IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 63 OF 2003

BETWEEN:

THE STATE

-and-

MALAWI DEVELOPMENT CORPORATION……...…RESPONDENT

Ex-parte: NATHAN MPINGANJIRA……APPLICANT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr G. Zibelu Banda of Counsel for the Applicant

Mr. Kalekeni Kaphale of Counsel for the Respondent

Mr Mankhanamba, Court Clerk

Dates of hearing : 15th May 2003

Date of ruling: 2nd June 2003

Kapanda, J

RULING

Introduction

The matter before me is a judicial review proceeding. It was commenced by the Applicant. He obtained permission to apply for a judicial review of the decision of the Respondent suspending the Applicant from employment. As is appearing in the Notice of Originating Motion the substantive hearing of the claimant's application for judicial

review was to be heard on 15th May 2003. This was the very same day the respondent's Summons to discharge leave was made returnable. As it were, in this ruling the court will essentially deal with the two applications simultaneously.

The Respondent wants the leave that was granted to the Applicant discharged. Thus, a summons to discharge the grant of leave was taken out by the Respondent. The grounds upon which the Respondent seeks to set aside the said leave are set out in the said summons.

The Applicant to discharge leave: The Basis

The Respondent wants the permission that was granted to the Applicant to apply for judicial review discharged on a number of grounds. The basis upon which the application to discharge leave is premised are set out in the summons and are as follows viz. :

(a) that leave to apply for judicial review was granted out of time.

(b) that there was no prior formal application for the extension of time within which to apply for judicial review before leave to apply for judicial review was granted.

(c) that the Respondent was not served with any application seeking the extension of time within which to apply for judicial review; neither did it attend court to be heard in opposition to the said application.

(d) that there was no sufficient or good reasons shown for the delay in applying for leave to apply for judicial review.

(e) that there is available to the applicant an alternative course of action or an alternative remedy in the form of access to the Industrial Relations Court; Hence the High Court has no jurisdiction to hear the present matter at first instance.

(f) that the applicant has no arguable case for judicial review because:

(i) the present matter arises out of a private contract of employment: it is a private law and not a public law matter.

(ii) under the private law contract of employment between the applicant and the respondent, the respondent has a right to suspend the applicant from employment pending investigations into serious misconduct, and later on, a proper hearing.

(iii) the applicant is still in employment and has lost no benefit or remuneration pending the finalisation of preliminary investigations into the allegations of misconduct.

(iv) under common law, there is no remedy for mental anguish or distress arising from the breach of an employment contract

Evidence

There is affidavit evidence from both parties. On the Applicant's side there are two affidavits sworn by the Applicant himself. The first affidavit was filed on 29th April 2003 and it is in support of the application for leave. The second affidavit is a supplementary one. The supplementary affidavit was filed on 5th May 2003. This second affidavit is in support of a Notice of An Originating Motion filed with this court on 2nd May 2003 and made returnable on 15th May 2003. None of the affidavits of the Applicant deals directly

with the matters raised by the Respondent.

On the Respondent's side only one affidavit was filed with the court. The filing was done on 7th May 2003. It is an affidavit sworn by Mr. Kalekeni Kaphale. This is the affidavit which is filed in support of the application to discharge the said leave to apply for judicial review.

There was no cross-examination of the deponents on their affidavits. From the affidavits on record there appears to be no serious dispute of facts.

Facts of the Case: A narrative

The facts obtaining in this case are in the affidavits mentioned above. I shall attempt, as far as practicable, to set out the facts in a chronological order as I find them:

August 2002

The Respondent engaged the Applicant, on 17th August 2002, as its Director of Finance and Company Secretary. This is borne out by the service agreement annexed to the Applicant's affidavit in support of application for leave to apply for judicial review. The Applicant did not stay long on this position.

September 2002

The Applicant was later appointed Deputy General Manager. This was on or about the 6th day of September 2002. It is important to note that his appointment to the post of Deputy General Manager was approved by the Minister of Statutory Corporations. This was done following a meeting, on 4th September 2002, that was attended by the Minister of Statutory Corporations; the Comptroller of Statutory Corporations; and the General Manager of Malawi Development Corporation. This is discerned from a letter dated 5th September 2002 and exhibited to the said supplementary affidavit of the Applicant. It is to be observed though that there is no service agreement reduced in writing regarding the appointment of the Applicant to the post of Deputy General Manager. The exact terms and conditions of his engagement to the said position of Deputy General Manager are therefore not known. This is unlike when the applicant was engaged as the respondent's Director of Finance/Company Secretary. Moreover, neither the Applicant nor the Respondent has given an explanation as regards why the appointment of the Applicant, to the said post of Deputy General Manager, had to be discussed at the said meeting of 4th September 2002. This Court finds it difficult to resist the conclusion that the involvement of the Minister of Statutory Corporations and Comptroller of the Statutory Corporations shows that the Government of Malawi is privy to the contract of employment between the Applicant and the Respondent. The government, through the Minister of Statutory Corporations, approved the appointment of the claimant as Deputy General Manager. Surely, the same government must also be allowed to suspend the applicant from his said post of Deputy General Manager.

