

**IN THE HIGH COURT OF ZOMBA
MISCELLANEOUS : NO. 1 OF 2015**



BETWEEN

THE STATE

VS

**COUNCIL OF THE UNIVERSITY OF MALAWI (UNIMA).....
RESPONDENT**

**EX PARTE: UNIVERSITY OF MALAWI WORKERS TRADE
UNION (UWTU).....
APPLICANT**

CORAM: HON. JUSTICE RE KAPINDU

- : E. Banda, Counsel for the Applicant**
- : T. Roka, Counsel for the Respondent**
- : A. Nkhwazi, Official Interpreter**
- : L. Mboga**

RULING

Kapindu, J

1. INTRODUCTION

- 1.1.** This is the Court's decision on an application for judicial review brought by the Applicant, the University of Malawi Workers' Trade Union (UMWTU). Counsel Edwin Banda appeared for and argued the case on behalf of the Applicants. The motion is supported by an Affidavit in Support, and Affidavit in Response to the Respondent's Affidavit in Opposition, and the Applicant's Skeletal Arguments.
- 1.2.** The application is opposed by the Respondent, the Council of the University of Malawi, who is represented by Mr. Ted Roka of Kalekeni Kaphale Lawyers.
- 1.3.** According to the Applicants' Notice of Application for Leave to Apply for Judicial Review, in the Form of Form 86A under the RSC, the Applicants seek to challenge the following decisions of the Respondent:
 - (a) The decision to withhold the pay of the members of the Applicant who were on strike;
 - (b) The decision to refuse the Applicant the right to appeal or the act or omission on the part of the respondent that resulted in failure to hold the appeal hearing;
 - (c) The decision of the respondent that members of UWTU were on an illegal strike;
 - (d) The finding by the respondent that the strike was illegal;

- (e) The finding of the respondent that the employees on strike were absent from work; and
- (f) The finding that the employees on strike were not entitled to pay or that the respondent was entitled to deduct and withhold their pay.

1.4. The Applicants invite this Court to decide that:

- (a) The decision by the Respondent to declare the strike as illegal was clearly ultra vires in that the Respondent had no power to make the decision under the law;
- (b) The Respondent usurped the function and power of the Industrial Relations Court (IRC) and acted as a court, being also the prosecutor and judge at the same time;
- (c) The finding that the employees on strike were absent from work or that they did not do work is absurd, the legal absurdity of which is embarrassing and defeats the enjoyment of freedom to strike and actually takes away the right to strike.
- (d) The Respondent's resolution that salaries should be deducted and withheld and to continue withholding salaries in that manner is unreasonable and is such that no reasonable public authority acting reasonably would arrive at that decision.
- (e) The withholding of pay in the circumstances is illegal.

1.5. The Applicants stated that the evidence would show that towards the end of 2014, there was a labour dispute between the Applicant's members and the Respondent relating to the increment of salaries. The Applicants wanted a pay rise and the Respondent offered an increment of 14% which the Applicants declined. The Applicants instead proposed 45%. The Applicants state that these facts are evident from both of their affidavits in support of the application and the Respondent's affidavit in opposition.

- 1.6.** The Applicants state that what followed was that Notices were issued by the Applicants to the Respondents. First according to the Applicants, was a letter of 20 October 2014 which was served on the Respondent on the same day. The same is marked as exhibit “FK1”. According to the Applicants, this provided a 21 day notice within which to resolve the matter failure which it threatened disruption of services.
- 1.7.** According to the Applicants, there was also another Notice from the Applicants to the Principal Secretary for Labour dated 20 October 2014, but delivered on 21 October 2014. It is marked “FK9”. The proof of service on the PS is marked “FK10”. According to the applicants, “FK9” was received by a Mr. Magombo on behalf of the PS for Labour. Mr. Magombo duly signed in acknowledgment of receipt of the letter. The Applicants argue that “FK9” clearly showed that there was a labour dispute regarding the 14% salary adjustment offered by the Respondent. The Applicants argue that there was no action on the Notice and the dispute remained unresolved on the expiry of the 21 days’ notice.
- 1.8.** The Applicants state that on 25 November 2014, they issued a threat of a sit in, or a strike as it were. They state that this came with a 7 days’ notice which notice was to expire, at the latest, by 3rd December 2014. The Applicants indicate that the strike started On 4 December 2014.
- 1.9.** It is the Applicants’ case that whilst the strike was ongoing, the Respondent issued threats of disciplinary measures to be taken by the Respondent against the applicants. According to the Applicants, the Respondents said that they were to do so because the strike was

illegal. They said that they had come to that position in a University of Malawi leadership meeting that took place on 12 December 2014. The Applicants argue that the Respondents further stated that they had come to that position after considering the opinion from their legal Counsel. Exhibit “BOM 5” of the Respondent in this matter was referred to as evidencing that point. The relevant part of “BOM 5” read:

RE: ACTION ON ILLEGAL STRIKE

On behalf of the University of Malawi leadership which met today at University office, I write to inform you that after considering the legal opinion of its Legal Counsel, it has asked me to inform you that your union members should return to work with immediate effect, because the strike is illegal.

The basis for the illegality of this action is that you have not followed normal legal procedures for going on strike as stipulated in the Labour Relations Act.

