's decision is illegal, unlawful, and unreasonable in the Wednesbury sense;*

(b) *An order similar to Mandamus compelling the Defendant to refer the matter to the High Court for a determination of a point of law under section 46 of the Workers Compensation Act;*

(c) *An order staying the Defendant's determination requiring the Applicant to pay Mr. Mungoni the sum of K20,378,744.64 as compensation for the injury;*

(d) *An inquiry into damages suffered by the Applicant due to the Defendant's failure/neglect to perform his statutory duty;*

(e) *Further and other reliefs; and*

(f) *Order of costs.*

8 The Respondent did not formally oppose the application by filing a sworn statement in opposition. He was, however, present in court on the date of hearing of the substantive application for judicial review.

9 In addition to adopting the sworn statement and skeleton arguments in support of the application, Counsel Sitima was brief and succinct in his address to the court.

10 Counsel Sitima in his submission stressed that the *ex Parte* Applicant in its objection requested the Respondent to refer to the High Court a question of law which is whether or not an employee injured in the course of employment but whose injury does not cause the injured employee to lose earnings or earning capacity is entitled to compensation under the Act. It was his submission that the request for referral was made pursuant to section 46 (1) of the Workers Compensation Act. In his view, the resolution of that point of law was a very important issue to benefit the *ex Parte* Applicant with regard to when is compensation due to an employee under the Act.

11 Counsel further observed that where the request to refer the matter to the High Court on a point of law comes from an interested party, the

Respondent does not have the luxury to refuse or neglect that which the law requires him to do. With respect to a request for referral from an interested party, the provision uses the word “shall” thereby giving no room to the Respondent to do otherwise. In support of his arguments, Counsel Sitima cited the case of *The State v Attorney General & Workers Compensation Commissioner ex Parte Reserve Bank of Malawi Misc. Civil Cause No.106 of 2013* where a similar issue to the present case arose. The court in its decision was emphatic that it was not open to the Respondent to refuse to make a referral to the High Court at the request of the Applicant. Rather, the Respondent was required by law consequent on the request to refer the question of law to the High Court for determination.

12 Counsel Sitima contended that the decision by the Respondent to refuse to make a referral was not in accordance with the stipulations of the law and therefore the decision was illegal and unreasonable in the Wednesbury sense. He concluded by calling on the Court to intervene by issuing a mandatory order in favour of the *ex Parte* Applicant compelling the Respondent to perform its duty in accordance with the dictates of the law.

13 In the interest of justice, the Court afforded opportunity to Mr. Ntandika, the Workers Compensation Commissioner to address the Court. He acknowledged that his office indeed received a request from the Applicant to have the matter referred to the High Court in accordance with the dictates of section 46 of Workers Compensation Act. It was his argument that he did not refer the matter to the High Court as he thought that he had already made a determination on the matter and that the only

remaining option for the *ex Parte* Applicant was to appeal against his determination.

Law and Argument

14 It is trite law that judicial review is concerned with the decision making process and not the decision itself. The role of the court in judicial review proceedings is supervisory. Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the favour of the applicant. Rather, it is a supervisory procedure whereby a judge is called upon to rule on the lawfulness of a decision, or the manner in which such decision was reached. The question for review, therefore, is whether the decision was lawful or unlawful, the question of appeal by contrast is whether, the decision was right or wrong. See **P. Craig, Administrative Law, 5th edition (Sweet & Maxwell, 2003) at p 9.**

15 There is a long established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court is prevented from setting aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only, if that process was framed in certain defined and limited aspects. Judicial review is, for that reason, referred to as supervisory jurisdiction – reflecting the role of the court to supervise the exercise of power by those who hold it to ensure it has been lawfully exercised.

16 I now turn to consider the issue of appeal, more so because the Worker's Compensation Commissioner was of the view that it was the only avenue available to the *ex Parte* Applicant.

17 What does the Act say about appeals? There are several provisions under the Act dealing with appeals. The first one is section 44 which reads as follows: -

"Any person affected by a decision of the Board made under section 43 may, within twenty-one days of such decision or within such further period as the Court may on good cause shown allow, appeal to the court of a Chief Resident Magistrate."

18 The appeal envisaged under this section is against the decision of the Commissioner pursuant to an inquiry undertaken under section 43 into the objections lodged under sections 41 and 42. Section 41 deals the process of lodging of objections generally while section 42 governs objections specifically arising out of a claim for compensation in respect of the death of a worker. Objections under section 42 are made on behalf of the dependants a deceased worker. It is the decision of the Commissioner pursuant to section 43 and on advice of the Board that is the subject of appeal.

19 Another class of appeals are those appeals lodged with the High Court. This class of appeals is covered under section 51. These are the appeals arising from any order or determination of the court of the Chief Resident Magistrate under section 44. Under section 51, unless some substantial question of law is involved, no appeal lies to the High Court: (i) without

leave of the court concerned or the High Court; (ii) in any case in which the parties have agreed to abide by the determination of the court, or in which the order of the court gives effect to an agreement concluded between parties; and (iii) on expiry of 30 days from the date of the order of the court unless the High Court extends the time for appealing.

