IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 17 OF 2000

(Being High Court Civil Cause No. 3473 of 1999)

BETWEEN:

THE COUNCIL OF THE
UNIVERSITY OF MALAWI.....RESPONDENT

- and -

NASINUKU I J SAUKILA.....APPELLANT

MSCA CIVIL APPEAL NO. 32 OF 2000

(Being High Court Civil Cause No. 3475 of 1999)

BETWEEN:

NASINUKU I J SAUKILA.....APPELLANT

- and -

THE COUNCIL OF THE
UNIVERSITY OF MALAWI.....RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE

THE HONOURABLE MR JUSTICE UNYOLO, JA

THE HONOURABLE MR JUSTICE MTEGHA, JA

R Mhone, Counsel for the Appellant

Mtambo, Counsel for the Respondent

Mbekwani (Mrs), Official Interpreter/Recorder

J U D G M E N T

Unyolo, JA

The parties in this case are Nasinuku Saukila, as the plaintiff, and the Council of the University of Malawi, as the defendant. As the facts will show in a moment, there are two appeals in this matter. The first appeal was filed by the defendant on 2nd May 2000 and the second appeal was filed by the plaintiff on 14th August 2000. To avoid confusion, we shall refer to the parties by the initial titles rather than as the appellant or respondent.

The plaintiff was until November 1999 a 4th Year student at the College of Medicine of the University of Malawi (hereinafter referred to as "the College"). Following a Disciplinary Committee meeting of 13th October 1999, the plaintiff was on 5 th November 1999 expelled from the College on allegations of misconduct, namely, drunken-ness, removing and breaking the portrait of the Chancellor of the said University and removing notices from Notice Boards without permission. It was alleged that these incidents occurred at the Kamuzu College of Nursing in Lilongwe.

The plaintiff was not satisfied with the decision and he applied to the High Court for a review of the same. The matter came before **Hanjahanja, J**, and after hearing the parties and Counsel on both sides, the learned Judge found that the Disciplinary Committee lacked the requisite quorum at the hearing of the plaintiff's case. He found that there were only five members instead of seven, as required by the University of Malawi Student Rules and Regulations. The learned Judge held that in the circumstances, the Disciplinary Committee's decision, expelling the plaintiff from the College, was invalid, null and void. He went on to say that the situation could not be cured by the "Doctrine of necessity". Accordingly, he allowed the application and ordered that the plaintiff, unless

expelled for other acts of misconduct than those which were the subject of the judicial review, should be reinstated and continue his studies at the College.

The facts continue. On the same day the lower Court's ruling was delivered, the College wrote the plaintiff informing him that he had been reinstated and further requesting him to appear before the Principal of the College to answer the same disciplinary charges which were the subject of the judicial review. Thereupon, the plaintiff took out a Summons for an injunction to restrain the College from holding the intended disciplinary hearing. In addition, he took out a Summons to have the defendant Council's chairman committed to prison for contempt of court, on the basis that the defendant, through the College, had ignored the above-mentioned ruling of **Hanjahanja, J**. The subsequent proceedings came before **Mkandawire, J**, and after hearing Counsel on both sides, the learned Judge was of the view that although the letter informing the plaintiff about his reinstatement also requested him to appear for another disciplinary hearing on the very charges that had been framed previously, the College had not thereby failed to comply with the court order made by **Hanjahanja, J**. The learned Judge opined that having reinstated the plaintiff as advised in the said letter, the College Principal was perfectly entitled, under the relevant Rules and Regulations, to re-hear the matter. The learned Judge held that the defendant Council's chairman was not in contempt of court, and he accordingly dismissed the plaintiff's application.

With regard to the first appeal against the ruling of **Hanjahanja, J**, the main issue is whether the learned Judge was wrong in finding, as he did, that the Disciplinary Committee convened by the College to hear the charges brought against the plaintiff, was not quorate. Dr Mtambo, Counsel for the defendant, argued before us that the learned Judge failed to properly interpret the relevant Student Rules and Regulations.

It is common case that the relevant Rules and Regulations are Clauses 11.1 and 11.2 of the University of Malawi Students Rules and Regulations. These provide as follows:

"11. STUDENT DISCIPLINARY COMMITTEE

11.1 The College Students Union Disciplinary Committee is responsible for considering cases of misconduct and makes recommendations to the Principal for a final decision. Provided where it is impractical to convene the Disciplinary Committee, the Principal may consider the case and make a decision after hearing the student.

