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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS APPLICATION NUMBER 31OF 2016

(Being IRC Matter number 113 of 2013)

BETWEEN:
GALAXY BROADCASTING COMPANY LIMITED **APPLICANT**

AND

GEORGE STEPHEN MISINDE AND THREE OTHERS **RESPONDENTS**

Coram: JUSTICE M.A. TEMBO,

Mwale and Maliwa, Counsel for the Applicant

Sauti, Counsel for the Respondents

Chanonga, Official Court Interpreter

ORDER

This is this court's order on the respondents' preliminary objection to the applicant's application for an order staying the decision of the Registrar of the Industrial Relations Court. The Registrar's decision sought to be stayed is the one where the Registrar refused to stay the execution of the order on assessment of compensation that was made by the said Registrar on notice to the applicants but in their absence.

This Court had granted an interim order staying the decision of the Registrar of the Industrial Relations Court pending the inter parte hearing. It is at this inter parte hearing that the respondents objected to the jurisdiction of this Court in this matter.

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The respondent's argument is that the applicant should have first applied for a review of the decision of the Registrar of the Industrial Relations Court by the Chairperson of that Court before taking up this matter before this Court by way of appeal and not as a miscellaneous application.

In support of their arguments the respondents referred to Rule 5A (2) of the Industrial Relations Court (Procedure) Rules which provides as follows

> Any decision of the Registrar or a Deputy Registrar may be reviewed by the Chairperson or Deputy Chairperson on application by a party to the matter or proceeding; and upon such review, the Chairperson or Deputy Chairperson may-
>
> (a) dismiss the application or confirm, set aside, vary or amend the decision of the Registrar or Deputy Registrar;
>
> (b) determine the matter as if it was coming before him or her in the first instance and give such decision as the case may require; or
>
> (c) refer the matter back to the Registrar, or Deputy Registrar with directions for further consideration.

The respondents then referred to the case of *Mkandawire v Council of the University of Malawi* [2008] MLR 63 where the Court held that with regard to employment related matters, for which the Industrial Relations Court has been given original jurisdiction by the Constitution, the High Court must come in as an appellate court although the High Court constitutionally has unlimited civil jurisdiction.

The respondents also referred to section 65 of the Labour Relations Act which provides that

> (1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.
>
> (2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered.

(3) The lodging of an appeal under subsection (2), shall not stay the execution of an order or award of the Industrial Relations Court, unless the Industrial Relations Court or the High Court directs otherwise.

The respondents further referred to section 20 of the Courts Act which is in the following terms

(1) An appeal shall lie to the High Court from a subordinate Court in the following cases-
   (a) From all final judgments.
   (b) From all interlocutory judgments and orders made in the course of any civil action or matter before a subordinate court.

The respondents then referred to the case of *Gani v Chande* MSCA civil appeal number 6 of 2003 where it was stated that in statutory interpretation the courts must faithfully endeavour to the expressed intention of Parliament gathered from the language used and the apparent policy of the enactment under consideration.

The respondents submitted that the following principles can be derived from the foregoing legal authorities. That where the Industrial Relations Court has been given mandate to handle a matter as a court of first instance the High Court gives way. That a decision of the Registrar of the Industrial Relations Court first gets reviewed by the Chairperson or Deputy Chairperson of that Court before it is brought up before the High Court. That the High Court sits as an appellate court in any decision of the industrial Relations Court and not as a court of first instance. In other words that there is no concurrent jurisdiction where a decision of the Industrial Relations Court already exists. That on matters of fact, the decision of the Industrial Relations Court is final and an appeal only comes to the High Court on matters of law or jurisdiction. Lastly, that the High Court should as nearly as possible enforce the express intention of Parliament gathered from the Labour Relations Act.

The respondent then submitted that in view of the foregoing the applicant's application for stay of execution of the Industrial Relations Court Registrar should be transferred to the Chairperson of the Industrial Relations Court for the following reasons. That the Registrar of the Industrial Relations Court made a decision on the applicant's application for stay. And that such decision should have been reviewed by the Chairperson of the Industrial Relations Court on application by the

applicant. However, that this procedure was not followed by the applicant in the present matter. Further, that even if this Court were to find that there would be no need for such a review, the instant application should have come by way of appeal on matters of law or jurisdiction which was not the case.

The respondents asked this Court to give full effect to the intention of Parliament as expressed in section 65 of the Labour Relations Act and section 20 of the Courts Act. And further submitted that this Court is further invited to consider the decisions of this Court that where a matter is dealt with by the Industrial Relations Court then this Court should refrain from dealing with such a matter unless the matter comes by way of appeal.

