IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 49 OF 2006

BETWEEN:

THE STATE

AND

ATTORNEY GENERAL (MINISTRY OF EDUCATION……..
…….….RESPONDENT

EX PARTE

AMOS SULUMA AND OTHERS…….…..……...APPLICANTS

CORAM: **HON JUSTICE M. C. C. MKANDAWIRE**
Mr Chiphwanya, counsel for the applicants
Respondent, Absent
Mrs Edith Malani, official interpreter

RULING

Mkandawire J,

This is an application for judicial review brought by the applicants. When the matter came for hearing on the 19th of October 2006, the respondent was not present and no reasons were given for their failure. As there was proof of service on the respondent, I ordered that we proceed with the matter.

The basis of this application emanates from the decision of the Ministry of Education not to pay the applicants fees for their Bachelor of Education upgrading course. The applicants therefore seek the following reliefs:

1. A declaration that the decision of the Ministry of Education not to pay the fees for the Bachelor of Education upgrading course of the applicants is irrational, unfair and unjust.
2. A declaration that the said decision is procedurally improper.

3. An order of the court akin to *certiorari* quashing the decision of the Ministry of Education to pay the fees for the applicants' Bachelor of Education upgrading course.

4. An order of the court akin to *mandamus* directing the Ministry of Education to pay fees for the applicants' Bachelor of Education upgrading course.

5. An order for costs.

Before I further delve into the matter, let me make an observation here. The applicants have cited The Attorney General (Ministry of Education) as the respondent. As I had noted in the matter of **The State and Attorney General, Mapeto Wholesalers and Faizal Latif** Civil Cause No. 253 of 2005, applicants in judicial review cases should learn to distinguish them from civil procedure (suits by or against the Government or public officers) Act, Cap 6:01 of the Laws of Malawi. Certainly, judicial review proceedings are not legal suits. In the latter, the Government is sued through the Attorney General who is the Principal Legal Advisor. The position is therefore clear that the Attorney General cannot be a party to such proceedings unless

it is shown that that office was privy to a decision that is being challenged. The cases of **Kool Temp Co vs The Controller of Customs and Excise and the Attorney General** (1992) TLR 523 at 524 and **Forbes vs Attorney General of Jamaica** No 2004/HCV 01286 have emphasized that point that the Attorney General is not a proper party in judicial review proceedings. These decisions have also been followed in the Republic of Belize in the case of **Regina vs Attorney General** *ex parte* **Belize Telecommunications Ltd** Action No. 40 of 2002. Here in Malawi, similar approach has been taken in the case of **Hon Brown Mpinganjira and others vs The Speaker of the National Assembly and Attorney General** Miscellaneous Civil Cause No. 3140 of 2001(unreported). The applicants therefore should not have cited the Attorney General herein. The correct party is the Ministry of Education as put in brackets.

SURVEY OF FACTS

The facts of the case are that all the applicants in this case are teachers employed by the Ministry of Education. They are now upgrading their qualifications at Chancellor College. Following an advertisement in the newspaper, the applicants applied for admission to the Bachelor of Education (mature entry) programme at Chancellor College; a constituent college of the University of Malawi. There are about 45 affidavits in support of this application. A close scrutiny of these affidavits shows that the facts are the same apart from some differences here and there on the supporting documents attached to these affidavits.

In a nutshell, the affidavits disclose that after having applied for admission to Chancellor College, all the applicants got letters of acceptance and were offered places on the Bachelor of Education (mature entry) programme. What is also very clear from these affidavits is that all the applicants had tunnelled their applications for admission through their respective heads or divisional managers. When the applicants got letters of admission from the University Registrar which letters are standard ones, all the applicants of course individually wrote the Secretary for Education through their respective heads and divisional managers or manageresses. I note from the affidavits that out of the total number of applicants, only seven applied to the Secretary for Education, for both paid study leave and scholarships to study. The rest only applied for paid study leave. Those who applied for both paid study leave and scholarships are: Stephen Banda,