11.2 The College Students Disciplinary Committee shall normally comprise the following:

(1) Vice Principal - Chairperson

(2) College Registrar or Assistant Registrar or Administrative Assistant who shall also be secretary

(3) Warden

(4) Students College Union Advisor

(5) Matron/Home sister

(6) 4 students representatives from the College Union

(7) One-co-opted member of staff"

Dr Mtambo submitted that the two provisions are different and deal with different matters. With respect, we do not agree. The two provisions, in our view, deal with the same subject matter. Condensed, what the two provisions are saying is that, what is called "The College Students Union Disciplinary Committee" was set up to be responsible for considering cases of indiscipline and misconduct involving students and to make appropriate recommendations to the Principal of the College for a final decision. The composition of the Disciplinary Committee is set out in Clause 11.2. This Clause provides for a total of ten members of the Disciplinary Committee. There is then a rider that where it is not possible to convene the Disciplinary Committee, the College Principal may hear the case himself and make a decision. It is clear from the ruling appealed from that the learned Judge correctly understood this to be the purport of the two provisions.

As we have seen, the Principal proceeded by way of convening the Disciplinary Committee. Clause 12.1 of the Student Rules and Regulations provides that two-thirds of the members of the Disciplinary Committee shall form a quorum at any meeting. We have seen that the total membership of the Disciplinary Committee under Clause 11.2 is ten members; two-thirds of this is seven members. It was not in dispute that only five members attended the Disciplinary Committee meeting that expelled the plaintiff from the College. It was stated some four members, namely, the student representatives, decided at the eleventh hour to pull out from the Disciplinary Committee and consequently they did not attend the meeting. Whatever was the reason, it is clear that with only five members attending the meeting, the Disciplinary Committee was not quorate. In the circumstances, the learned Judge's finding on this aspect cannot be faulted.

A secondary issue is whether the learned Judge was wrong in finding that the "Doctrine of necessity" referred to in the Press Trust case, **MSCA Civil Appeal No. 92 of 1996**, was not applicable to the present case. As we have just said, four student members of the Disciplinary Committee resigned from the Disciplinary Committee just before the Disciplinary Committee was convened. It was the defendant's case that the four students did so deliberately, in order to frustrate the College's intention to convene the disciplinary hearing. The learned Judge observed that he understood the Press Trust case as laying

down the principle that once a quorum is formed at the beginning of a meeting, the withdrawal of some members, thereby reducing the quorum, would not invalidate the proceedings subsequent to the withdrawal of the other members, or the resolutions made during such a meeting. He said that the Press Trust case could be distinguished on the facts from the present case, where there was no quorum, even at the very beginning of the meeting. To say, as Counsel for the defendant submitted, that the learned Judge said that the Doctrine of necessity was restricted only to this scenario, is putting words into the learned Judge's mouth. He did not say that.

To conclude on this aspect, it might be useful to say here that the Press Trust case appears to be misunderstood. The Doctrine of necessity was not part of the ratio decidendi of that case. The case was decided on other grounds. The remarks which the court made in that case, vis-a-vis, the doctrine of necessity, were only obiter. We thought we should make this comment in case the defendant was trying to pray in aid of the doctrine of necessity using the Press Trust case. Actually, it is difficult to understand how Counsel for the defendant thinks that the doctrine of necessity, properly understood, would apply to the facts of the present case. All in all, the defendant's submission on this point has no merit and it must fail.

We now turn to the second appeal. As indicated, the appeal on this particular aspect is by the plaintiff against the ruling of **Mkandawire, J**. Several grounds of appeal were filed. Paraphrased, these are, firstly, that the learned Judge erred in finding that the defendant did not comply with the order of the lower court directing that the plaintiff should be reinstated. It was also contended that the learned Judge omitted to consider that **Hanjahanja, J** had actually directed that the plaintiff should be reinstated, unless expelled for other acts of misconduct than those which formed the subject matter of the judicial review in the present case; and that consequently the learned Judge erred in holding that the College was entitled to re-hear the very charges that had been brought against the plaintiff. Secondly, it was argued that the learned Judge erred in finding that the plaintiff did not want to answer the disciplinary charges. Finally, it was argued that the learned Judge misdirected himself in law in not

considering the effect of the interlocutory injunction order which restrained the defendant from conducting further proceedings.

With regard to the first point, we have indicated that after the order of the plaintiff's reinstatement was made, the College wrote the plaintiff advising that he had been reinstated and inviting him to appear before the Principal to answer the same charges. It was argued for the plaintiff that the purported reinstatement was a mere sham, intended to ensuring that the plaintiff was brought within reach of the defendant to be retried. It was further contended that it was not open to the College to re-hear the case in the light of the order of **Hanjahanja, J**, which expressly stated that the plaintiff could be expelled from the College only for other charges than those which were the subject of the judicial

review.

