

IN THE HIGH COURT OF ZOMBA
JUDICIAL REVENUE
ALAWI
STRY
). 31 OF 2016



BETWEEN

THE STATE

VS

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

**EX PARTE: SYLVESTER AYUBA JAMES
(On his own behalf and On behalf of
the Students' Union of Chancellor College).....
APPLICANTS**

CORAM: HON. JUSTICE RE KAPINDU

: Mr. T. Tembo, Counsel for the Applicant

: Ms. T. Kaime-Mauluka, Counsel for the Respondent

: A. Nkhwazi, Official Interpreter

RULING

Kapindu, J

1. INTRODUCTION

1. This is the Court's decision on an ex-parte application brought by the Respondent for the discharge of an Order of leave to apply for judicial review that this Court granted to the Applicant on the 8th day of September 2016. It is brought under Order 53 Rule 14 of the Rules of the Supreme Court (RSC) as read with Order 32 Rule 6 of the RSC. The Application is supported by an Affidavit sworn by Linda Saka, Assistant Registrar - Student welfare at Chancellor College which is a constituent College of the University of Malawi.

2. The relevant part of Practice Note 53/14/62 in Supreme Court Practice, 1999 (Sweet & Maxwell) (SCP), which Practice Note deals with "Applications by respondents for the discharge of leave to move for judicial review and appeals against orders made on such applications", states that:

The High Court Judge should adopt the following approach to ex parte applications for leave to move for judicial review:

(i)The Judge should grant leave if it is clear that there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary

on the facts and all such argument as is necessary on law.

(ii) If the Judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(iii) If, on considering the papers, the Judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the Judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the Judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award (see ***Antaios Compania Naviera SA v. Salen Rederierna AB*** [1985] A.C. 191 at 207) namely: if, taking account of a brief argument on either side, the Judge is satisfied that there is a case fit for further consideration, then he should grant leave.

3. Yesterday, the 8th of September 2016, I received an application for leave to apply for judicial review brought by Mr. Sylvester Ayuba James, President of the Students' Union of Chancellor College (SUCC) on his own behalf and on behalf of his fellow students, members of SUCC. In his application, Mr. James indicated in the application that

the applicants seek relief in respect of the following decisions of the Respondent:

- (a) The decision of the Respondent to issue “re-admission forms” for all students of Chancellor College for them to sign and submit, with undertakings to abide by certain politically impinging conditions, which conditions inhibit the adequate and lawful enjoyment of the Applicants’ several civil and political rights;
- (b) The decision of the Respondent to technically withdraw and/or essentially expel all students of Chancellor College from the University of Malawi and require their “re-admission”, such expulsion being without any reason and/or without following proper administrative procedure, and subsequently requiring the Applicants’ “re-admission”;
- (c) The decision of the Respondent to deregister the Applicants from the registry of Chancellor College for the subsisting academic year, and subsequently requiring the Applicants’ re-registration, when the said purported de-registration is without any reasons, justifications and proper administrative procedure;
- (d) The decision of the Respondent to demand that the Applicants pay MK1500 each as damages for the destruction of property when it is not established that the same was caused by the applicants; when there is strong evidence that the damage was caused by Police; and when there is an ongoing investigation by the Malawi Human Rights Commission to establish who caused the damage on campus; and that even if it were established that the same [the damage] was caused by the Applicants (which the Applicants deny), where there

is no independent assessment of the value and extent of the damage, or where the Applicants were not involved in the assessment of the damages;

(e)The decision of the Respondent to demand from the Applicants individual reports of the events that led to the closure of Chancellor College from which the current issues flow, when the applicants at all material times acted and conducted themselves as members of the Union and when the Applicants' Union Constitution requires that the President or, in some instances, the Speaker should provide such reports or be the spokesperson for the Union.