On its part the applicant submitted that the preliminary objection is not properly taken before this Court because the respondents raised the same when they were about to orally start making a response on the applicant's application for stay that was before this Court. The respondents replied that that particular issue was already resolved in that this Court awarded costs thrown away by the adjournment that day's hearing. This Court agrees with the respondents.

When the respondents raised the issue of jurisdiction at the commencement of their oral reply at the hearing of the applicant's application the applicant objected to reference to the present preliminary objection. This Court upheld the applicant's objection and stated that the respondent should have put the applicant on notice. At that point the applicant stated that it had no choice but to accept an adjournment so that the respondents should properly put their objection to this Court's jurisdiction on notice to the applicant. So that same issue of improperly raising the preliminary objection cannot be raised again by the applicant in the circumstances.

The applicant also lamented the fact that the respondents filed the preliminary objection out of the time ordered by this Court. The respondents replied that although that is the case the applicant has not suffered any prejudice as it has ably responded on the matters at hand. This Court does not condone the respondents' failure to file the preliminary objection on time but using its inherent powers at the same time grants the respondents liberty to proceed with the preliminary objection particularly because the applicant has indeed not been prejudiced at all in preparing to meet the preliminary objection herein.

The applicant then submitted on whether this Court has jurisdiction to entertain the application for stay of the Industrial Relations Court Registrar's decision herein.

The applicant first stated that the section 20 of the Courts Act does not apply to the Industrial Relations Court because the Industrial Relations Court is created under the Constitution and established by the Labour Relations Court and not the Courts Act. This Court agrees with this submission.

It is clear that the Industrial Relations Court is created under section 110 (2) of the Constitution and then specifically provided for under the Labour Relations Act. Subordinate Courts of Magistrates as created under the Courts Act are those referred to in section 110 (1) of the Constitution. Section 110 of the Constitution provides as follows

> (1) There shall be such courts, subordinate to the High Court, as may be prescribed by an Act of Parliament which shall be presided over by professional magistrates and lay magistrates.
>
> (2) 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.

There is no mention of the Industrial Relations Court under the Courts Act. Section 20 of the Courts Act cannot therefore apply to the Industrial Relations Court. The fact however remains that the Industrial Relations Court is a subordinate Court to the High Court as per section 110 (2) of the Constitution. That is why its decisions are appealable to the High Court in terms of the Labour Relations Act.

The applicant then referred to section 66 of the Labour Relations Act which provides that the Industrial Relations Court shall consist of the Chairperson and Deputy Chairperson and persons nominated by the most representative organization of employees (the "employees' panel"), and appointed by the Minister and persons nominated by the most representative organization of employers (the "employers' panel"), and appointed by the Minister. At least one woman shall be represented on the panels.

The applicant then referred to section 67 of the Labour Relations Act which provides that

> (1) Subject to subsection (3), a sitting of the Industrial Relations Court shall be constituted by the presence of the Chairperson or the Deputy Chairperson and one member from the employees' panel and one member from the employers' panel, as chosen by the Chairperson.
>
> (2) Subject to subsection (3), the decision of a majority of the members in a sitting shall be the decision of the Industrial Relations Court.
>
> (3) Where the dispute involves only a question of law, a sitting of the Industrial Relations Court may be constituted by the presence of the Chairperson or Deputy Chairperson sitting alone.
>
> (4) Every decision, including any dissenting opinion, shall be issued to the parties within twenty-one days of the closing of the final sitting on the matter.

The applicant then submitted that the Industrial Relations Court can only sit as such if there is the Chairperson or Deputy Chairperson sitting together with the panelists from the employers' and employees' organizations except that the Chairperson or Deputy Chairperson may decide a question of law alone. And further that it is the decision of the Industrial Relations Court sitting as such that can be referred to as the decision of the Industrial Relations Court.

The applicant submitted that it is such a decision of the Industrial Relations Court that may be appealed to the High Court on a question of law or jurisdiction as provided under section 65 of the Labour Relations Act. Further that a decision of the Registrar is not covered by section 65 of the Labour Relations Act. Consequently, that the respondent's argument that the applicant should only have come by way of appeal to the High Court against the Industrial Relations Court Registrar's decision is not correct.

The view of this Court is that the import of the provisions in section 66 and 67 of the Labour Relations Act is indeed that only a decision of the Industrial Relations Court as constituted under section 66 of Labour Relations Act may be entertained on appeal by this Court. However, this has implications for the decision of the Registrar. The decision of the Registrar cannot be entertained by way of appeal or otherwise by this Court.

For this reason, and contrary to the applicant's contention, the Registrar's decision may only be reviewed by the Chairperson or Deputy Chairperson of the Industrial

Relations Court in terms of Rule 5A (2) of the Industrial Relations Court (Procedure) Rules.