If you and your members do not return to work, Management will take the appropriate disciplinary measures in accordance with the prevailing Terms and Conditions of Service.

(signed)

B.W. Malunga

UNIVERSITY REGISTRAR

1.10. The Applicants state that on 16 December 2014, the Respondent reiterated the threats. They again called the strike an illegal strike. The Applicants cite exhibit “BOM6” (exhibited to the affidavit of Benedicto Wokomaatani Malunga) or for the Applicants “FK3” (exhibited to the Affidavit of Franklin Kapeni), which they submit did not mince any words. In its relevant parts, the said Memorandum stated:

RE: ILLEGAL STRIKE

I write to inform you that after considering the legal opinion of the University Legal Counsel, I write to request you that you should return to work by Thursday, 18th December 2014...If you choose not to return to work by the said date, Management will take appropriate disciplinary measures in accordance with the prevailing Terms and Conditions of Service. You are also being informed that you will not be paid for the days that you have been absent.

(signed)

N. Kaphuka (Mrs.)

For/UNIVERSITY REGISTRAR

1.11. The Applicants submit that it is very clear that the said decision (in Exhibit “BOM 6” was made without the involvement of the Principal Secretary for Labour. They therefore argue that it is lame for the Respondents to argue that the decision to declare the strike illegal was not their decision, as they suggest in their papers.

1.12. Applicants state that it is this decision to declare the strike illegal, and further the decision to declare them as absent from work, and in addition the decision to, therefore, deduct their pay, that they find adverse and are complaining against.

1.13. The Applicants state that the correspondence from the PS for Labour, letter marked as exhibit “FK2”, was dated 18 December 2014. The Applicants state that even that latter stated that “the employer may take disciplinary action against you”, suggesting that the decision to deduct pay was clearly the Respondent’s and no one else’s.

1.14. The Applicants state that “FK2” is also significant as it likewise declared the sit in (or strike) illegal. A relevant part of “FK2” in this regard reads:

I never received a report of the dispute between you (University Workers Trade Union) and your employer, namely the University Council, which would have enabled me to appoint a conciliator.

In view of this, the sit in is illegal. I therefore urge you and your members to call off the sit in and follow the set procedure, otherwise you risk being disciplined by your employer. I trust you will take my advice very seriously and that in future you will follow set procedure according to law.

1.15. The applicants submit that good governance and administrative law, particularly based on section 43 of the Constitution and the principles of natural justice and the rule of law, emphasise the right to be heard before condemnation, punishment and disciplinary action of any sort.

They submit that the right to be heard includes the right to receive notice of the charge(s), the evidence against the charged person being brought to his or her attention, and the opportunity to contradict the same.

1.16. The Applicants have submitted that the Respondent's decisions were made ultra vires. They argue that the University Registrar who is just a keeper of records under University statutes had no power to do so. They contend that even the University Council itself could not be competent to make such a decision. They further argue that Council could not even ratify such a decision. The Applicants submit that the only institution with the power to declare a strike illegal is the Industrial Relations Court.

1.17. The Applicants therefore pray that this Court should grant the reliefs that they seek.

1.18. The Respondent was represented by Counsel Ted Roka of Kalekeni Kaphale lawyers. I must also mention here that both Counsel for the Applicants and Counsel for the Respondent argued the case with candour and ability. I am greatly appreciative of their research and industry.

1.19. Counsel Roka began by stating that what his learned colleague, Mr. Banda, had taken the Court through was pretty much a correct restatement of the facts.

1.20. Counsel Roka began by focusing on the question of the legality of the strike. He submitted that the law is clear that an employee or union cannot engage in a lawful strike without the involvement of the Secretary for Labour.

- 1.21.** The Respondents submit that whilst the Applicants claim that they consulted the Ministry of Labour on their intention to go on strike, the Court record would show that even the very person that they claimed to have notified and who was supposed to facilitate conciliation under the Labour Relations Act denied knowledge of the Notice delivered to him on the intended strike or indeed on an unresolved dispute.
- 1.22.** The Respondents submit that one can only Report to the Secretary for Labour what is an unresolved dispute. Counsel Roka invited the Court to look at Exhibit “BOM4” which was a Memorandum addressed to all welfare associations including the Applicants inviting them to a meeting on 1 December 2014. He pointed out that the applicants attended the meeting. Counsel Roka submitted that only the University Council, which at the time was yet to be constituted, had the power to decide on salaries. Counsel then argued that only 2 days after the 1st December meeting, the applicants proceeded on a sit in. He contended that at that stage, there was yet no unresolved dispute that was worth reporting to the Secretary for Labour.
- 1.23.** Counsel Roka argued that “BOM7” (which is also “FK2”) was clear evidence that the Secretary for Labour had no knowledge of the Notice alleged to have been served on him by the applicants.
- 1.24.** Counsel contended that an unresolved dispute is a dispute that has been through the conciliation process. It only becomes unresolved after the conciliation process has failed. The Respondents argued that there was no evidence that this matter had been taken through the process of conciliation.

1.25. The Counsel Roka argued that even if it were to be assumed that the Respondent had no power to state that the strike was illegal, this matter must be determined on its own facts because during the period the courts had been closed. He invited the Court to take judicial notice of that fact. In this regard Counsel Roka submitted that even if the Respondents were to seek a declaration from the Courts, that chance was not available.

