

A handwritten signature in black ink, appearing to be "L. Banda".

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 63 OF 2016

BETWEEN:

**THE STATE (On the application of MALAWI
TELECOMMUNICATIONS LIMITED)**

CLAIMANT

AND

THE OMBUDSMAN

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Banda, Counsel for the Claimant
Chatepa, Counsel for the Defendant
Mankhambera, Court clerk

JUDGMENT

1. This is the decision of this Court made pursuant to Order 19 Rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, on an application by Malawi Telecommunications Limited for judicial review of the defendant's decision, namely, inquiring and pronouncing a determination against the claimant on a labour matter when the defendant had no jurisdiction given by law.
2. By the said application, Malawi Telecommunications Limited sought the following reliefs, namely, a declaration that pursuant to section 123 (1) of the Constitution and section 5 (1) of the Ombudsman Act, the Ombudsman did

not have jurisdiction to conduct an investigation into alleged unpaid death benefits to the beneficiaries of the estate of Jean Helen Glevulo who was, allegedly until her death in 1994 an employee of the defunct Ministry of Transport and Communication as there were/are reasonably available, several remedies by way of court proceedings or by way of appeal from a court; an order of prohibition, restraining the Ombudsman from enforcing the impugned determination pronounced on 10th May, 2016; an order akin to certiorari quashing the decision and determination pronounced by the Ombudsman on 10th May, 2016 and a declaration that the beneficiaries of the estate of Jean Helen Glevulo proceed by way of a court action.

3. The facts of this matter are not complicated. The claimant is a limited company since its incorporation around 2006.
4. On 27th January, 2016, the defendant summoned the claimant to a public inquiry which was held on 24th February, 2016. The inquiry pertained to unpaid death benefits of Jean Helen Glevulo who was alleged to be an employee of the claimant when it was previously under the defunct Ministry of Transport and Communications before its incorporation as a limited company. The son of the deceased was the complainant at the defendant and alleged that he had started processing the death benefits with the Ministry of Transport and Communications to no avail hence the complaint he made at the defendant in 2000.
5. The claimant objected to the defendant's jurisdiction on account of there being reasonable and practical remedies available to the complainant and that the defendant acted outside the prescription of her jurisdiction under section 123 (1) of the Constitution. The defendant overruled the claimant's objections and determined the complaint before her.
6. Malawi Telecommunications Limited having been dissatisfied with the defendant's decision exercised its right to seek a review of the defendant's decision as is provided under section 123 (2) of the Constitution.
7. There are three grounds on which the review is sought, namely, that the defendant acted outside her jurisdiction as granted by the Constitution and the Ombudsman Act by presiding over a matter notwithstanding that there are reasonably available practical remedies before courts of law; that the defendant conducted an inquiry and made a determination against the claimant which is a private entity and thereby acted outside her jurisdiction;

and finally, that in her determination the defendant assumed the role of interpreting the Constitution and the Ombudsman Act and had effectively ousted the jurisdiction of the courts and thereby acted outside her jurisdiction.

8. At this stage this Court will consider the submissions of the parties.
9. Both parties referred to section 123 of the Constitution which provides for the defendant's powers of investigation as follows:

- 1) The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.
- 2) Notwithstanding subsection (1), the powers of the office of the Ombudsman under this section shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined.

10. They then alluded to the provision on the duties and functions of the Ombudsman in section 5 of the Ombudsman Act which provides that:

- (1) Subject to the Constitution, the Ombudsman shall inquire into and investigate in accordance with the provisions of this Act, and take such action or steps as may be prescribed by this Act on any request or complaint in any instance or matter laid before the Ombudsman in accordance with section 7 (1) or (2), and concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society.
- (2) Without derogating from the provisions of subsection (1), any request or complaint in respect of any instance or matter referred to in that subsection may include any instance or matter in respect of which it is alleged-
 - (a) that any decision or recommendation taken or made by or under the authority of any organ of Government or any act or omission of such

organ is unreasonable, unjust or unfair, or is based on any practice which may be deemed as such;

(b) that the powers, duties or functions which vest in any organ of Government are exercised or performed in a manner which is unreasonable, unjust or unfair.

(3) This section shall not apply in respect of any decision taken in or in connection with any civil or criminal case by a court of law.

11. The claimant then submitted on the nature and purpose of judicial review. It correctly submitted that traditionally, and for long, it has widely been held that judicial review is concerned with the manner in which a decision was made, but not with its merits. See *Makono v Lilongwe City Council and another* [1999] MLR 159 and *Khembo v The State (National Compensation Tribunal)* [2004] MLR 151. See also *In the Matter of the Constitution of the Republic of Malawi and in the Matter of the Removal of Mac William Lunguzi as Inspector General of Police and in the Matter of Judicial Review* Misc. App. 55 of 1994, where Mkandawire J., stated that:

Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power.