January 2003: Suspension

The Applicant is currently on suspension from duty. He was so suspended from duty on 17th January 2003. The Applicant was informed of his suspension from duty through the

office of the Comptroller of Statutory Corporations in the Department of Statutory Corporations. In his letter of 17th January 2003 the Comptroller of Statutory Corporations advised the Applicant, inter alia, as follows:

"In view of this suspension which comes in the wake of a suspected criminal offence which is under Police Investigation, you are required to vacate your office immediately and surrender your keys to the Authorities. You are advised not to take away any document from the office until investigations are completed--"

This suspension was tacitly ratified by the Respondent. I am of this view because there is no letter of suspension coming directly from the Respondent to the Applicant.

7th April 2003: The Applicant seeks redress in the Industrial Relations Court

On 7th April 2003 the Applicant filed a claim with the Industrial Relations Court . The claim is for wrongful suspension and breach of contract. In the statement of claim the Applicant is seeking damages for breach of contract. He is also claiming payment of terminal benefits.

29th April 2003:Application for Judicial Review

The Applicant did not stop with his claim in the Industrial Relations Court. He then, without withdrawing the claim in the Industrial Relations Court, came before this Court. On 29th April 2003 he took out an application for leave to apply for Judicial Review. The Court granted him the permission. At the substantive hearing of the Judicial Review the Applicant wanted the Court to grant him, inter alia, the following reliefs:

"1. An order similar to certiorari quashing the decision of the respondent to suspend the applicant from his position as Finance Director/Company Secretary on the orders of the Malawi Government and without valid cause or providing an opportunity to the applicant to be heard before making the decision aforesaid.

2. An order similar to prohibition restraining the respondent from continuing to keep the applicant in suspension regarding his position, rights and obligations under the contract of employment between the applicant and the respondent.

3. A declaration that the Malawi Government had no power or authority to suspend the applicant from his position of Finance Director/Company Secretary for the respondent indefinitely or at all and that the said suspension is illegal, unconstitutional and therefore void.

4. A declaration that the suspension and alleged criminal investigation against the applicant have rendered the employment relations between the applicant and the respondent irretrievable and that by reason of the respondent's conduct the applicant be released from his duties.

5. An order similar to mandamus requiring the respondent, in terms of the contract of employment between the applicant and the respondent, to determine the said contract of employment and pay the applicant all his contractual dues payable in accordance with the contract of employment between the applicant and the respondent.

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7. Punitive/exemplary damages for breach of contract of employment…”

A point of correction regarding the position of the applicant at the time he was suspended from duty. The applicant’s position is that of Deputy General Manager of the respondent company and not Finance Director/Company Secretary.

Further, it is to be observed that most of these reliefs can be obtained in the Industrial Relations Court. In saying this I am alive to the fact that the orders by the Industrial Relations Court would not be the former prerogative orders. They would all the same be orders whose effect would be the same as the said former prerogative orders that are being sought in the proceedings before this court.

The Respondent wants to stop the Applicant from proceeding with the Judicial Review. Hence the application by the Respondent to set aside to the leave that was granted to the Applicant. At law an application to set aside leave is allowed where the Respondent can show that the substantive application will clearly fail. As it shall soon be demonstrated the claimant’s application for judicial review would fail on the ground that he has no arguable case for judicial review.

Issues In Dispute

From the Summons filed by the Respondent; the affidavits sworn by both parties; and the arguments of Counsel, this Court finds that the following are the issues that must be determined:

(a) whether or not there was a delay in applying for Judicial Review.

(b) whether, if there was such a delay, the leave that was granted to Applicant should be discharged.

(c) whether or not the Applicant has an arguable case for Judicial Review.

(d) whether or not the Applicant’s choice of Judicial Review proceedings in this Court is a right one?

The above are, in my view, the issues that require adjudication. It must be observed that notwithstanding the isolation of the issues the court will not refer to them seriatim when it is considering the issues and making its findings.

Consideration of the Issues

Delay

The position at law is that an application for Judicial Review should be made promptly. Indeed, the law is that it should in any event be made within three(3) months unless the court considers that there is a good reason for extending the period within which the application should be made. The Respondent, as already observed, wants the leave that was granted herein discharged on the ground of, inter alia, delay. The delay that is in issue here is of twelve days. The Applicant has urged this Court to find that a delay of twelve days is not inordinate. He further submitted that it did not prejudice the Respondent considering that he was late by only twelve days. Thus, so the argument of the applicant goes, this Court should not discharge the leave.

