

Y. L. S.



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CASE NUMBER 57 OF 2017

BETWEEN
THE STATE
AND

NATIONAL COUNCIL FOR HIGHER
EDUCATION.....RESPONDENT

EX PARTE:

OUSMAN KENNEDY, CONFIDENCE PHIRI, KEN KWALALA AND JUMA
WASILI (REPRESENTING THEMSELVES AND OTHER STUDENTS OF
BLANTYRE INTERNATIONAL UNIVERSITY)APPLICANTS

CORAM: Hon Jack N'riva, Judge
Mr. Chimkango of counsel for the applicants
Mr. Khonyongwa of counsel for the respondents
Mrs. Mtegha Court Official

ORDER

This is a hearing of originating summons by the applicants against the decision of
the respondent to withdraw the accreditation of Blantyre Internationally University.

The applicants were enrolled as students at the University. They are against the respondent's decision to retrospectively apply and implement the decision to withdraw the accreditation of the university. The applicants are also challenging the failure by the respondent to apply procedures laid down in the National Council for Higher Education Act. Further, the applicants are against the application and implementation of the decision without following standards and that no standards had been approved by the Minister as required under the National Council for Higher Education Act and that there was no council duly constituted as required by the Act.

The application is supported by a sworn statement filed by the first applicant.

The applicants are students at Blantyre International University. They enrolled with the institution between 2013 and 2015 when the institution was duly accredited. Before they finished their studies, the respondent made an assessment of the institution and as a result, it withdrew the accreditation of the institution.

The applicants argue that at the time of the withdrawal of the accreditation, the names of the members of National Council for Higher Education were not gazetted as required by section 4(4) of the National Council for Higher Education Act.

The applicants argue that by virtue of section 27(1) of the Act, the quality assurance standards have to be prescribed by the Minister responsible, but the respondent applied the standards that had not yet been approved by the Minister. Further, the applicants had not completed their programmes of study, so as to constitute an academic cycle.

The applicants argue that at the time of assessment, the applicants had finalised their studies. The applicants argue that the withdrawal of the accreditation had a retrospective application and affected those who completed their education when the accreditation was valid. There was a certificate issued in 2010 and expired in 2015. The applicants argue that the respondent had a duty to immediately evaluate the institution at the expiry of the certificate. However, the respondent waited until 2016 which was, in the view of the applicants, negligence on the part of the respondent. The applicants argue that while at one point the certificates were valid, they became invalidated. The applicants, therefore, argue that the respondent acted in contravention of the law, under section 27 (2) of National Council for Higher Education Act, by not considering what an academic cycle means.

The applicants therefore ask the Court to make an order quashing the decision of the respondent. Alternatively, the Court should make an order that the withdrawal of the

accreditation can only apply from such a time when it was made. The applicants argue that even if the institution were unaccredited, the applicants cannot go back to school since they already completed their education.

Counsel for the respondent relied on the sworn statement of Dingane Soko, the respondent's Corporate Services Manager. He states that the respondent is responsible for ensuring standards in institutions of higher education. It determines the minimum criteria in developing national qualification framework compatible with regional and international standards. In pursuance with its mandate, the respondent called stakeholders' consultation meeting to determine minimum criteria and procedures for registration and deregistration of the institutions of higher learning in Malawi. All higher learning institutions in Malawi were represented.

Following the meeting, minimum standards were set and duly approved by the Minister and an evaluation framework for accreditation was developed. The minimum standards and the evaluation framework were disseminated to all institutions of higher learning.

Blantyre International University expressed interest to be accredited pursuant to section 36 of the National Council for Higher Education Act and there was an assessment conducted from 23 to 26 May, 2016. During the period of the assessment, the Council noted that several programs failed to meet the standards set for accreditation. The respondent communicated the issue to Blantyre International University. By virtue of section 27 (4) of Act, the respondent is mandated to publish the results of accreditation in the *Gazette* or the media. They published the results through *The Nation* newspaper in November 2016.