12. Judicial review has to be based on sound constitutional principles. This Court notes that perhaps one of the most prominent proponents of this modern view about the nature and purpose of judicial review in Malawi is Prof Danwood Chirwa. In his article titled 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' *Journal of African Law* 55 (1) (2011) 105, he proposed that judicial review under the Constitution of the Republic of Malawi is different from, and is broader in scope than, the traditional common law one. For him, judicial review in Malawi falls into two categories: (i) judicial review concerning acts, decisions, and omissions of Government for their conformity with the Constitution of the Republic of

Malawi; and (ii) judicial review simpliciter (of an administrative action), which involves the review of administrative actions, decisions, and omissions on more grounds than those which are available in common law judicial review.

13. This kind of categorization of judicial review in Malawi has received judicial endorsement in several recent cases including: *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union* (Judicial Review) (Misc. Civil Cause No.1 of 2015) [2015] MWHC 494 (27 July 2015) and *S v Judicial Service Commission and Another* (Judicial Review No. 22 of 2018) [2019] MWHC 34 (04 February 2019).
14. In the *State v Council of the University of Malawi; Ex Parte: University of Malawi Workers Trade Union case*, supra, the Court, with Justice Prof. Kapindu presiding, had this to say:

I should mention that I deliberately use the full term “judicial review of administrative action here” because in modern day Malawian constitutional law, which inextricably intersects with administrative law, there are two types of judicial review, viz: (a) judicial review of administrative action and (b) constitutional judicial review. The former is the review procedure by courts of conduct by public authorities or bodies that requires the procedure under Order 53 of the Rules of the Supreme Court, 1965 (or for those of another procedural school of thought, the procedure provided for under Order 54 of the Civil Procedure Rules, 1998). The latter review process (Constitutional judicial review) is premised on Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution, where the Courts review conduct by the Government or law for consistency with the Constitution. It need not be administrative action.

15. If any person harbored any doubt about this modern view of judicial review in Malawi, Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is now conclusive on this point. As noted by the claimant, it provides for constitutional judicial review on one part, and judicial review simpliciter on the other part. It expressly provides that 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, 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; and
- (iv) Bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

16. The claimant and the defendant agree, and correctly in this Court's view, that the defendant has authority to investigate any and all cases falling within her jurisdiction. And that the only limitation is that it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy. See *The State v Ombudsman ex parte The Principal Secretary for Agriculture and others* MSCA Civil Appeal number 24 of 2017.
17. On the first ground for judicial review, namely, that the defendant acted outside her jurisdiction as granted by the Constitution and the Ombudsman Act by presiding over a matter notwithstanding that there are reasonably available remedies before courts of law, the claimant submitted as follows. It noted that the claim pertaining to processing of death benefits is one that can easily be processed with the Industrial Relations Court as it is a labour related matter. And that the defendant should have directed the complainant accordingly. It observed that the Industrial Relations Court is an informal court that does not even make orders as to costs and that therefore there would not be an issue of expense to worry about. See *First Merchant Bank Limited v Mkaka and others* MSCA civil appeal number 53 of 2013.
18. The claimant also observed that the other way for the defendant to proceed was to advise the complainant to proceed to obtain letters of administration from the High Court so that he could process his late mother's death benefits. It added that the defendant in fact made observations on this aspect when she overruled the claimant's objections. The claimant was not satisfied that the defendant observed in her impugned determination that most people do not know about how to obtain letters of administration and that such a process would in fact be costly and would therefore mean that there is in fact no reasonably available remedy by way of court proceedings for the complainant. The claimant asserted that in fact the defendant should have

directed the complainant accordingly to get the letters of administration instead of assuming jurisdiction. The claimant asserted further that, if the concern was about cost, then the defendant should have directed the complainant to the Legal Aid Bureau that is set up precisely to assist indigent litigants.

19. On her part, the defendant alluded to the case of *The State v Ombudsman ex parte The Principal Secretary for Agriculture and others* MSCA Civil Appeal number 24 of 2017 wherein the Court pointed out that a reasonably available remedy is one that the complainant can have recourse to without too much expense and one that is differentiated from those remedies that might at best be illusory. The defendant then noted that in the present matter, the complainant, who had no documentation, had no financial muscle to do what the defendant did on exercise of her jurisdiction which was to call for documentation from the claimant and the responsible Ministry to ascertain whether the death benefits in issue herein were in fact due or not. And that the complainant would not have done such whether through the avenue of the Industrial Relations Court or by obtaining letters of administration from this Court as he had no financial muscle.
20. This Court has considered the case cited of *The State v Ombudsman ex parte The Principal Secretary for Agriculture and others* MSCA Civil Appeal number 24 of 2017 and observes that when faced with a claim that the defendant has acted beyond her jurisdiction this Court must determine whether it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or whether there is no other practicable remedy.
21. In the present matter, this Court agrees with the claimant that it does appear that there is a remedy reasonably available by way of proceedings in a court to the complainant. As observed by the defendant in her determination, the complainant would have been directed by the defendant either to the Industrial Relations Court or to get letters of administration from this Court and then he would have processed the matter of the death benefits pertaining to the estate of his late mother. The issue of expense that the defendant was preoccupied with is one that is well taken care of by institutions deliberately set up in our justice system. As observed by the claimant, the defendant would have referred the complainant to the Legal Aid Bureau for legal