1.26. Counsel Roka further submitted that courts should not be used by parties to seek opinions but to resolve disputes. He queried whether it was right that an employer should rush to court to seek the court's opinion before they react. He continued to argue that and in a situation where courts are not operational, the employer should surely be able to react to such situations, and that only when the employees are aggrieved should they take the matter up on the issue of the declaration of illegality or legality of the strike.

1.27. Counsel Roka then moved on to the applicants' argument that there was an infringement of the right to be heard. Counsel argued that the right to be heard is only available to employees in a disciplinary action by the employer. In this case, Counsel argued, the decision to deduct pay was not a disciplinary action and, therefore, he contended, that issue did not arise.

1.28. The Respondents argued, as an extension to the above argument, that the law is very clear under Section 57(2) of the Employment Act where an employee is entitled to be heard. Counsel Roka argued that Section 56 of the Employment Act, particularly Section 56(2) of the Act, lists what constitutes disciplinary action. He further submitted that under Section 56(3), there is a proviso that addresses the issue of deduction of wages in cases of absenteeism. For the sake of clarity of

the argument, the Court hereby sets out the relevant provisions of Section 56 of the Employment Act:

56. Disciplinary action

(1) An employer shall be entitled to take disciplinary action, other than dismissal, when it is reasonable to do so considering all the circumstances.

(2) For the purposes of this Part a “disciplinary action” includes—

- (a) a written warning;
- (b) suspension; and
- (c) demotion.

(3) Subject to subsection (4), no employer shall impose a fine or other monetary penalty on an employee:

Provided that the employer may not pay wages to the employee for the period he has been absent from work without permission of the employer and without reasonable excuse.

1.29. Counsel Roka submitted that in view of all these issues, the Respondent’s decision could not be faulted on the basis of violation of rules of natural justice.

1.30. To wrap up, Counsel Roka submitted that the decision of the Respondents was one that any other employer in the Respondent’s situation or position would have made in the circumstances. He therefore argued that the decisions complained of could not be said to be unreasonable in the *Wednesbury’s* sense. He contended that the

Respondents verily believed any reasonable employer could have made the same decision.

1.31. Counsel Roka's arguments were supported by Skeletal Arguments and an affidavit in opposition.

1.32. This Court is now called upon to determine whether the Applicants are entitled to the reliefs that they seek. That is the issue for determination herein.

2. ANALYSIS OF LAW AND FACTS

2.1. I must begin by recalling that in my earlier interlocutory decision of 2nd March 2015 on an application by the Respondent to discharge the Order of Leave to Apply for Judicial Review that I made in this matter, I outlined the reasons for assuming jurisdiction in this matter rather than referring the same to the Industrial Relations Court. I will therefore not proceed to repeat what I said in that decision here.

2.2. Judicial Review *"is the most effective means by which courts control administrative actions by public functions"* See **The State vs Attorney General (Ministry of Agriculture and Food Security), Ex Parte McWilson Qongwane & Others**, Miscellaneous Civil Cause No. 36 of 2012 (HC – Mzuzu), per **Madise, J.** It *"is a supervisory jurisdiction which reviews administrative action rather than an appellate jurisdiction"*, *Ibid.* Judicial review of administrative action lies in four categories of cases:

(a) Where there is want or excess of jurisdiction by the decision maker. In other words, where the decision maker has acted

ultra-vires his or her powers. See *Supreme Court Practice, 1999 Practice Note 53/14/28A*;

(b) Judicial review will lie where there is an error of law on the face of the record. See **R. v. Northumberland Compensation Appeal Tribunal** [1952] 1 K.B. 338; **Baldwin and Francis Limited v. Patents Appeal Tribunal** [1959] A.C. 663; [1959] 2 All E.R. 433, HL). See also *Supreme Court Practice, 1999 Practice Note 53/14/29*;

(c) Where there has been failure to comply with the rules of natural justice. See *Supreme Court Practice, 1999 Practice Note 53/14/30*; and

(d) Where the decision-maker has acted unreasonably in the sense expressed in what is commonly referred to as the *Wednesbury* principle. According to this principle, decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. See **Associated Provincial Picture Houses Limited v. Wednesbury Corporation** [1948] 1 K.B. 223; [1947] 2 All E.R. 680, per **Lord Green M.R.** See also *Supreme Court Practice, 1999 Practice Note 53/14/31*.

2.3. Generally, the orthodox common law position is that in cases of judicial review of administrative action, the Court is largely concerned with the decision-making process rather than the substance of the decision itself (or the merits of the decision as commonly stated). Of

course, there are instances where the court must necessarily consider the merits of the decision in cases of judicial review of administrative action.

- 2.4.** 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 under provided for 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.
- 2.5.** Back to the point that in some cases of judicial review of administrative action courts may also delve, in some cases, into the substance or merits of the decision, an instance is where the claim is grounded in unreasonableness. It makes sense, in such a case, for the Court to appropriately delve into the merits of the decision. However, the court still does so with restraint and only as far as is necessary. We should also bear in mind that Section 43(1) of the Constitution requires that every person has the right to administrative justice and that this right requires that for every administrative action taken which has the effect of affecting his or her rights or legitimate expectations, the decision must be justifiable in relation to the

reasons given. Thus, in order to determine whether the decision taken is justifiable in relation to reasons given, the Court must necessarily examine the merits of the decision. It is this Court's opinion that Section 43 of the Constitution cannot be or ought not to be left out in any discourse on judicial review of administrative action in Malawi.