The first pertinent question to be answered is whether, where an applicant succeeds to have the decision of an administrative body, such as the College in the present case, set aside on judicial review, there could be another hearing or re-hearing on the same facts. The answer to this question may be in the affirmative, depending on facts. For example, where the administrative body's decision was attacked on judicial review on the basis that there was a failure to comply with the rules of natural justice, like a failure to give a respondent an opportunity to be heard, the administrative tribunal could properly re-hear the matter after affording the respondent such opportunity: see **Ridge vs Baldwin (1964) AC 40**; see also **De Verteuils (1918) AC 557**. In our judgement, the same is true where, as in the present case, the irregularity was merely that the administrative tribunal lacked a quorum at the meeting where its decision was made. In such a case, the tribunal would properly re-hear the matter.

But reverting to the present case, we have seen that **Hanjahanja, J** directed that the plaintiff should be reinstated "unless expelled for other misconduct than the subject of the judicial review". The question is whether the learned Judge was right in making this last limb of the order, beginning with the word "unless". With respect, we are unable to support this part of the order, since, as we have already held, it was open to the College to re-hear the plaintiff's case. Further, by adding the last limb, it appears to us that the Judge had made a decision on a substantive issue which, as we all know, is not the purpose of judicial review, and in any case, he did so without hearing the parties on this issue.

This brings us to the contention that **Mkandawire, J** erred in finding that the plaintiff did not want to answer disciplinary charges. Looking at the facts as a whole, we are unable to find fault with the learned Judge's finding on this point. It is significant to note that the plaintiff brought the judicial review proceedings, complaining about the procedure that was followed by the Disciplinary Committee, in that it was not quorate. Another issue he raised in the affidavit he swore in support of the application was that he was not given a chance to cross-examine the person who laid the disciplinary charges against him. It has been noted that the second inquiry was going to come before the College Principal. The question of quorum would not therefore arise again. Further, the second inquiry was going to afford the plaintiff the opportunity to cross-examine the person he wanted to cross-examine. But as it happened, the plaintiff instead chose to go back to court for an injunction. And even before the injunction proceedings were heard, he filed a Summons for contempt of court, the subject of the second appeal. Matters appear to have been complicated unnecessarily by those proceedings.

We have considered the submission that the reinstatement of the plaintiff was a mere sham, considering that the letter that communicated the news of the plaintiff's reinstatement also requested him to appear for another disciplinary hearing before the

College Principal. It was contended that in order to comply with the court order, the College should have allowed the plaintiff to attend classes pending the disciplinary hearing, which the College did not do. The defendant explained this, saying that the College was on recess at that time. It appears to us that this indeed was the case, and that the College opened several weekslater, on 2nd May 2000.

On these facts, we are of the view that the learned Judge's finding that the College complied with the court order made by **Hanjahanja, J** cannot be faulted. We have given careful consideration to the part of the learned Judge's order which stated that the plaintiff should be reinstated "unless expelled for other acts of misconduct than those which were the subject of the Judicial Review". But as we have already indicated, that part of the order was wrong in law.

We now turn, finally, to the contention that the learned Judge misdirected himself in law by not considering the effect of the interlocutory injunction which restricted the defendant from conducting further proceedings. With respect, we do not think the plaintiff's contention is made out. It is noted that the interlocutory injunction order in question, which was made by **Twea, J** on 9th April 2000, was granted for a period of seven days only, pending the hearing of an inter-parties application. That application was not immediately pursued and, apparently, it has not been heard to this day. Clearly, the interlocutory injunction order had lapsed, having not been renewed by the time **Mkandawire, J** was seized of this matter. The learned Judge cannot, therefore, be criticised.

To sum up, both appeals must fail, and are dismissed save that, for the reasons already given above, the "unless" part of **Hanjahanja, J's** order must, and is hereby, set aside. But the learned Judge's order quashing the Disciplinary Committee's decision expelling the plaintiff from the College and directing that he be reinstated is upheld. It is however open to the College to re-hear the plaintiff's case if it is still inclined to do so.

The orders of the courts below with regard to costs are upheld. In this court each party is to pay its own costs.

DELIVERED in Open Court this 4th day of June 2001, at Blantyre.

Sgd .....

R A BANDA, CJ

Sgd .....

L E UNYOLO, JA

Sgd .....

H M MTEGHA, JA