The applicant contended that Rule 5A (2) of the Industrial Relations Court (Procedure) Rules is only permissive as it simply says any decision of the Registrar of the Industrial Relations Court 'may' be reviewed by the Chairperson of Deputy Chairperson of the Industrial Relations Court. The applicant further contended that the word 'may' is permissive meaning that the applicant is at liberty to either apply for a review of the Registrar's decision or to apply to this Court for a review.

This Court takes the view that the respondents advanced that the use of the word 'may' is not permissive at all in this context. What the word 'may' entails here is that the decision of the Registrar of the Industrial Relations Court has to be reviewed whenever there is an application for such review. The Chairperson and Deputy Chairperson cannot refuse to do a review whenever there is an application brought for that purpose. This is particularly true given that this Court's appellate jurisdiction excludes the decisions of the Registrar of the Industrial Relations Court.

There is persuasive authority to the effect that although the use of the word 'may' connotes permissiveness the same word 'may' can connote the same meaning as 'shall' which is not permissive at all but mandatory.

The word 'may' has ordinarily been understood to confer power, authority, privilege or right. This word is contrasted to the word 'shall' which expresses a duty, obligation, requirement or condition precedent. The word 'may' is a permissive or enabling expression. See *Sheffield Corpn v Luxford, Sheffield Corpn v Morrell* [1929] 2 KB 180 at 183. The use of the word 'may' prima facie conveys that the authority which has power to do such an act has the option to do it or not to do it. *See Massy v Council of the Municipality of Yass* (1922) 22 SR (NSW) 494 at 499, per Cullen J.

However, the use of the word 'may' in a statute in some cases, for various reasons, connotes that as soon as the person within the statute is entrusted with the power it becomes that person's duty to exercise the power. See *Sheffield Corpn v Luxford, Sheffield Corpn v Morrell* [1929] 2 KB 180 at 183. There is persuasive authority on this point. So, where a statute directs the doing of a thing for the sake of justice

or the public good, the word 'may' is the same as the word 'shall' as was provided in a statute , 23 Hen 6 [Stat (1444-5) Hen 6, c 9 (repealed)] which said, 'the sheriff may take bail' and that was construed as 'he shall take bail' for he is compellable so to do. See *R v Barlow* (1693) 2 Salk 609 at 609.

A further persuasive authority is provided in the case of *Re Eyre & Leicester Corpn* [1892] 1 QB 136 at142, 143 a matter that involved interpretation of the Arbitration Act l 889, section 5 (repealed) which provided that if the appointment of an arbitrator was not made within seven days after service of a notice by one of the parties in a case where differences had arisen with regard to such appointment, the court or a judge 'may' on application make an appointment. In that matter Lord Esher MR had this to say

> The parties have agreed with regard to certain matters to substitute arbitration by a single arbitrator for a trial in court; it is admitted that there is a dispute within the submission; the parties have failed to concur in the appointment of an arbitrator; and there has been a proper notice given which has not been complied with. What under these circumstances does the section provide that the court is to do? It says that the court 'may' appoint an arbitrator.....I think in such a case as this 'may' means 'must', and that the court is bound to appoint an arbitrator.

In the present case a reading of the relevant provisions in section 65 of the Labour Relations Act and Rule SA (2) of the Industrial Relations (Procedure) Rules leads to the conclusion that the Chairperson and Deputy Chairperson shall review decisions of the Registrar of the Industrial Relations Court whenever an application is bought for such review. That must be the intention of Parliament as expressed in the foregoing provisions.

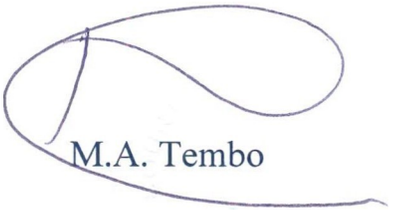
Given that the High Court does not have statutory power to hear appeals from decisions of the Registrar of the Industrial Relations Court then such decisions shall be reviewed by the Chairperson or the Deputy Chairperson whose decisions can in tum be appealed to the High Court.

In the foregoing premises, this Court transfers this matter to the Chairperson of the Industrial Relations Court who shall determine whether the order declining a stay of execution by the Registrar of her Court was merited or not.

The interim order granted by this Court shall subsist.

With regard to costs this Court has considered the novel nature of the issues herein and concludes that each party bear its own costs except that the respondents will bear the costs on the adjournment occasioned when they raised the preliminary objection. The Chairperson shall set down the review within one month of this order in view of the length of time this matter has taken in the Industrial Relations Court.

Made in chambers at Blantyre this 4th July 2016.



JUDGE