2.6. Before delving into analysis of the issues that are up for determination in this case, I find it necessary to mention that this whole matter revolves around a particular right: the right of employees to go on strike. We must therefore define what this right entails in the Malawian context and how it may lawfully be exercised.

2.7. A strike is defined in Section 2 of the Labour Relations Act, Cap 54:01 as:

concerted action resulting in a cessation of work, a refusal to work or to continue to work by employees, or a slowdown or other concerted activity of employees that is designed to or does limit production or services, but does not include an act or omission required for the safety or health of employees, or a refusal to work under section 52.

2.8. Thus, by its very definition, a strike has the effect of limiting production or services and this, therefore, as a general statement (subject to specialist qualifications), is a phenomenon that is harmful to the economy, at least in the short-run. Labour is an economic factor of production and where it is withdrawn, the immediate negative economic impact needs no economist to appreciate, whilst the eventual full cost does need an economist to analyse and evaluate. In addition, where labour is withdrawn in institutions that provide social

services, such as the University in the instant case, the full cost of withdrawing labour can be very significant whilst at the same time not easily and fully quantifiable in monetary terms.

2.9. The law is not blind to the real and potential adverse consequences of strike action, but it also recognizes its fundamental importance to humanity, and guarantees it as a fundamental human right. Section 31 of the Constitution explicitly entrenches the right to withdraw labour. Regard being had to the competing interests and tensions inherent in the very nature of strike action, the law strictly regulates how and when it may be exercised. The policy of the law is to make recourse to strike action a matter of last resort.

2.10. In the nature of its conception under the Labour Relations Act, the right to strike is not exercised individually. There must be some “concerted action.” Thus one employee cannot, by himself or herself, proceed on a solo or lone strike against his or her employer. He or she may not do some lone picketing at or near his or her place of work or former place of work or a place of business of an employer or former employer for the purposes of peacefully communicating information or peacefully persuading other employees to similarly proceed on strike. Thus where there is no demonstration of organized collective bargaining, a strike action is untenable.

2.11. The manner in which employees, organised for purposes of collective bargaining, become entitled to proceed on strike action is defined in Sections 44, 45 and 46 of the Labour Relations Act. I set out the relevant provisions of these two provisions hereunder, and for analytical purposes, logic seems to require that I start with Section 46 and then proceed to Sections 44 and 45 of the Act.

46. Strike or lockout procedures

(1) Subject to subsections (2) and (3), where there is an unresolved dispute under section 45 either party may take action by way of a strike or lockout anytime after the dispute is deemed to be unresolved.

(2) A party may not take action by way of strike or lockout if—

(a) the procedures set out in section 44 have not been complied with; or

(b) the dispute has been referred for determination under section 45 (1) or section 45 (2) (a).

(3) A party to a dispute intending to strike or lockout, shall give notice in writing to the other party and the Principal Secretary responsible for labour at least seven days before taking such action.

44. Conciliation procedure

(1) If a dispute is reported to the Principal Secretary responsible for labour and he or she is satisfied that the dispute settlement procedures established in a collective agreement covering the parties to the dispute have been exhausted, unless all parties have consented to waive those procedures, the Principal Secretary responsible for labour or any person authorized by him or her to do so, shall endeavour to conciliate the parties, subject to subsection (2).

(2) Where one of the parties to the dispute is the Government, including any public authority or

commercial enterprise in which the Government has a controlling interest, the parties shall agree upon a conciliator, who shall endeavour to conciliate the parties.

(3) Where the parties are not able to agree on a conciliator under subsection (2) within seven days of the dispute being reported, the Industrial Relations Court shall, on the application of either party designate an independent arbitrator.

(4) The conciliation under subsections (1) and (2) shall be completed within twenty-one days of the receipt of the report, unless the parties to the dispute agree to extend the time.

(5) A dispute shall be deemed to be unresolved if a party fails to attend or the parties fail to reach agreement on the settlement of the dispute within the time prescribed in subsection (4).

(6) Where a settlement of the dispute has been effected pursuant to this section, it shall be recorded in writing and signed by the parties and the conciliator or arbitrator, as the case may be.

(7) The settlement agreement referred to in subsection (6) shall become binding on the parties on the date it is signed, unless the agreement states otherwise.

45. Unresolved disputes

(1) If a dispute is unresolved and concerns—

(a) the interpretation or application of any statutory provision or any provision of a collective agreement or contract of employment; or

(b) an essential service, either party to such dispute, or the Principal Secretary responsible for labour in the case of paragraph (b), may apply to the Industrial Relations Court for determination of the dispute.

(2) If a dispute is unresolved and concerns matters other than those referred to in subsection (1)

—

(a) where the parties to the dispute agree, the dispute shall be referred to the Industrial Relations Court for determination; or

(b) either or both parties may give notice in accordance with section 46 (3) that they intend to strike or lockout.