He further said that the prior accreditation of Blantyre International University was meant to be for five years and it elapsed on 5 June 2015 after which the institution had to be re-accredited according to the provisions of the Act. The witness further said that in section 36(3) of the Act, every institution in existence at the time of coming into force of the Act had to apply for re-accreditation within six months. If the applicants had taken sufficient steps to ascertain the accreditation, they would have been aware of the status of the accreditation and all the standards and the evaluation framework: the information is published and readily available and accessible on National Council for Higher Education website. He further said that the accreditation of Blantyre International University was not revoked but elapsed by time by virtue of section 36 of the National Council for Higher Education Act. He stated that the respondent followed the procedures laid down in the Act and that

they did what is in the best interest of Malawi to promote and ensure high standards of education.

The applicant's main arguments are that the withdrawal of the accreditation should not apply to them because they were within an academic cycle that was accredited. When they started their education, the accreditation certificate was valid. When National Council for Higher Education withdrew the accreditation, some students had finalised their studies and they could not go back to school to get a valid qualification. The other argument is that the respondent acted without backing of the law: there was no council, the Minister had not approved the standards and the Minister did not publish in the *Gazette* members of the council.

The respondent, on the other hand, argues that the applicants were not in accredited academic cycles. The respondent argues that if a program of study is for four years, its academic cycle is for four years and it must be evaluated every four years.

Counsel further argues that the accreditation certificate for the university elapsed and the institution's accreditation was due for review. Counsel argues that neither accreditation nor non-accreditation can apply retrospectively.

On composition of council, the respondent argues that the appointment takes place upon appointment and not on gazetting. This was in response to the applicants' argument that the respondent's board was not gazetted. Counsel made reference to section 26 of General Interpretation Act.

Counsel argues that the requirement of publication in a *Gazette* was a means of transparency to inform the general public. Counsel argues that the appointments were made and were published in the newspaper. Further to that, Blantyre International University, just like all the other higher learning institutions, recognised the Council's authority including applying for accreditation from them.

The respondent also says that the Minister approved institutional quality standards and the institutions of higher learning received the standards.

Counsel argues that what the applicants are applying for in this Court is tantamount to make the Court to accredit Blantyre International University when the National Council for Higher Education found the institution wanting. Counsel argues that the University did not meet the conditions for accreditation. Counsel argues that each cohort starts its own cycle. He says that their preferred interpretation is that each course of study is an academic cycle. Therefore, counsel argues that there was no retrospective application.

Counsel argues that the respondent acted fairly and that the decision was fair and valid and that the applicants have an alternative remedy which is to take to task the University to improve on the standards. Counsel argues that the spirit of accreditation of universities is to enforce minimum standards and that this application should be dismissed with costs.

In response counsel for the applicants argues that section 36 of National Council for Higher Education does not talk of consequences of failure to have accreditation. Counsel argues that Blantyre International University had accreditation until 1 June 2016. Counsel argues that the meaning of an academic cycle is unclear and that the Court should construe the ambiguity in favour of the applicants. Counsel argues that if the respondents did not understand what an academic cycle means, they had to seek clarity from the Minister or refer back the matter to Parliament.

The parties, especially the applicants, raised many issues. However, in simple terms, the question for determination is whether to grant the reliefs that the applicants sought from this Court by the way of judicial review. Narrowly put, the question is whether the decision of the respondents is amenable to judicial review.

As stated in *Zodetsa and others v Council for the University of Malawi* [1994] MLR 412 (HC), the remedy of judicial review is concerned with the reviewing of the decision-making process itself. *Jamadar v Attorney-General (Dept. of Immigration)* [2000–2001] MLR 17. It is, in general, not concerned with the merits of the decision in respect of which the application has been made. The duty of a Court in judicial review is to ensure that while lawful authority has been conferred by Parliament that authority is not abused by unfair treatment. The Court can interfere with the decisions reached by public bodies performing public functions only in cases where the decision reached is such that no reasonable persons or body properly constituted could have reached that decision. The aim of judicial review is not for the Court or a Judge to substitute a decision of a body duly empowered to make a decision: *State v Chief Secretary to the President and Cabinet ex parte Muluzi* [2011] MLR 357.