At the time the Applicant made his application for leave there was an attempt to explain

why he delayed in making the said application for leave. The Applicant averred that the delay was not deliberate but rather it was due to his thinking that his employers would not take long in coming up with a decision regarding his suspension. I am not sure if the Court fully applied its mind to the relevant provisions of **O. 53 of the Rules of Supreme Court 1995 Edition** as regards late applications for permission to apply for judicial review. If it had done so it would have realised that there was need to give notice of an application to extend time to the Respondent. As a matter of fact an application for extension of time should have been made separately. It should not been buried within the application for leave to apply for judicial review.

It is noted that leave was all the same granted despite the observations made above. This court can not, at this stage, do anything to correct this anomaly. The situation would have been different if the issue of delay was raised at the substantive hearing of the judicial review: **O.53/1-14/31 of Rules of the Supreme Court 1995 Edition.** At that stage it would have been open to this court to refuse reliefs on the ground that such delay would cause hardship to, or is prejudicial to the rights of, the Respondent. Unfortunately the affidavit of the Respondent has not demonstrated that there will be any prejudice to the rights of the Respondent or that there will be substantial hardship to the Respondent. The permission that was granted to the claimant can not, therefore, be set aside on the ground of delay.

Suspension of Applicant: Is it susceptible to Judicial Review?

It is trite knowledge that Judicial Review is about reviewing the decision making process of public authorities or bodies. Further, as I understand it, this procedure is used in proceedings where a person wants to establish that a decision of a person exercising public power or a decision of a public body infringes rights which are entitled to protection under public law. Furthermore, it is to be noted that the position at law is that the remedy of judicial review will not be entertained in all employment cases: **The State -vs.- The Southern Region Water Board ex-parte Richard Willard Jones Chikoja** Misc. Civil Cause No. 47 of 2003 (High Court) (unreported decision of Chimasula Phiri, J. of 20th May 2003). I entirely agree with the views of my learned brother judge in the above-mentioned decision. If we allow that the remedy of judicial should be used in all employment cases willy-nilly then this court will soon replace management of companies or the boards of companies.

I hold the view that the Applicant does not have an arguable case for judicial review. The dominant factor in this case is that the Applicant wants to enforce private rights under the private law of employment . Further, the decision to suspend the Applicant is not an administrative action as commonly understood in constitutional law or as is provided for in Section 43 of the Republic of Malawi Constitution. This Court doubts very much if the rules of natural justice (the right to be heard) should be called into play where a body, albeit a public one, decides to suspend an employee pending investigations into an alleged misconduct. This is the case because a suspension is only intended to put a freeze on the relationship as an inquiry is going on. The applicant would have to be given the opportunity at an enquiry, if there is going to be any, to give his side of the story before any decision is made either to retain him or dismiss him from employment. Furthermore, I am of the view that the Department of Statutory Corporations did not exercise public

power when it decided to suspend the Applicant so as to warrant the reviewing, by this court, of the said decision. Indeed, the decision of the Respondent is not an administrative one which is subject to review in judicial review proceedings. In my opinion it is only an action (decision) in the exercise of public power that could be termed an administrative action (or decision) and therefore coming within the provisions of Section 43 of the Constitution. It is such type of a decision that could be reviewed in judicial review proceedings. I doubt if a decision to suspend an employee of a public body is an exercise of public power which is amenable to judicial review. For this reason the claimant's application for judicial review would fail if this matter proceeded to a substantive hearing. The long and short of it is that the application for judicial review is not successful.

Judicial Review and employment cases

I wish to observe that a number of cases were cited by the Applicant to support the argument that this Court, and the Malawi Supreme Court of Appeal, does recognize the use of Judicial Review process in employment cases. All the cases cited were dealing with the termination of employment. They are, therefore, distinguishable from the present case where the main issue is about the suspension of the Applicant who, by the way, is getting all the benefits he is entitled to under his contract of employment with the Respondent. Moreover, it must be observed that in the authorities put before this Court the issue whether Judicial Review proceedings was an appropriate mode of commencing the proceedings involving employment issues was neither raised by the parties nor dealt with by either the High Court or the Malawi Supreme Court of Appeal.

It is my understanding that the authorities cited are of no relevance to the instant case where the applicant's services were not terminated. The applicant is merely suspended from employment pending investigations by the Police. More on the suspension of the applicant will be discussed very shortly.

Private law remedy in a private relationship?

