IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

JUDICIAL REVIEW CAUSE NO 14 OF 2021

BETWEEN:

THE STATE (ON APPLICATION OF ZAITHWA MILANZI) .....1ST CLAIMANT

ALEXANDER CHIBAYO.....2ND CLAIMANT

KENNETH MBAWA.....3RD CLAIMANT

CHISOMO CHAMDULA.....4TH CLAIMANT

CHRISPIN PHIRI.....5TH CLAIMANT

DEBORAH CHINYANGA.....6TH CLAIMANT

A LOT OTHER GRADUANDS.....7TH CLAIMANT

AND

COUNCIL OF THE UNIVERSITY OF MALAWI.....RESPONDENT

CORUM: JUSTICE R.M CHINANGWA

Nthewa	Counsel for the Claimants
Chikabvumbwa	Counsel for the Respondents
Chitao	Court Clerk

JUDGEMENT

Introduction

1. The claimants seek judicial review against two decisions made by the defendnats namely
   a) To hold a virtual graduation ceremony whose 1st congregation was scheduled for 28th April 2021 which excludes students who are writing supplementary (or referral) examinations for the 2019/2020 Academic Year to graduate with their counterparts
   b) To hold a virtual graduation ceremony whose 1st congregation was scheduled for 28th April 2021 instead of a physical or traditional graduation ceremony.
2. The claimants seek the following reliefs:
   a) A declaration that the decision to exclude students who are writing supplementary exams from graduating as contained in the Press Release dated 29th of March 2021 is unconstitutional; unlawful; unjustifiable; irrational; unreasonable in the *Wednesbury* sense; and procedurally unfair.
   b) A declaration that the decision to hold a virtual graduation ceremony instead of a physical graduation ceremony which is scheduled for 28th April, 2021 as contained in the Press Release dated 29th March 2021 is unjustifiable; irrational; unreasonable in the *Wednesbury* sense; and procedurally unfair.
   c) Consequently, a declaration that the decisions to exclude students who are writing supplementary exams from graduating with their counterparts and to hold a virtual graduation ceremony instead of a physical graduation which is scheduled for 28th April, 2021 as contained in the Press Release dated 29th of March 2021 are unconstitutional, unlawful, illegal, irrational and unreasonable in the *Wednesbury* sense;
   d) A declaration that the decision to exclude students who are writing supplementary exams to graduate with their counterparts is discriminatory and a flagrant violation of their right to education and legitimate expectations;
   e) A like order to certiorari quashing the decision to exclude students who are writing supplementary exams from graduating with their counterparts on 28th April, 2021 as contained in the Press Release dated 29th of March 2021;
   f) A like order to certiorari quashing the decision to hold a virtual graduation ceremony which is scheduled for 28th April, 2021 as contained in the Press Release dated 29th of March 2021;

g) A mandatory order directing that the students who are writing supplementary exams for the 2019/2020 Academic Year should be allowed to graduate with their counterparts and that no congregation for graduating ceremony be held which excludes them;

h) A like order to mandamus compelling the Defendant to hold a physical or traditional graduation ceremony within a reasonable time after the release of supplementary exams.

i) An interim order staying the implementation, in any way and form, or the bringing into effect, the virtual graduation ceremony for the 1st congregation in the 2021 graduations for the time being scheduled for 28th April 2021 as per the Press Release dated 29th of March 2021 including the requirements or demands for graduands or students to undertake preparatory, administrative or any other steps in relation thereof;

j) Any other order as the court deems just in the circumstances of the case.

k) An order for costs.

3. This matter was filed with the court on 7th April 2021. On 9th April 2021, leave for judicial review was granted and an order dismissing an application for an interlocutory injunction was pronounced. In the said order the court gave directions that the application be served on the defendant by 16th April; the defence file a defence by 3rd May 2021 and a scheduling conference be held on 10th May 2021. Following several adjournments at the instance of the parties, the matter was then heard on 12th July 2021.

4. The applications filed an affidavit in support of the application, which application was opposed by the defendnats. Below is a summary of the facts as gathered in the sworn statements of both parties.

The Facts

5. The claimant's affidavit was sworn by Zaithwa Milanzi who deponed that Chancellor College was administering supplementary examinations for 2019/2020 academic year from 29th March, 2021 to 8th April, 2021. The academic calendar for 2019/2020 academic year indicated that the College Assessment of supplementary exams will be held on 19th April, 2021; that staff holiday begins on 20th April, 2021; and that the academic calendar for 2019/2020 for Chancellor College will come to an end after the release of supplementary examinations. Through a Press Release dated 29th it was communicated that the University

will hold its 1st congregation for 2021 graduations virtually on 28th of April, 2021; that those who were writing supplementary examinations are not included in the graduation and will not be allowed to graduate with their counterparts. It is argued that no reasons were given for the decision and there was no prior discussions; that a graduation ceremony is not a public gathering as defined at law; that the policy direction on easing restrictive measures given by the President was ignored; that at the material time there was a substantial decline of Covid 19 cases at 4.4 % positivity rate and were declining; that education facilities had reopened and graduation ceremonies were held amidst the pandemic with no empirical evidence to suggest an increase in the risk of Covid-19; that secondary interested parties would physically attend the graduation and. that the infection rates did not warrant denying the claimants a physical attendance.