Courts will only interfere with a decision where the authority has acted without jurisdiction, or failed to comply with rules of natural justice, or abused its powers *Kalumo v Attorney-General* [1995] 2 MLR 669, *Khembo v The State (National Compensation Tribunal)* [2004] MLR 151, *Chipula v Attorney General* [1995] 1 MLR 76, *Taulo and others v Attorney General and another* [1994] MLR 328.

Barnett H describes judicial review as

... the means by which administrative authorities – whether ministers of the Crown, government departments, local authorities or others with law making and administrative powers – are confined by the courts within the powers granted to them by parliament. It is for a court to determine – following the granting of an application for judicial review – whether the body in question has acted *intra vires* or *ultra vires* (that is, inside or outside its powers).

In *State and another v Malawi Electoral Commission* [2004] MLR 374 (HC), Chombo, J identified three commonly used grounds for judicial review: illegality, irrationality and procedural impropriety.

Illegality refers to decisions or actions that are *ultra vires* the relevant legislation see *Padfield v Minister of Agriculture Fishing and Food* [1968] AC 997. ... Illegality also refers to decisions or actions based upon an incorrect interpretation of the law; see *Re: Islam (Tafazzul)* [1983] 1 AC 688. An incorrect interpretation of the law can in turn result into want of jurisdiction or excessive exercise of jurisdiction; see *Rocal Communications Limited* [1981] AC 374, [1980] 2 All ER 634.

On irrationality, the Court said:

Irrationality is multifaceted and is reflected in any of the following conduct by a public authority:

- (a) acting for an improper purpose
- (b) acting with bad faith
- (c) typically fettered discretion
- (d) improperly delegating functions,
- (e) reaching a conclusion that no body properly directing itself on the relevant law and acting reasonably could have reached (Wednesbury unreasonableness),
- (f) failing to take into account relevant matters or taking into account irrelevant matters,
- (g) abuse of power,
- (h) acting in a disproportionate manner.

Whilst on procedural impropriety, of concern is about the right to a fair hearing. The Court said:

What is of concern here is the right to a fair hearing; the obligation on public bodies to comply with express procedural rules, and to avoid bias; see the cases

of *Ridge v Baldwin* [1964] AC 4; *Republic v Lambeth London Borough Council, ex parte N* [1996] ELR 299 and *Republic v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139, respectively.

The applicants raise several grounds on which they find fault with the decision of the respondent. First, they argue that the respondent contravened National Council for Higher Education Act on the issue of academic cycle. On that point, the argument by the applicants is that they were in an accredited academic cycle. The respondent, on the contrary, argues that the applicants were in an unaccredited academic cycle.

Section 2 of the National Council for Higher Education Act defines an academic cycle as a period within which to complete a programme of study. The definition seems to be quite clear, if one is to purposively interpret the provisions of the National Council for Higher Education Act.

The duty of Courts in construing statutes is to faithfully endeavour to give effect to the expressed intention of Parliament as gathered from language used and apparent policy of enactment under consideration: *Chatepa and another v Malawi Housing Corporation* [1997] 1 MLR 237. Reading the meaning of an academic cycle as well the other provision on when institutions of higher learning have to receive evaluation, one is left with clear meaning of an academic cycle.

In simple terms, an academic cycle means the period from the start to the end of an academic programme. Section 27(2) of the Act answers the question when the respondent is to conduct evaluation of an institution:

The Council shall evaluate the performance of higher education institutions every academic cycle for purposes of accreditation.