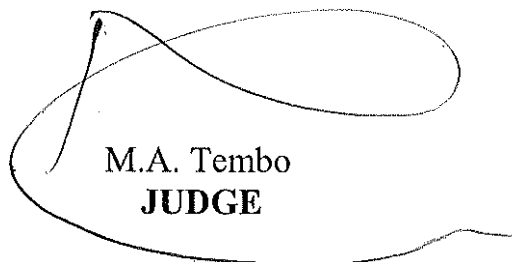
assistance on the matter at hand rather than assuming jurisdiction as she did on the basis that the complainant would not afford to go to court.

22. In the circumstances, the finding of this Court is that there appeared to be reasonably available to the complainant a remedy by way of proceedings in a court. The remedy was not illusory. As such, the first ground of review succeeds as this Court finds that the defendant acted in excess of her jurisdiction as set in section 123 (1) of the Constitution.
23. On the second ground for the review, namely, that the defendant conducted an inquiry and made a determination against the claimant which is a private entity and thereby acted outside her jurisdiction, the claimant's view is that section 5 of the Ombudsman Act is clear that only public bodies are amenable to the defendant's jurisdiction. The defendant took the view that section 123 (1) of the Constitution does not restrict her jurisdiction to public bodies and that therefore she would go by the Constitution and not the Ombudsman Act.
24. This Court observes that indeed section 5 of the Ombudsman Act is subject to the Constitution. So, the Constitution reigns supreme in so far as the defendant's jurisdiction is concerned. This Court took time to look at the Constitutional provisions that provide for the defendant as per the wise counsel of the Supreme Court that all relevant provisions of the Constitution must be read on a given subject to give effect to the meaning of provisions of the Constitution. See *Nseula v Attorney General* [1999] MLR 313.
25. This Court therefore read provisions in chapter X of the Constitution that provide for the defendant's office. It was particularly struck by section 124 of the Constitution which provides for the powers of the defendant. Specifically, this Court noted that in section 124 (b) of the Constitution the defendant is given powers to require disclosure of information and production of documents of any kind from any public body. That power is limited to public bodies. This appears to this Court to be very instructive as to what the defendant can investigate. The power to require disclosure of information and documents is limited to public bodies. It does not extend to private bodies. This is the reason why the Ombudsman Act elaborates in section 5 that the powers of the defendant are limited to Government organs and bodies.
26. This Court therefore agrees with the claimant that the defendant has no jurisdiction to do a public inquiry and make a determination with regard to

the claimant which is a private body, being a limited company. Of course, the defendant can question any person or subpoena any person reasonably believed to be connected to her investigation as per section 124 (a) and (c) of the Constitution but that does not appear to confer jurisdiction to conduct inquiries into complaints pertaining to private bodies. The second ground of review therefore succeeds.

27. On the last ground of review, namely, that in her determination the defendant assumed the role of interpreting the Constitution and the Ombudsman Act and had effectively ousted the jurisdiction of the courts and thereby acted outside her jurisdiction the claimant made the following argument. The claimant took the view that when the defendant overruled the claimant's objection to do with the claimant being a private body and therefore not being amenable to the defendant's jurisdiction, the defendant exceeded her jurisdiction by saying that she would go by section 123 of the Constitution that does not limit her jurisdiction to public bodies as opposed to section 5 of the Ombudsman Act that does. On the other hand, the defendant stated that she was entitled to express that view in the face of the objection by the claimant on that aspect.
28. This Court takes the view that the defendant, when faced with an objection challenging her jurisdiction in terms of the Ombudsman Act and the Constitution, was entitled to deal with the objection as part of her determination. There was nothing wrong with that and that did not amount to her exceeding her jurisdiction as she was applying herself to her determination and all matters arising in the course of the determination. That is why the claimant on being dissatisfied with such determination has the right which it has exercised here by way of review. To hold otherwise may result in the defendant's work getting stifled as she may not be able to apply the law and Constitutional provisions in the course of her work on the basis that she cannot interpret laws. Applying laws in her work entails that she interprets such laws in any given situation. She would have to bring her understanding of such laws to bear. The last ground of review therefore fails.
29. Given that the review has succeeded on two substantive grounds, this Court exercises its discretion to grant the reliefs sought by the claimant.

Made in open Court at Blantyre this 1st April, 2022.



M.A. Tembo
JUDGE