(3) If there is a question as to whether an unresolved dispute is covered under subsection (1) or (2), either party or the Principal Secretary responsible for labour may apply to the Industrial Relations Court for a determination.

(4) In an application under subsection (3), the Industrial Relations Court shall determine the question in a summary manner, whether or not by way of hearing witnesses.

(5) Subject to section 65 (2), the decision of the Industrial Relations Court shall be final.

2.12. It is therefore clear from these provisions that the procedure to be followed before employees may proceed on strike is very rigorous. It is to be observed that employees may not proceed on strike unless there is an unresolved dispute and the procedures laid down in

Sections 44, 45 and 46 of the Labour Relations Act have been complied with.

2.13. The procedures under Section 44 are peremptory and employees intending to proceed on strike must scrupulously comply with them. Before employees may proceed on strike, in terms of Section 44 of the LRA, the following must happen:

- (1) There must be a dispute between the employer and the employees;
- (2) Where there is such a dispute, the parties must first examine and exhaust, any dispute settlement procedures established in the collective agreement covering the parties, if such procedures exist;
- (3) If the dispute is unresolved under the internal settlement procedures contained in such a collective agreement; or, where such settlement procedures do not exist, the dispute must be reported to the Principal Secretary responsible for Labour;
- (4) The Principal Secretary responsible for Labour, upon receiving such notice must acknowledge receipt thereof in writing. As I will comment below however, failure on the part of the PS for Labour to comply with this peremptory requirement on his/her part should not be fatal to the exercise of the employees' right to proceed on strike.
- (5) Upon receiving such notice, the Principal Secretary for Labour may not take any further action unless he/she is satisfied that the dispute settlement procedures established in the collective agreement covering the parties to the dispute have been

exhausted, unless he/she is equally satisfied that the parties have consented to waive those procedures;

(6) Where the PS responsible for Labour is satisfied that the settlement procedures in the internal agreement between the parties have been exhausted without success, or that the parties have mutually decided to waive those procedures, he or she or any person authorized by him or her to do so, must endeavour to conciliate the parties. The PS responsible for Labour, however, may only endeavor to conciliate where the parties involved are private and the Government, any public authority or commercial entity in which Government has a controlling interest is not involved;

(7) Where one of parties to the dispute is the Government, including any public authority or commercial enterprise in which the Government has a controlling interest; as was in the present case where the Respondent was and is a public authority, the PS for Labour is not allowed to conciliate. Instead the parties must, between or among themselves, agree upon a conciliator, who should endeavour to conciliate them;

(8) The conciliation procedure under either of the two options outlined above must be completed within twenty-one days of the receipt of the report, unless the parties to the dispute agree to extend the time. Where the parties fail to agree within this period, the dispute is now deemed to be unresolved;

- (9) The dispute will also be deemed to be unresolved if a party to the dispute fails to attend the conciliation proceedings;
- (10) Where the parties cannot agree on a conciliator within seven days from the date when the dispute was reported to the PS responsible for Labour; no conciliation process may proceed. Instead, Under Section 44(3), an arbitration process kicks in. At that stage, the Industrial Relations Court, on the application of either party, is required to designate an independent arbitrator;
- (11) Where the matter is not resolved in terms of Section 44 of the LRA, Section 45 then spells out what must happen next.
- (12) Under Section 45(1)(a), if the dispute relates to the interpretation or application of any statutory provision or any provision of a collective agreement or contract of employment, employees are not allowed to proceed on strike. Either party may apply to the Industrial Relations Court for determination of the dispute;
- (13) If the dispute concerns an essential service, employees are not allowed to strike. The law requires either party to such dispute, or the Principal Secretary responsible for labour, to refer the matter to the Industrial Relations Court for determination. (It should be made clear here that the general principle under the LRA is that decisions of the IRC are not appealable to the High Court, in terms of Section 65(1) of the LRA. They are final and binding. The only exception where appeals are allowed is where the issue for determination is a question of law or jurisdiction (S.65(2)));

(14) If the unresolved concerns matters other than the interpretation or application of any statutory provision or any provision of a collective agreement or contract of employment; or does not relate to an essential service, then, under Section 45(2) of the LRA, where the parties to the dispute agree, the dispute should be referred to the Industrial Relations Court for determination; or, in the alternative, either or both parties may give notice in accordance with section 46 (3) that they intend to strike or lockout;

(15) At this stage, according to Section 46(3) of the LRA, a party to a dispute intending to strike or lockout, must give notice in writing to the other party and the Principal Secretary responsible for labour at least seven days before taking such action;

(16) Where such notice referred to in (15) above has expired, and all the required processes referred to above have been complied with, employees may then proceed on strike and it is only then that a strike can be lawful.

2.14. The length and magnitude of the procedural requirement that I have outlined above in order for parties to proceed on lawful strike may appear too onerous, but the law deliberately made them onerous because, as I mentioned earlier, the policy of the law is to require that strike action must truly be an action of last resort by employees under organized labour. It is the law, and not this Court, that spells out these requirements. What this Court has done has been simply to consolidate them and provide them, hopefully with better clarity. It is imperative that employee organisations carefully study the law and advise their members appropriately on when and when not a strike is legal.