20 The third class of appeals known under the Act arise where a party is dissatisfied with the decision of the Workers Compensation Tribunal established under section 52. According to section 54, any person aggrieved by the decision of the Commissioner or the Board may appeal to the Workers Compensation Tribunal. An appeal to the Workers Compensation Tribunal should be made within twenty-one days of receipt of the notification of such decision. The Workers Compensation Tribunal may either confirm or reverse the decision appealed against or indeed make other orders as it deems just. An appeal from the Workers' Compensation Tribunal lies to the High Court only on a point of law but not on fact. Again, an appeal shall lie to the Supreme Court of Appeal on any point of law but not on any matter of fact.

21 In my view, it should be observed that under the Act, the process of appeal and that of stating a case to the High Court are two distinct procedures. It is very clear that the issue in the present proceedings does not fit in the scheme of an appeal. The issue of stating a case to High Court on a point of law for its determination is a distinct and independent matter altogether from that of appeal.

22 What therefore, does the law say about the request by the *ex Parte* Applicant? The starting point in answering this question is section 35

which establishes the office of Workers Compensation Commissioner. It states as follows-

“For the Administration of this Act, the Board shall, with the approval of the Minister, appoint-

- (a) An officer to be designated as the Workers’ Compensation Commissioner (in this Act referred to as the Commissioner;*
- (b) Such other staff subordinate to the Commissioner as may be deemed necessary.*

23 As the office responsible for the administration of the Act, the Commissioner performs a host of duties and functions. The duties and functions are found in several sections of the Act. One such provision is section 46 which reads as follows-

“(1) The Commissioner may, with the advice of the Board, and shall at the request of any interested party to any proceedings under this Act, state a special case on any question of law in connection with any matter arising in such proceedings for the decision of the High Court.”

(2) In any case so stated, the Commissioner shall set forth-the facts which were established; and

(3) the view of the law which has been adopted in relation to those facts”.

24 The *ex Parte* Applicant is relying on this provision because the Respondent refused or neglected to refer the matter to the High Court as requested because he was convinced that the only route was by way of appeal. It is clear from Exhibit "VB 5" that the *ex Parte* Applicant requested the Respondent to state a case to the High Court for determination on a question of law. The Respondent in his explanation when addressing the Court, conceded that he was indeed requested but that he did not act on the request because in his view, the applicant should have appealed against his decision. As stated above, the issue of an appeal does not feature herein.

25 This was a clear misapprehension of the law on the part of the Respondent. The import of the equivalent of section 46 was correctly, in my view, explained and interpreted in the case of *The State V Attorney General and Workers' Compensation Commissioner ex-Parte Reserve Bank of Malawi (supra)*. According to section 46, the Respondent may on his own motion refer a matter on a point of law to the High Court but upon request by an interested party, the Respondent shall refer the matter on a point of law to the High Court. The word shall is pre-emptory with the effect that the Respondent does not have any option but to do that which the law requires of him. There is no room for excuses on the part of the Respondent.

26 On the facts in the present case, this Court has no doubt that this is a clear example of irrationality or unreasonableness in the Wednesbury sense. The refusal by the Respondent not to refer the matter to the High Court by way of case stated was a decision which no reasonable authority could have reached in the circumstances. It was a decision which no sensible authority with due appreciation of its statutory responsibilities

could have made. The Commissioner acted contrary to what the law demands of his office.

27 The *ex Parte* Applicant herein seeks the like order of mandamus. Explaining the reach of judicial review orders the authors of *Halsbury's Laws of England 4th Edition Volume 1 at p III from Paragraph 89*, describe the purpose of the like order of mandamus as follows-

"The order of mandamus is of most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in case where, although there is an alternative remedy, yet the mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "*the mandate*" it is stated-

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

28 What these principles mean is that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

29 The questions worth considering are: (i) whether or not the Respondent owed a statutory duty to the *ex Parte* Applicant upon request to refer the matter by way of case stated on any question of law for the decision of the High Court: and (ii) whether or not the Applicant made a request and the Defendant refused to do so. As already demonstrated, these questions must be answered in the affirmative.

Disposal of the Matter

30 Consequently, and in view of the foregoing, the *ex Parte* Applicant has satisfied this Court that the orders prayed for should be granted. As such, a like order of mandamus is therefore issued to compel the Respondent to refer the matter to the High Court for determination on a point of law in accordance with section 46. This should be done within 45 days from the date of this judgment.

Further, and in addition to the order of mandamus, all other reliefs sought by the *ex Parte* Applicant are granted. The Registrar to undertake an inquiry into damages suffered by the *ex Parte* Applicant due to the failure or neglect by the Respondent to perform his statutory duty. The Respondent is also condemned in costs of this application.

PRONOUNCED in open Court this 15th day of June 2021 at Lilongwe.

A handwritten signature in black ink, appearing to be 'W. Y. Msiska', written in a cursive style.

W. Y. Msiska

JUDGE