4. The Applicants therefore seek the following reliefs:

(a)A declaration that the decisions are illegal, irrational, procedurally improper and they grossly violate the applicants' constitutional right to freedom of association as provided by Section 31 of the Constitution of the Republic of Malawi (hereinafter referred to as the Constitution), the right of freedom of expression as provided for under Section 35 of the Constitution, the right to assemble and peacefully demonstrate as provided for under Section 38 of the Constitution, the right to education under Section 25 of the Constitution and the right to administrative justice under Section 43 of the Constitution;

(b)A like order to certiorari quashing the aforementioned decisions;

(c) An Order of interim injunction under Order 53, rule 3(10)(b) directing the Respondent to stop and desist forthwith from implementing all the said decisions until further determination and disposal of this matter by this Court;

(d) A direction that hearing of the matter be expedited;

(e) An Order of injunction directing that the Respondent pays back the money so far paid by individual students in obliging to the abovesaid decision, and that the applicants should not pay any such money until further determination and disposal of this matter by this Court;

(f) An inquiry as to costs and damages; and that

(g) All necessary and consequential directions be made as this Court may deem fit in the circumstances.

5. Upon considering these issues as raised by the applicants, the Court formed the view that points had been made by the Applicants in the instant case, that were fit for further investigation by this Court on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on law; and therefore decided to grant leave for the Applicants to move for judicial review of the issues raised.

6. The Respondent is clearly not satisfied by the decision of the Court to grant leave to apply for judicial review to the Applicants and indeed with the attendant consequential interim orders that this Court made. The Respondent has therefore filed an Ex-parte Summons for an Order discharging leave to apply for judicial review as mentioned earlier. The Respondent raises the following arguments in support of the application for the discharge of leave:

(a) That the applicants failed to make full and frank disclosure of all material facts when making the application for leave to apply for judicial review;

(b) That, as the Affidavit of Mary Wasili shows [This is wrong as the affidavit was in fact sworn by one Linda Saka], the Applicants did not disclose to the Court that they had convened an emergency general assembly without the authority of the college and that it is at this form where the Respondent alleges that a resolution to do a sit-in resulted in unlawful demonstrations;

(c) That the Applicants know and yet they did not disclose the fact that the police were called to the campus by the College Administrators upon observing that the students were damaging college property;

(d) That the Applicants have also omitted to inform the Court that the College has been unable to make a conclusion on the inquiry into the demonstrations due to an order of injunction obtained by them;

(e) That the facts which the Applicants suppressed or did not disclose were so material to the extent that if the Court had been given

notice of, leave to apply for judicial review would not have been granted;

(f) That since the Applicants obtained leave to apply for judicial review through the suppression of material facts, the leave that this Court granted should be discharged.

(g) That the Applicants' substantive application is not likely to succeed because there is no arguable case, in that being asked to fill a form and to be re-submitted to the college is merely an administrative process that was taken to ensure the smooth running of the college; and that as such it is not a question that a Court should be called upon to adjudicate;

(h) That the order of leave to apply for judicial review in the instant matter be discharged because there is no arguable case for judicial review.

7. It is apposite at this juncture that I should set out Practice Note 53/14/4 in SCP 1999 on the effect of Order 53, Rule 14 of the RSC. The Practice Note states that:

It is open to a respondent (where leave to move for judicial review has been granted ex parte) to apply for the grant of leave to be set aside (see paras 53/14/62 to 53/14/64, below); but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail.

8. Further, we have to bear in mind Practice Note 53/14/55 in SCP 1999 which states that:

The purpose of the requirement of leave is: (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless, and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" (*R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617 at 642; [1981] 2 All E.R. 93 at 105, per Lord Diplock). **Leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant** (ibid., at 644/106). (This Court's emphasis)

9. I am mindful that this matter is still at the stage of leave to apply for judicial review and that I must steer clear of making decisions that might have the effect of pre-empting issues to be raised and argued

by the parties during the substantive hearing of the motion for judicial review. I am entitled however to make statements justifying why I am of the view that there is a case for further consideration at full hearing.