It was submitted on behalf of the ex-parte Applicant that since the Respondent is a public company then the public law remedy of Judicial Review should be available to the applicant to remedy a wrong committed against him. I do not agree with this argument. The relationship between the claimant and Respondent is a private one notwithstanding the fact that the Respondent is a public body. If there is a breach of any of the terms of the contract of employment, between the applicant and the respondent, the remedy should be found in a legal suit under private law. This Court has said that it is not every right or freedom that would be enforced horizontally: **Saukila -vs.- The National Insurance Company Ltd.** Civil Cause No. 117 of 1997**, Felix Mtwana Nchawe -vs.- Minister of Education, Science and Technology** Misc. Civil Cause No. 82 of 1997. Further, I wish to put it here that in as much any wrong invariably involves a breach of a fundamental right or freedom it is not correct to say that the process to be taken to remedy the wrong will always be through Judicial Review.

The effect of Investigations by the Anti Corruption Bureau or the Police

It has not been suggested that the Anti-Corruption Bureau or the Police are through with the investigations in the matter allegedly involving the claimant. Further, it is not the case

that the Respondent, or the Department of Statutory Corporations, has control over the investigations by either the Police or the Anti-Corruption Bureau. For these reasons the Court ought not allow that Judicial Review proceedings should be used to frustrate investigations into alleged impropriety on the part of an employee. We should allow the investigations to take their full course without any hindrance.

Is the High Court a proper forum?

The other issue that this court has to deal with is the question of the claimant's choice of this court. The parties addressed me on this point. Indeed, there is a divergence of views on this issue. The Respondent is of the view that this court is not the right forum to bring the claim herein. It is argued by the respondent that in view of the fact that the claimant could have an alternative remedy in the Industrial Relations Court he should not be allowed to proceed with the judicial review proceedings herein. On the other hand, the Claimant is of the opinion that there was nothing wrong in commencing these proceedings in the High Court. There were a number of authorities cited to me on this issue. This court has a few remarks to make on the said cases.

It must be put here that in**Kaunde vs. Malawi Telecommunications Limited** Civil Cause No. 687 of 2001 this court never said that the Industrial Relations Court has exclusive jurisdiction over each and every employment case. This of course does not take anything away from the fact that allowing all employment cases, or labour disputes, to come to the High Court would deny litigants a tier of appeal that they would have. The view of this court is that to deny a litigant a tier of appeal in the court system amounts to a denial of access to justice. Further, I would like to repeat that if we entertained each and every employment case because we have an unlimited original jurisdiction then there will be no need to have the Industrial Relations Court. Actually, the fact that the High Court has unlimited original jurisdiction should not be taken to mean that the High Court should handle each and every case under any law. If such were the case then all the criminal matters being handled in the subordinate courts would have been coming before the High Court. It is on this premise that I do not think that the case of **Malawi Telecommunications Limited vs. Malawi Post and Telecommunications Workers Union** Civil Cause No. 2721 of 2001 is advocating that the High Court should be so submerged with employment cases when there is the Industrial Relations Court, established under the Constitution, which must deal with labour and/or labour related matters.

Furthermore, if we accept the argument that where the claimant prays for an order similar to any of the former prerogative orders then those proceedings should come before us we will never manage our cases effectively. We need to scrutinise the cases that come before us under the process of judicial review. If we do not then any imaginative Counsel will only need to draft his client's claim in such a way that it includes a prayer for such type of orders then the claim will be before the High Court. The cases will come before us even when they do not deserve to be here. A claim for any of the said former prerogative orders described above should not blind us into accepting that a particular claim can only be dealt with by this court. We need to lift the veil so as find out if those claims are not a sham intended to abuse the court system.

Non-withdrawal of claim in the Industrial Relations Court

Finally, it must be observed that the claimant has not withdrawn the claim he filed in the Industrial Relations Court. During the time he made the application for leave to apply for judicial review the claimant undertook to withdraw the claim in the said Industrial Relations Court once leave was granted. The undertaking was made on 29th April 2003 when the court granted him the said leave. At the time the instant application was being heard, on 15th May 2003, the undertaking had not been complied with. This is a clear case of an abuse of process. We will not allow that the claimant should abuse the court system.

Conclusion

This court has not been persuaded that this matter, which is essentially an attempt by the claimant to lift his suspension from duty, is suitable to proceed to a substantive hearing so that the Court could review the decision of the Respondent. In any event the court finds that the claimant's application for judicial review is without merit.

For the reasons given above the leave that was granted to the claimant is set aside. The claim herein will have to proceed as if it had been commenced by way of a Writ of Summons. This of course will be subject to the withdrawal of the claim in the Industrial Relations Court. Unless the applicant withdraws his claim in the Industrial Relations Court he will not be allowed to proceed with the claim herein.

The costs of, and occasioned by, this application will be costs in the cause.

Pronounced in Chambers this 2nd day of June 2003 at the Principal Registry, Blantyre.

F.E.Kapanda

JUDGE

Nathan Mpinganjira and MDC- Misc. Civil Cause No. 63 of 2003