2.15. Having said this, I remind myself that whilst this exposition of the law relating to strikes is appropriate to provide a proper background context to the issue of strike action under Malawian employment law generally, it is not, strictly speaking, what this Court has been called upon to decide. It is however background context necessary, and I considered this Court's duty to clarify to both parties, on what the law requires so that they are guided in their future decision-making processes. Judicial review processes are both backward-looking and forward-looking.

2.16. This Court must now proceed to decide on the issues this Court has been called upon to decide on.

2.17. First, this Court has been invited to pronounce that the decision by the Respondent to declare the strike as illegal was clearly ultra vires in that the Respondent had no power to make the decision under the law; and that the Respondent usurped the function and power of the Industrial Relations Court (IRC) and acted as a court, being also the prosecutor and judge at the same time. In support of this argument, the Applicants cited the decision of the Industrial Relations Court (IRC) in the case of **Singano, Borman & Others -vs- G4 Security Services Ltd**, Matter No. IRC PR 344/143 of 2006, where the Court, on the question as to whether or not a strike was illegal by reason of not complying with the requisite procedures, decided that this question "is to be determined by the IRC" and that the Court, in this regard "has powers to order an injunction against any intended or actual strike that was perpetuated without following proper procedures. See Section 54(1) LRA." This Court agrees entirely with Counsel for the Applicants in this regard, and indeed with the decision of the IRC in **Singano, Borman & Others -vs- G4 Security Services Ltd**.

2.18. The question is whether indeed the Respondent made the decision complained against. The answer in my view must be in the affirmative. I wish to, in this regard, refer to exhibit “BOM5” where the Respondent stated as follows:

RE: ACTION ON ILLEGAL STRIKE

On behalf of the University of Malawi leadership which met today at University office, I write to inform you that after considering the legal opinion of its Legal Counsel, it has asked me to inform you that your union members should return to work with immediate effect, because the strike is illegal.

The basis for the illegality of this action is that you have not followed normal legal procedures for going on strike as stipulated in the Labour Relations Act.

If you and your members do not return to work, Management will take the appropriate disciplinary measures in accordance with the prevailing Terms and Conditions of Service.

(signed)

B.W. Malunga

UNIVERSITY REGISTRAR

2.19. “BOM5” was followed by “BOM6” in which the Respondent further stated:

RE: ILLEGAL STRIKE

I write to inform you that after considering the legal opinion of the University Legal Counsel, I write to

request you that you should return to work by Thursday, 18th December 2014...If you choose not to return to work by the said date, Management will take appropriate disciplinary measures in accordance with the prevailing Terms and Conditions of Service. You are also being informed that you will not be paid for the days that you have been absent.

(signed)

N. Kaphuka (Mrs.)

For/UNIVERSITY REGISTRAR

2.20. The decision of the Respondent, when one considers this correspondence, leaves nothing to doubt. The Respondent made a decision declaring the strike illegal based on the advice from their Legal Counsel. Whether such declaration was correct or not in substance may be gauged against process to be followed prior to employees proceeding on strike that I have mentioned above; but, as I mentioned earlier, this is strictly not a matter for my decision in these proceedings. The significant matter for determination is whether the Respondent made a declaration that the strike was illegal and whether, if it did so, it had the power or competence so to do, as a matter of law. This Court's decision is that the Respondent made a declaration that the strike was illegal and that the Respondent did not have the power nor the competence to make such a declaration in point of law. This was a matter that should have been determined by the Industrial Relations Court.

2.21. The other decision this Court has been invited to make is to declare that the finding by the Respondent that the employees on strike were

absent from work or that they did not do work was absurd, the legal absurdity of which is embarrassing and defeated the enjoyment of freedom to strike and actually took away the right to strike. This issue will be dealt together with the remaining issues raised by the Applicants which were that the Respondent's resolution that salaries of the employees deemed to have been on an unlawful strike be deducted and withheld, and the Respondent's decision to continue withholding such salaries in the manner it has done was and is unreasonable; and that no reasonable public authority acting reasonably would arrive at that decision. In addition, the last issue raised by the Applicant that the withholding of pay in the circumstances is (generally) illegal. Is also dealt with here.

2.22. I must mention that employees who proceed on a lawful strike should not be penalized or financially or otherwise prejudiced by reason of participating in a lawful strike. Such indeed would end up rendering the whole notion of the right to strike to be emptied of all meaningful content. Where therefore, employees proceed on a lawful strike, the only risk that an employee has, as I understand the employment Act, when Sections 48 and 50 of the Labour Relations Act, and the rest of its relevant provisions are read together,¹ is that an employee on strike may end up losing his or her job as a result of operational requirements by the employer resulting from the strike action, if such change of circumstances is successfully demonstrated by the employer and the requirements of the Employment Act (Cap 55:02) have been satisfied.²

1 In other words when the LRA is read as a whole.

2 Section 50 of the LRA provides as follows: (1) If an employee who has participated in a strike in conformity with this Act or who has been locked out by his or her employer, presents himself or herself for work after the end of the strike or lockout, the employer shall, within a reasonable period, reinstate such employee in the employment that he or she held immediately prior to the strike or lockout, unless material changes to the employers' operations

2.23. Section 48 of the LRA provides as follows:

Where action in pursuance of a strike or lockout takes place in conformity with this Act—

(a) the provisions of a collective agreement, if any, between the parties shall not be deemed to have been breached by reason only of such action;

(b) **the contract of employment with respect to each employee involved in the strike or lockout shall not be deemed to have been breached by reason only of such action.**(My emphasis)

2.24. Absenteeism amounts to a breach of the employment contract with respect to each employee and where the strike is illegal, such may not there would be no basis to penalize or prejudice an employee by way of deduction of his or her salary or other emoluments.