Irene Chipeta-Zimba, Josiah Chamanza, Violet Kachaka Banda, Fred Kanje, Aubrey Kayambwali and Flora Kaphantengo. The applicants reported for studies at the university. Whilst there, on the 6th of March 2006, they all got letters from the respondent that out of the 116 applicants for the mature entry programme, the respondent had selected only 46 students who they would be responsible for funding and that those not included on the list would be assumed to have gone there on their own. Details of the names of those selected for funding are tendered in evidence. The applicants depone that they have become aware through interaction with other secondary school teachers who have undergone this similar programme that throughout the years, the respondent has sponsored teachers' upgrading programmes at the Chancellor College. They further depone that the respondent have not responded to their applications for study leave or application for scholarships. They further say that the letter of 2nd March, 2006 concerning the selection of those the respondent will sponsor was not even copied to them. They actually got copies from the Dean of Education at Chancellor College. The applicants have also deponed that they had legitimate expectation that the respondent would sponsor them. They also question the procedure followed in coming up with the decision as who to sponsor and who not to sponsor. They described the said decision to be procedurally improper therefore rendering it unreasonable, unfair and unjust. It is their contention that the money for sponsorship being public money, such access can only be denied after a transparent and meritorious or just, fair and satisfactory selection exercise.

Before I further delve into the analysis of this case, I bear in mind that this case has come before me for purposes of judicial review. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. The case of **Chief Constable of North Wales Police vs Evans** (1982) 3 ALL ER 14 is very clear on this. I further take it that the purpose of judicial review is the court's control over executive action. There are three grounds to that effect. The first ground is that the public authority should be properly exercised. In other words, those who exercise public authority should do so within the province of their powers. If they do exceed their mandate, then they have acted *ultra vires.* The second relates to unreasonability of use of that power. If the power has been exercised in an unreasonable manner, then judicial

review would lie. The third ground refers to the procedure followed. If the action taken is not procedurally proper, that would be amenable to judicial review.

As I had already observed earlier, this matter went uncontested. The court has been denied the opportunity to learn from the respondent as to the policy which they have at the Ministry of Education on issues of training. It is clear from the facts in the case that the respondent knew that the applicants had been admitted to upgrade themselves at Chancellor College. It is also very clear that the respondent was requested by the applicants for permission to go on study leave with full pay. Some of the applicants even applied for sponsorship.

The respondent has so far not responded to any of these letters. The only letter coming from the respondent relates to the selection list which letter was not even copied to the applicants. The respondent did not even find it necessary to inform the applicants about their decisions on who were to be sponsored.

In looking at this case, I have addressed my mind towards Section 43 of the Constitution which deals with the issue of administrative justice. I note from the provision of this section that every person is entitled to procedurally fair administrative action, which is justified in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened. There is also need for the decision maker to furnish the affected party with reasons in writing.

The procedure followed by the respondent herein is totally unacceptable. The respondent knew very well that the applicants had developed legitimate expectations when they applied to them for paid leave as well as sponsorships. The expectation was further boosted with the fact that the respondent have been sponsoring teachers in the past to similar courses at Chancellor College, a thing they have not controverted. The respondent did not even bother to respond to the applications. It is not even clear as to what criteria was followed in coming up with the list of those 46 students. There is no transparency in the way they came up with their decision. The court therefore finds that the decision was procedurally improper.

I therefore declare that the decision of the respondent Ministry of Education not to pay the fees for the applicants is irrational, unfair and unjust. I further declare that the said decision is procedurally improper, discriminatory and lacks transparency. I therefore order that the decision herein be quashed. I further order that the respondent should find means that the applicants herein be assisted to have sponsorship so that their legitimate expectations are not frustrated. Certainly, had the respondent put in place a training policy, they should not have been in this quagmire. This should act as food for thought. I finally order that the respondent should pay costs of this action.

MADE in chambers this 27th day of October 2006 at Blantyre.

M. C. C. Mkandawire

JUDGE