IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW NUMBER 45 OF 2020

BETWEEN:

ILLOVO SUGAR (MALAWI) PLC	CLAIMANT
AND	
THE REGISTRAR OF INDUSTRIAL RELATIONS COURT AND	1ST DEFENDANT
ANOTHER	
MABVUTO SAILOTA AND OTHERS	2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR. MBENDERA, OF COUNSEL FOR THE CLAIMANT

ATTORNEY GENERAL, FOR THE 1ST DEFENDANT ABSENT DESPITE SERVICE

MR. MICKEUS, OF COUNSEL FOR THE 2ND DEFENDANT

MR FELIX KAMCHIPUTU, OFFICIAL COURT INTERPRETER

ORDER

The Claimant, Illovo Sugar (Malawi) PLC filed an application for permission to commence judicial review proceedings against the Registrar of the Industrial Relations Court. The Claimant is challenging the decision of the said Registrar to preside over and continue presiding over assessment of compensation proceedings in Matter N0. IRC 452 of 2011, involving the Claimant and Mabvuto Sailota & others, in the Industrial Relations Court, without jurisdiction, rendering those proceedings a nullity. Secondly, the Claimant is challenging the failure by the Chairperson of the Industrial Relations Court to preside over the assessment of compensation referred to above together with a panel and instead permitting the Registrar of Industrial Relations Court so as to do notwithstanding lack of jurisdiction.

I granted permission to the Claimant to commence judicial review proceedings and stay of the assessment proceedings in the Industrial Relations Court. Subsequently, I gave directions on the conduct of the substantive judicial review proceedings bearing in mind the corona pandemic. While waiting for compliance with my directions, there was an application that was filed by the 2nd defendant seeking an order from the court to be added as a party. I ordered that the 2nd defendant be added as a party to the current judicial review proceedings pursuant to Order 19, Rule 23 (3) (c) of the Courts (High Court) (Civil Procedure) Rules, 2017. I arrived at this decision as I was convinced and remain so, that it was just and fair that the 2nd defendants be added as a defendant to the proceedings as these judicial review proceedings directly affect them. Later, the 2nd defendant filed an application for discharge of the permission of judicial review and stay of proceedings that I granted. The said application is supported by a sworn statement sworn by counsel Messrs Mickeus.

Allow me to first put on record the Claimant's story that prompted them to commence judicial review proceedings. Counsel for the Claimant depones in his sworn statement for judicial review that his legal firm was retained by Illovo Sugar Company to represent them in assessment proceedings in the Industrial Relations Court following a high court judgment that awarded overtime pay and interest to the 2nd defendants in **MABVUTO SAILOTA et al V ILLOVO SUGAR LIMITED, CIVIL APPEAL NO. 33 of 2015**, a copy of which was exhibited as **NM1.** In paragraph 5 of the said sworn statement, counsel depones that they noted that the assessment of the overtime pay and interest thereon was set down before the Registrar of the Industrial Relations Court and not the Chairperson or Deputy Chairperson of the Industrial Relations Court. Counsel depones in paragraph 6 that the Assistant Registrar Nebi was supposed to deliver his order on assessment on 1st July 2020. Counsel avers in his sworn statement that he did not discover any Order of the Industrial Relations Court directing the Registrar of the Industrial Relations Court to undertake assessment proceedings. Counsel submitted that the Registrar of the Industrial Relations Court does not fit in the definition of Court in relation to the Industrial Relations Court, as such the Registrar has no jurisdiction to undertake this exercise except on an express order of the Industrial Relations Court. It is against this background that the applicant applied for permission to commence judicial review proceedings against the decision of the Registrar undertaking assessment proceedings without the purported jurisdiction.

As already alluded to above, the 2nd defendant applied for discharge of permission for judicial review I granted. The application is supported by a sworn statement by Counsel Luciano Mickeus. Counsel depones that the assessment proceedings took place in 2018 before late His Honour Mangawa Makhalira being the Registrar of the Industrial Relations Court (May His Soul Rest in Peace). Counsel depones that the Applicant herein who is the respondent in the lower court participated in the assessment proceedings and did not raise any issues with regard to jurisdiction of the Registrar. Counsel submits that the only issue raised by the Claimants was to do with motion to have some people in attendance to give evidence as exhibited by **LM 1** and **LM 2.** Counsel depones that the Claimant herein did not disclose to the court that the alleged decision to preside over the assessment took place in 2017 and that the Applicant fully participated which was later concluded in 2018. Counsel submits that they were only waiting for a ruling on assessment. Unfortunately, before delivery of the ruling, His Honour Makhalira passed on.