10. As I have already mentioned, upon carefully considering the issues raised by the Applicants in the application for leave to apply for judicial review, this Court formed the opinion that the applicants have raised issues fit for further investigation on a full hearing of the motion for judicial review.
11. The Respondent has expended much energy arguing that the Applicants suppressed material facts in the application. I am not persuaded by this argument. The Applicants are only challenging decisions taken by the Respondent. Some of the decisions that are being challenged were clearly made by the Respondent as there is no dispute between the parties. The Respondent has admitted having taken such decisions, only that it argues that it was well within its powers to take such decisions. For instance, the Respondent admits that it decided that students will be required to sign a form in order “to be re-admitted into the college.” (Paragraph 10 of the affidavit of Linda Saka). That paragraph referred to the exhibit marked “LS2” which is headed “RE-ADMISSION FORM”. That Form states, on the second page thereof, that:

Be advised that **failure to sign** and **return** this form by 9th September, 2016 shall be construed that you are not interested to re-register, consequently, considered not admitted into the university to continue with your studies for this semester of the **2015/2016 academic year**. It follows from the

foregoing that you shall lose your eligibility to access teaching, learning, and research activities, which also include and not limited to access to accommodation, classrooms, laboratories, library etc. Please note that the University reserves the right of admission. (Original emphasis)

12. The Applicants are arguing, among other things, that this decision, which is clearly conceded by the Respondent, is a decision to technically withdraw and/or essentially expel all students of Chancellor College from the University of Malawi and require their “re-admission”, such expulsion being without any reason and/or administrative procedure, and subsequently requiring the Applicants’ “re-admission”. It is evident that the Respondent does not agree with the Applicant’s interpretation of the effect or purport of its decision. The question I have to ask myself is: examining the language used in this decision, do the applicants raise an issue fit for further investigation by this Court at trial? Do the applicants raise an arguable case? Or should this Court eliminate this issue at this early stage for being frivolous, vexatious or hopeless? In my considered opinion, this issue raises a serious question to be tried in this matter. The point is certainly not frivolous, vexatious or hopeless and it is fit for further investigation by this Court at full hearing.
13. Again the Respondent takes the view that it “reserves the right of admission” in respect of all students already admitted into the University and the College. The Applicants, by contrast, argue that this is not so and that this decision is illegal, irrational and procedurally improper for, among other reasons, grossly violating their right to education under Section 25 of the Constitution. In arguing that they have a right to education, it logically follows that the

Applicants correlatively argue that the Respondent has a duty to provide education to them. In my view there is need for a Court to determine whether these positions are compatible with each other or whether they conceptually sit in tension with each other. There is, in my view, a question here fit for further investigation at a full judicial review hearing.

14. The Respondent also admits that it is requiring all students to pay a re-admission fee of MK1500 which is meant as reparation for the damage the Applicants allegedly caused at Chancellor College and it argues that it was well within its powers to make this imposition. On their part, the Applicants take issue with this decision. They argue that it is not established that the damage was caused by the Applicants; they argue that there is strong evidence that the damage was caused by the Police; they further essentially argue that the conclusion that the applicant students were responsible for causing the damage is premature as “there is an ongoing investigation by the Malawi Human Rights Commission to establish who caused the damage on campus.” They proceed to advance an alternative argument that even if it were established that the damage was caused by the Applicant students (which the Applicants deny), there has been no independent assessment of the value and extent of the damage, and that the process of arriving at the quantum of the said damage is also suspect as “the Applicants were not involved in the assessment of the damages.”
15. The question is whether it is correct to say that these arguments are frivolous, vexatious or hopeless and that they raise no points fit for consideration at a full hearing of judicial review. Again in my considered view, these are serious issues to be tried by the Court at the full hearing.