2.25. The right to strike is part of a wider constitutional right under Section 31 of the Constitution: the right to withdraw labour. Human rights law is clear that when a person acts in exercise of a constitutionally guaranteed right, the presumption is that he or she has validly exercised such a right, and if there is an argument that such exercise fell within any of the constitutionally recognized limitations or restrictions, the burden lies on the one seeking to vindicate the restriction or limitation to prove the validity of the limitation or restriction.

have resulted in the abolition of such employment.

(2) Nothing in this section exempts an employer from ensuring that any termination of employment satisfies the requirements of the Employment Act. Cap. 55:02

2.26. In this regard, in order to conclude that the decision to declare the employees on strike to have been absent, a precondition was to show that the strike was illegal. Prima facie, proof of illegality of the strike could comply with the various constitutional requirements for limitation or restriction of the right to withdraw labour. I have already demonstrated however that the self-declaration by the Respondent that the strike herein was illegal, and the consequent taking of pecuniary prejudicial measures against the employees, was made ultra vires the powers and competence of the Respondent, and was therefore invalid. In this regard, any decisions that were made consequent upon this invalid declaration were equally ultra vires, incompetent and invalid.

2.27. I must make a couple of other observations before I leave this point. First, one notices, from “BOM5” and “BOM6” that the action taken by the Respondent was classified by the Respondent as amounting to a disciplinary measure. Indeed, where action is taken based on alleged absenteeism, which is a disciplinary measure. In addition, it is a disciplinary measure based on the violation of an individual employment contract. This Court wishes to state that disciplinary measures must not be imposed collectively. A disciplinary measure imposed by an employer on an employee amounts to administrative action under Section 43 of the Constitution. A panoply of Court decisions have emphasized the principles of natural justice, including, considering the peculiar circumstances of this matter, the *audi alteram partem* rule (i.e the right to be heard) which is an individual rather than a collective right. This right cannot be complied with, and could not have been complied with, in the circumstances in which action was taken against the employees, the Applicant’s members.

2.28. I must pause here and remind myself of the argument advanced by the Respondent's Council recorded in paragraph 1.28 above. For ease of reference to what is said above, Counsel Roka submitted that the law is very clear under Section 57(2) of the Employment Act where an employee is entitled to be heard. He argued that Section 56 of the Employment Act, particularly Section 56(2) of the Act, lists what constitutes disciplinary action; and that under Section 56(3), there is a proviso that addresses the issue of deduction of wages in cases of absenteeism. The relevant provisions of Section 56 of the Employment Act are in the following terms:

56. Disciplinary action

(1) An employer shall be entitled to take disciplinary action, other than dismissal, when it is reasonable to do so considering all the circumstances.

(2) For the purposes of this Part a "disciplinary action" includes—

- (a) a written warning;
- (b) suspension; and
- (c) demotion.

(3) Subject to subsection (4), no employer shall impose a fine or other monetary penalty on an employee:

Provided that the employer may not pay wages to the employee for the period he has been absent from work without permission of the employer and without reasonable excuse.

2.29. It appears to be Counsel Roka's view that disciplinary measures under that part of the Employment Act can only be in the form of:

- (a) a written warning;
- (b) suspension; and
- (c) demotion.

2.30. He is clearly of the view that deduction of wages does not amount to a disciplinary measure. Counsel's interpretation is wrong. He misses the point that Section 56(2) is not couched in exclusive terms. It is couched in inclusive terms. Disciplinary measures include those specifically listed under that sub-section, but surely, on a fair and I would add correct interpretation of that Section, disciplinary measures under that part are not limited to those listed. Counsel Roka has appropriately made reference to Section 56(3) of the Employment Act. A fair and correct interpretation of that Section suggests that, as a general principle, the Employment Act excludes the imposition of a fine or other monetary penalty on an employee as a disciplinary measure. I would imagine that this is for the obvious reason that irrespective of the misconduct, such employee would have earned his or her money anyway, if he was reporting for work. The Section then has a proviso which justifies the deduction or withholding of wages due to the employee for the period he or she has been absent from work without permission of the employer and without reasonable excuse. Again, this would be a justified disciplinary measure as the employee would not have worked and earned his or her pay for that duration. It remains clear to me though, that the deduction of pay in cases of absenteeism, constitutes a disciplinary measure.