On that point, it seems to me that it was incumbent on the respondent to evaluate each academic cycle. The question is whether the applicants were in an accredited academic cycle. The respondents argue that Blantyre International University had accreditation only up to June 2016. The University did not seek renewal of the accreditation until the time they made the application which the Council rejected. Counsel representing the applicants argues that the law does not provide for consequences of failure to apply for accreditation. Section 36 of National Council for Higher Education Act is the transitional provision of the Act. Under it all the institutions of higher learning, established under statute or charter or registered with the Ministry of Education, in existence at the commencement of the Act were deemed to have been registered under the Act. At the same time, at the commencement of the Act, the institution was under an obligation to apply to the

Council for accreditation. My view is that one would interpret the provision that the failure to apply for re-accreditation would mean that the accreditation would fall of.

The other argument is that the standards for accreditation were not signed by the Minister. However, the person making a sworn statement on behalf of the respondent exhibited a document that the Minister signed as a preface to the standards. The respondents argue that the Minister signed standards; the applicants have not disputed this assertion. Therefore, on the face of it, it appears to me that the Minister might have duly signed the standards. The argument must therefore fail that there were no standards or that the Minister had not signed for the standards. But even if it were the case that the Minister did not sign for the standards, the requirement is not mandatory. Reading through the provision, the requirement is electable.

The other argument is that the Council was not duly constituted. The ground on which the applicants made the assertion was that the Board was supposed to be gazetted but it was not. Section 4(4) of the Act is clear and is in mandatory terms that the Minister has to publish in the *Gazette* the members of the Council. The allegation has not been disputed by the respondent that the Minister did not publish in the *Gazette* the members of the Council. The publication of the names of the members in the *Gazette* is not a mere formality. It is a requirement. Failure to publish the membership of the Council in the *Gazette* means the process of appointment is incomplete.

Kapanda J, as he then was, in *The State v President of the Republic of Malawi and MACRA ex parte Joy Radio*, Miscellaneous Civil Cause Number 198 of 2006, held that the failure by the President to gazette the appointment of Board Members of Malawi Communication Regulatory Authority rendered the appointment inoperative. In simple terms, where there is statutory requirement to publish in the *Gazette* an appointment, failure to publish in the *Gazette* goes to the core of the appointment itself. Thus, in this matter, there was no Council. Therefore, any act that the body might have done would be of no legal consequences. If it is true that the body discredited a duly accredited University, they acted outside their powers. The respondent lacked legal authority. The act was void at law.

Counsel for the respondent argues that the purpose of publication in the *Gazette* is to notify the public. Counsel argues section 26 of the General Interpretation Act backs his argument. That provision states:

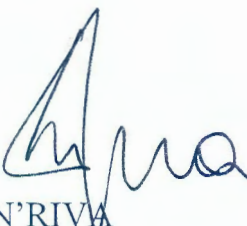
Where, by or under any written law, the President or any Minister or any other person is empowered to appoint or name a person to exercise any powers or

perform any duties, the President or such Minister or other person may appoint a person by name or the person for the time being holding the office designated by the President, such Minister or other person to exercise such powers and perform such duties; and thereupon or from the date specified in the appointment, the person appointed by name or the person holding the office so designated may exercise such powers and perform such duties accordingly.

Still, it appears to me that, for purposes of the appointment under the National Council for Higher Education Act, the appointment is completed by publishing the names of the members of the Council in the *Gazette*. That provision talks of nothing concerning publication in a *Gazette*. On the issue before us, the publication was one of the core processes in the appointment. I cannot agree with counsel that the publication was merely for public knowledge.

In summary, I do not find that the respondent acted illegally on want of standards or misconstruction of an academic cycle. Illegality only arises on the failure to publish in the *Gazette* the membership of the Council of the respondent. Only if the respondent discredited Blantyre International University when it was duly accredited, I emphasise this point, the decision was made without authority. That is if the Council withdrew the University's accreditation when there was one, the withdrawal was made without authority. There was no decision at all.

DELIVERED the ^{27th} day of ^{March} ~~February~~, 2018


J N'RIVA
JUDGE