Counsel depones that had the Claimants disclosed the fact that the assessment took place in 2017-2018 and that they participated, he believes that frank disclosure would have compelled this court to decline granting permission to the Claimants to move for judicial review. Counsel depones that the Claimant did not exhaust all available means of challenging the decision of the Registrar if any presiding over the matter

in line with Rule 5 (2) of the Industrial Relations Court (Procedure) (Amendment) Rule, 2009. Counsel believes that there is no any decision worth review by this court as the Claimant participated in the assessment proceedings without raising any issues with the jurisdiction of the Registrar or Chairperson or Deputy Chairperson of the Industrial Relations Court. Counsel submits that decisions of the Industrial Relations Court including decisions of the Registrar of the Court made in exercise of his judicial functions are not subject for judicial review as the law does provide means or procedures of dealing with such judicial decisions in case a party is aggrieved by such a decision. Counsel submits that the Claimant skipped all these remedial procedures. Counsel submits that it is in the best interest of justice that permission for judicial review that was granted be discharged.

In reply to the application for discharge, counsel for the Claimant filed a sworn statement in opposition. Counsel depones that the assessment proceedings took place in and around 2018 and that the parties were waiting for a delivery of the ruling on assessment. Counsel submits that despite their participation in the assessment proceedings in the lower court, where a judicial officer has no jurisdiction to do an act, even the parties cannot, by participating in the proceedings or otherwise, confer jurisdiction on the judicial officer. Counsel submits that the same argument applies that not raising the issue of jurisdiction by the previous legal practitioners does not confer jurisdiction on the Registrar of the lower court. It has to be put on record that the legal firm of counsel was retained in May 2020 as evidenced by **NM2.** In paragraph 6 of the sworn statement in opposition, counsel depones, in response to the assertion that the application for judicial review was made out of time, that the assessment of overtime pay was not an event but a continuing process. Counsel submits that consequently, the Registrar's decision continued as long as he continued presiding over the proceedings and so continued on the day that this court issued the stay. Counsel submits that the stay as granted by this court restrained the Registrar from continuing the unlawful act including delivery of the order on assessment as set down on 1st July 2020. Counsel submits that in these circumstances, it would not have been prudent to challenge the decision by means of a review under the Industrial Relations Court Rules. Counsel depones that review by the Chairperson or Deputy Chairperson assumes that the registrar had the requisite jurisdiction, which in the present case, counsel submits, the Registrar had none. He avers that the only court with jurisdiction in these circumstances is the High Court. Counsel submits that it is the Registrar's decision to preside over and continue presiding over the assessment proceedings that is amenable to judicial review. Counsel denies the assertion that he misled this court in any way as there is a decision worthy of review since the decision of the Registrar of the Industrial Relations Court directly affect or threaten the rights, freedoms, interest or legitimate expectation of the Claimant. Counsel also denied the assertion that he concealed to this court the fact that they took part in the assessment proceedings before the Registrar.

THE LAW AND ANALYSIS

The law governing judicial review applications is contained in Order 19 Rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017. Judicial review applications are to be commenced promptly without any delay. Order 19 Rule 20 (5) provides that an application for judicial review shall be filed promptly and shall be made not later than 3 months of the decision. Order 19 Rule 20 (6) provides that a court may extend the period under sub-rule (5). My reading of the law shows that judicial review applications are to commence without any delay. Where a claimant commences an application for judicial review beyond the 3 months' prescribed time, the court is at liberty to dismiss such an application. As per these Rules, a court may extend the period, in my considered view, on application by the claimant, upon being satisfied that the reasons advanced for late commencement of the proceedings are genuine. The onus lies with the

claimant to convince the court. Where an application is filed after expiry of 3 months, and the claimant has not made an application for extension, the court in those circumstances is enjoined to dismiss the application. Addressing the same issue, the Supreme Court of Appeal in **CHAWANI V THE ATTORNEY GENERAL [2000-2001] MLR 77,** had the following to say:

> "The other observation we would wish to make is that applications for judicial review must be made promptly. They must be commenced within three months from the making of the administrative action complained of. See Order 53, rule 4(1) of Rules of the Supreme Court. If the application for judicial review, in the present case, was made promptly and resolved speedily, it would have been proper and convenient to declare the respondents' action null and void and to order the re-instatement of the appellant. The appellant would have been given an opportunity to earn what he is claiming now. The appellant, however, applied for judicial review in December, 1997, nine months after he was forced to go on early retirement. He was, in the circumstances, guilty of inordinate delay. No explanation for such delay was offered, both in the Court below and before this Court. It would appear that at the time when the appellant applied for judicial review, he had already received the salary for the remaining eight years. It can be seen that the delay in commencing judicial review proceedings tended to prejudice the making of an order for re-instatement and compelled the appellant to insist on claims for damages."

The reason for prompt application in judicial review proceedings was well expounded by Lord Diplock in **O'REILLY V MACKMAN, [1983] 2 AC 237** as follows:

> " The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

In judicial review applications, therefore, time start running once the decision or grounds for judicial review have arisen.

Reverting to the present case, the 2nd defendant has submitted that the assessment of damages by the registrar of the Industrial Relations Court commenced 2017. The 2nd defendant further submitted that the Claimant participated in the assessment proceedings and that they did not raise any questions with regard to the jurisdiction of the Registrar. The Claimant, in opposition, has submitted that the assessment of damages took place in and around 2018. The Claimant is of the view that not raising questions on the jurisdiction of the Registrar coupled with their participation, does not confer jurisdiction on the Registrar. The Claimant also submitted that the assessment proceedings before the Registrar was not an event but a continuing process. The question I have to resolve is whether the application for judicial review

proceedings herein was brought promptly within 3 months as prescribed by the law. I am of the considered view that the Claimant did not bring the application promptly within the 3 months' prescribed time pursuant to Order 19 Rule (5) of the Courts (High Court) (Civil Procedure) Rules, 2017. Assuming that the assessment proceedings took place in 2018 (or 2017 as indicated by the 2nd defendant) as the Claimant would want this court to believe, almost 2 years have elapsed. What this means is that the grounds for judicial review arose in 2018 and that time started running from the day the Registrar commenced presiding over the assessment proceedings. I do not agree with the Claimant that the assessment is a continuous process and not an event with respect to commencement of judicial review proceedings. The moment the Claimant was aware that the Registrar had assumed jurisdiction in the assessment proceedings in 2018, the Claimant was at liberty to commence judicial review proceedings within 3 months. Instead, the Claimant participated in the assessment proceedings that took time to be concluded for reasons already explained above. I am inclined to conclude that the Claimant did not commence judicial review proceedings in good faith. These proceedings have been commenced when the Registrar was to deliver his ruling on assessment. I have noted that the Claimant in his sworn statement in support of the application for judicial review did not mention that the assessment proceedings commenced in 2018 and that the Claimant duly participated. This was, in my considered view, deliberate aimed at misleading the court in granting permission for judicial review. Any reasonable person will conclude that the Claimant commenced the judicial review proceedings to frustrate the 2nd defendants. In these circumstances, permission for judicial review cannot stand as there has been inordinate delay in commencement of judicial review proceedings.

I will not delve into issues with regard to powers of review of the Chairperson or Deputy Chairperson over decisions of the Registrar as raised by both parties as doing so will only be an academic exercise.

In conclusion, it is my finding that the Claimant commenced judicial review proceedings beyond the 3 months' prescribed time. If the Claimant was desirous of commencing judicial review proceedings out of time, resort could have been to Order 19 Rule 20 (6), which unfortunately the Claimant did not. In the absence of an order extending time within which to commence judicial review proceedings, the permission to move for judicial review that I granted cannot stand. I therefore set aside the order granting permission to commence judicial review proceedings and I also set aside order of stay of proceedings I granted.

I also condemn the Claimant to costs.

MADE IN CHAMBERS THIS 18TH DAY OF AUGUST 2020 AT PRINCIPAL REGISTRY, CHICHIRI, BLANTYRE.

JOSEPH CHIGONA

JUDGE.