2.31. The other observation is made with reference to the Respondent's Counsel's argument that even if it were the case that the only institution mandated to declare a strike illegal was the Industrial Relations Court, it was impossible for the Respondent to get that remedy as courts at the material time were not operating, paradoxically due to a strike. This Court has already held that indeed the Industrial Relations Court was the institution that had the power to make such a declaration. I must add of course that under Section 108 of the Constitution and Section 5A of the Courts Act the High Court would similarly exercise such powers. Section 108(1) of the Constitution provides that "There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine **any civil or criminal proceedings under any law**", whilst Section 5A of the Courts Act provides that "**Every Judge shall**, in addition to such other powers as may be conferred upon him, **have all the powers conferred on any subordinate court by any written law.**" Section 110(2) makes it clear that the Industrial Relations Court is a Court subordinate to the High Court. It states that: "**There shall be an Industrial Relations Court, subordinate to the High Court**, which shall have original jurisdiction over labour disputes and such other issues relating to employment and shall have such composition and procedure as may be specified in an Act of Parliament." (Emphasis added)

2.32. I take judicial notice of the fact that indeed, during the period under reference, members of staff of the judiciary (excluding officers in the judiciary holding judicial office) were on strike. Again, I take judicial notice of the fact that judicial operations of the judiciary drastically reduced during the period referred to. However, it is incorrect to state in blanket terms that during the period when members of staff of the judiciary (I use this term in the official sense as it is provided for under

the Judicature Administration Act (Cap. 3:10) of the Laws of Malawi), courts were not operational. In **Kondwani Tebulo v Republic**, Criminal Review Cause No.1a Of 2014, a decision I rendered on 31 December 2014 (heard on 19 December 2014 and referred to me by the Chief Resident Magistrate Court at Zomba on 15 December 2014), I made several remarks regarding the work of courts during that strike. Of Course, in doing so, I was also making a judicial decision – a good “proof by counter-example” to negate the assertion that courts were completely paralysed during that period.

2.33. Among other things, I had stated in **Kondwani Tebulo v Republic** that “The strike by support staff cannot be read to suggest that where an order is made in the absence of a striking member of the Judiciary support staff, such order is ineffectual. That is a wrong way of approaching court Orders” (Para. 3.5 of the decision). I also stated that “admittedly, when judicial support staff are on strike, as mentioned earlier, the operations of the Judiciary would be, and are severely impaired. The Court system cannot be effective and efficient without the Judiciary’s support staff. To emphasise, they are important, key and indispensable to the functioning of the Judiciary” (Para. 3.8); and further, that “The approach that since only a few applications are being heard then the Applicants should not be released on Court bail notwithstanding the Court Order, on grounds of perceived unequal treatment in comparison with other suspects in detention, is not helpful. This is the approach that Justice Sachs of the Constitutional Court of South Africa referred to as a quest to achieve “equality of the graveyard”, instead of working towards “equality of the grapevine” (Para. 3.7).

2.34. I cite this decision, made during the period of the strike referred to by the Respondent's Counsel, to establish that it is not true that Courts in this Country were not operational during that period.

2.35. In response to Counsel's assertion therefore, which to me had the unfortunate, though I know unintended implication by Counsel that in light of the strike by members of staff of the judiciary, all and sundry in the country were entitled to have recourse to self-help as an alternative to judicial remedies, I hold that this argument is untenable. Firstly, it is evident that some courts were operational though at a conspicuously diminished rate during that time. In any event, if Counsel's argument were to lie in the Respondent's mouth at all, I would have expected the Respondent to demonstrate that it had attempted to access a judicial declaration during the period under reference, and that did not succeed. I cannot specifically take judicial notice in terms of the circumstances as they applied at the IRC, but at the least I can take judicial reference that both parties to this dispute are based in Zomba, the Respondent being almost a stone's throw distance away from this Court's Registry, and that certainly no attempt was made by Respondent to access any declaration during that period. I am therefore unable to uphold the Respondent's argument in this regard.

2.36. Even if the Respondent had failed to access a remedy from either the IRC or the High Court, I would have expected to see evidence that the parties had attempted to appoint a conciliator, as required by the LRA. This is an alternative dispute resolution measure available and specifically required by the Act. There is no demonstration by the Respondent that any measures were taken on its part to engage the Applicant's to appoint a conciliator. Generally, even if self-help measures were to be accepted as of necessity in certain cases,

categories of which do not immediately come to mind, I hold the specific view that in the circumstances of the present matter, no such necessity arose.

3. DECLARATIONS AND ORDERS

3.1. On consideration of all the facts in this case and the prescriptions of law, I make the following declarations and orders:

- (a) That the decision by the Respondent to declare the strike as illegal was clearly ultra vires in that the Respondent had no power to make the decision under the law, and was therefore incompetent and invalid;
- (b) That the Respondent usurped the function and power of the Industrial Relations Court (IRC) or the High Court in making such a declaration;
- (c) That the finding that the employees on strike were absent from work or that they did not do work was incompetent and invalid, premised on the fact that the prior declaration of the strike by the Respondent as illegal was equally incompetent and invalid;
- (d) That the Respondent's resolution and decision that salaries of the applicant's members who were on strike should be deducted and withheld and to continue withholding such salaries is unreasonable and ultra vires the powers and/or rights of the Respondent and illegal;

(e) That the Respondent should immediately pay all its employees that were affected by its decision to deduct and withhold pay herein the full amount that was thus deducted and withheld;

(f) Costs are awarded to the Applicant.

Made at Zomba in Open Court this 27th Day of July 2015

RE Kapindu, PhD

JUDGE