16. I have formed the impression that most of the arguments that the Respondent advances in issue are essentially contentious issues that ought to be determined at the full hearing. The arguments essentially urge that the Applicants suppressed material facts by failing to disclose certain facts. An examination of such facts however shows that these alleged facts are essentially part of the subject of dispute. For instance, the Respondent argues that the Applicants “did not disclose the fact that the police were called to the campus by the College Administrators upon observing that the students were damaging college property”. Examining the papers, one notices that the Applicants have stated in their application that “it is not established that the damage was caused by the Applicants” and that “there is strong evidence that the damage was caused by the Police.” What then is it the Respondent believes the Applicants should have disclosed in this respect for purposes of leave to apply for judicial review when they already expressly state that they were not responsible for the alleged damage? This in my view, is a classic example of an issue in dispute which can only be completely and effectually resolved at a full hearing after the Court hears all the relevant evidence.
17. The Respondent has also argued that the Applicant’s substantive application is not likely to succeed because there is no arguable case, in that being asked to fill a form and to be re-submitted to the college is merely an administrative process that was taken to ensure the smooth running of the college; and that as such it is not a question that a Court should be called upon to adjudicate. The Court recalls however that in the case of ***Richard Kapile and Others v Council of the University of Malawi***, Miscellaneous Application No. 47 of

1992 something strikingly similar to what we have in the present case happened. Students were required, under similar circumstances, to complete a readmission form, make certain undertakings and take responsibility for damage which was caused by some of the students to College Property, and the circumstances in which they were required to do this was pretty much the same as what has happened in the instant case. The Court determined that the matter was justiciable. Msosa J (as she then was) rendered what has become a celebrated decision in the area of judicial review of administrative action in this country. I am sure the Respondent is keenly aware of that case, to which it was a direct party, and that it must have carefully considered it and its implications when it decided to take a similar course of action some 24 years later. I bear in mind that the Respondent is likely to inform the Court how it has decided to take an approach strikingly similar to an approach that was critiqued and faulted by the Court in the **Kapile** decision, and that a full hearing will actually be an opportunity for the Respondent to proffer such a justificatory explanation. This is obviously no occasion for this Court to take a position on the merits of the present decision vis-à-vis the **Kapile** case. What I can clearly state at present, however, is that just like Msosa J (as she then was) decided in **Richard Kapile and Others v Council of the University of Malawi** that the issue (of completing and submitting a readmission Form) that the Respondent argues should not be amenable to review by the Courts was actually justiciable, I similarly find on the strength of that case and other cases such as **Benedict Nkhoma & Others v Council of the University of Malawi**, Miscellaneous Civil Cause No. 54 of 1992 that this issue is justiciable. In **Benedict Nkhoma & Others v Council of the University of Malawi**, Tambala J (as he then was) stated that:

From the object of the University of Malawi, it can be said that the respondents have a public duty to offer, within their financial, material and other constraints, to deserving students university education of a high standard. In the landmark case of ***Richard Kapile and Others v Council of the University of Malawi***, Miscellaneous Application No. 47 of 1992, Justice Msosa, after observing that the respondents are a public corporation and a creature of statute, held that when the respondents make decisions affecting the rights of students, care must be taken to ensure that principles of natural justice are observed and that this Court is entitled to intervene to correct an apparent violation of such principles. **This Court's jurisdiction to entertain applications of this kind is, therefore, well settled and it was not contested by Counsel for the respondents.** (This Court's emphasis)

18. The Court continued to state that:

In Miscellaneous Civil Application No. 47 of 1992, ***Richard Kapile and Others v Council of the University of Malawi***, Msosa, J ordered the re-admission into Chancellor College of some students who were refused such admission following the closure of the College shortly before the end of the 2nd term. **The present application is very similar to that of *Richard Kapile and Others*.**

19. What the cases of ***Richard Kapile and Others v Council of the University of Malawi*** and ***Benedict Nkhoma & Others v Council of the University of Malawi*** show, for purposes of this application, is that in cases similar to the present, courts have readily granted leave to applicants to apply for judicial review. Issues such as the requirement to complete and submit readmission forms after the closure of the College as a precondition for re-admission and re-registration on reopening, have previously been deemed justiciable. I see no reason why in the instant case these issues should be deemed unarguable and non-justiciable. That argument cannot be sustained and it is dismissed.

20. The Respondent argues that the instant application is intended to frustrate administrative processes of the college and to delay the re-opening of Chancellor College. It argues that failure by the students to sign the readmission forms will greatly and negatively affect the operations of the college which has employed human and material resources in preparing for the reopening. Indeed, the evidence before the Court is that the Respondent has taken a decision to reopen the College on Monday, the 12th of September 2016.

21. The Respondent has not demonstrated how or why this application, which essentially challenges the essence of requiring all students to sign a readmission Form and to pay a readmission fee of MK 1,500 for purposes of reparations for damages as a precondition for such reopening, would in any way prevent the Respondent from proceeding with the reopening of Chancellor College as already scheduled. If the Applicants succeeded at trial for instance, I would like to believe that Chancellor College will still proceed to re-open. My sense is that considering that the Respondent has already employed human and

material resources in preparation for the reopening, it would be prudent to proceed with the reopening as already scheduled, subject to the orders that this Court has made. All in all, the Respondent's argument in this regard lacks merit and it is dismissed.

22. I also noted that in paragraph 17 of the Affidavit in support of the discharge of leave to apply for judicial review, the Respondent states that the Applicants failed to disclose to the Court that Mr. James herein blocked the Respondent's inquiry into the illegal demonstration by way of an injunction and that this has left the Respondent with no choice but to require students to sign the form for purposes of opening the College. The Respondent has exhibited a document marked "LS3" which is a copy of the Order of injunction in support of this argument.

23. The Respondent in this regard is making reference to the case of ***The State v Council of the University of Malawi, Ex-Parte Sylvester James & 7 Others***, Judicial Review Cause No. 27 of 2016 at this Registry which was handled by my sister Judge, Ntaba J. The documents submitted by the Respondent are themselves insufficient and do not disclose enough facts for this Court to be fully informed of what exactly happened in that case. The essential documents relating to the actual application for judicial review in that case have not been exhibited in order for this Court to be fully apprised and to establish that there indeed exists an inexorable nexus between the two matters such that if the Applicants in this case had brought to the attention of this Court that matter, this Court could not have granted leave to apply for judicial review. Just focusing on the Order of interlocutory injunction which has been exhibited as "LS3" however, I notice that the proceedings in that case related to disciplinary proceedings to

which only a few among the present affected Applicants were called. The order of Ntaba J herein stayed the Respondent's decision summoning those few Applicants in that case to a disciplinary hearing until the final determination of the Judicial review. That Order is dated 21 August 2016.

24. On the basis of the information made available to this Court in this regard, it seems to me that the two matters are distinct, although some of the present Applicants, such as Mr. James, are directly affected by both. From "LS3" only eight among the thousands of students of Chancellor College were directly affected by Judicial Review Cause No. 27 of 2016. With the information availed to me, I fail to see how knowledge of Judicial Review Cause No. 27 of 2016 could have swayed my decision in favour of denying leave. The argument has not been satisfactorily made and I dismiss it.
25. In the premises, the Application to Discharge the Order of Leave to Apply for Judicial Review fails and it is dismissed.
26. Costs are always in the discretion of the Court. I have considered that this matter is essentially a friendly dispute within the University family. Indeed, I noted that the affidavit in support of the application to discharge leave was actually sworn by the Assistant Registrar responsible for Student Welfare at Chancellor College. But then I have also considered that it is an established legal principle that applications to discharge leave to apply for judicial review "are discouraged and should only be made where the respondent can show that the substantive application will clearly fail" (Practice Note 53/14/4 in SCP 1999). Clearly the Respondent's application to discharge leave lacks merit. This Court must therefore discourage such applications

within the spirit of the law, and that makes it appropriate that I order, as I hereby do, that costs for this Application be awarded to the Applicants.

Made at Zomba in Chambers this 10th Day of September 2016

A handwritten signature in blue ink, appearing to read 'RE Kapindu', with a stylized flourish at the end.

RE Kapindu, PhD

JUDGE