6. In response, the defendant's Deputy University Registrar argued that the graduation ceremony having already taken place on 28th April, 2021 means there is no standing decision warranting these proceedings; that the claimants were not entitled to graduate as they did not have their final year result approved by senate being students who were writing and/or had written supplementary (referral) examinations; that at the time of the Press Release, the claimants did not have any right to challenge the defendant's decision to exclude them from the graduation because they had not yet qualified and there was a possibility that not all would pass their supplementary examinations; that the graduation ceremony style, number of graduands; dates are set at the defendant's sole discretion; that the claimants have not proved that this was the first time that the defendant had excluded students writing supplementary examinations from graduating; that there has been graduands being left from graduating on account of a myriad of reasons but are lined up at a later date as the university holds a number of graduation ceremonies every year of graduands coming from same end of year examination considered by same Senate.
7. Regarding the virtual graduation, the defendant deponed that the defendant through its Senate adopted a resolution that held that in view of the Covid -19 pandemic and also in light of the government statutory restrictions of public gatherings to only 100 persons, the defendant's congregations ought to proceed virtually and was so held on 28th April, 2021; that the virtual graduation was cost efficient as 1825 graduates graduated in one ceremony saving the defendnats costs of holding additional ceremonies; that the claimants are not by

law party to discussions on how graduation ceremonies are to be held or conducted; that on 8th October, 2020, the defendant's management met with the University of Malawi Students Union Executive (UMSU) who are the claimants' leaders and representatives to clarify the decision to hold a virtual graduation; that the decision to hold a virtual graduation was preferred to save lives of both staff and students as several members of staff lost their lives through COVID-19; that having had over 1850 graduands it was impossible to have them accommodated in one place in view of the social distancing preventive measures.

Issues for Determination

8. This court has to determine whether the claimants are entitled to reliefs sought.

Analysis of Law and Evidence

9. In **Taulo and others** v Attorney **General and another** [1994] MLR 328 (HC) it was held that it is not the purpose of judicial review to review the merits of a decision but the decision-making process itself. In **In re Constitution of the Republic of Malawi; in re Lunguzi** [1994] MLR 72 (HC) it was held that Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.
10. In **White and another** v Attorney **General and another** [1993] 16(2) MLR 903 (HC) the court held that judicial review aims 'to protect an individual against abuse of power by authorities exercising judicial, quasi-judicial and administrative powers. Judicial review is not to detract from authorities the powers and discretion properly vested in them by law.
11. In **Nkhoma and others** v Council **of the University of Malawi** [1993] 16(2) MLR 666 (HC) the court held that the Council of the University of Malawi is a public corporation and creature of statute and, when making decisions affecting the rights of students, must observe principles of natural justice by affording students the right to a hearing.
12. In **S v Katunga** Ex Parte: Masseah (Judicial Review Cause No. 44 of 2017) [2018] MWHC 801 (26 July 2018) the court held that the concept of judicial review is enshrined in section 43 of the Constitution. This section provides that:

"Every person shall have the right to (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms,

legitimate expectations or interests are affected or threatened; and (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known."

13. In **Chawani v The Attorney-General [2000–2001] MLR 77** the Supreme Court of Appeal interpreted the Constitutional provision as follows: '*Section 43 of the Constitution requires, in our view, that an administrative action affecting another person must be lawful and fair; it must also be supported by reasons which must be given to the affected person. This requirement exists where the administrative action would adversely affect the rights, freedoms, interests and legitimate expectations of a person. There is an additional requirement to give written reasons for an administrative action where the rights, freedoms, interests and legitimate expectations are known to the decision-maker. The purpose of section 43 is clearly to ensure transparency in decision-making where the decision is likely to infringe the rights, freedoms, interests or legitimate expectations of others. The section was also intended to enable persons affected by administrative actions to have adequate opportunity to defend themselves effectively. A person would be able to present a good and effective defence to an administrative action when he knows the reasons supporting the action.*

14. In this case the facts reveal that the defendants had advised the student body the academic events that would take place in the year. On the list of events the date of graduation was not indicated. However, the dates scheduled for deferred and supplementary exams were end February and end March 2021 respectively. The last assessment being college assessment was scheduled for 19th April 2021. A graduation ceremony was later scheduled for 28th April 2021 leaving out those who had written the deffered and supplementary exams. The question is was a legitimate expectation created? Was the decision unreasonable? Was the decision irrational? This court finds that a legitimate expectation to graduate is created once students satisfy all the requirements of the programme. In addition a legitimate expectation would have been created if the academic calendar had stipulated that a graduation would take place after the deferred and supplementary exams. As held in the White Case it is not the duty of the court to impose on the defendnats when activities should be undertaken. The claimants did not show on a balance of probabilities that they had satisfied all the requirements of the programme; and that after satisfying all

the requirements of the programme they were denied the opportunity to graduate. At such a point then any decision not to make them graduate would have to be within the dictates of the law. The defendants have stated that they do hold several graduation ceremonies. The claimants have not shown that the defendants had failed to hold other graduation ceremonies after they had satisfied the requirements of their programme. A consultation process would have been futile having in mind the observations above. The decision to hold the graduation ceremony was not irrational or unreasonable and neither were the legitimate expectations of the claimants cut off as the claimants were not denied a graduation if and when they had satisfied the requirements of their programme.

15. Now regarding, holding a virtual graduation. Many arguments have been raised both for and against. The arguments will not be reproduced in this part for brevity of this judgement. Having considered the arguments this court observes from the facts that a graduation was on the academic calendar of the defendnats. The defendants conducted the graduation virtually in order to adhere to the Public Health Rules 2020 which dictated how many people would physically gather. Thus, to this end the defendants could not be faulted in the decision-making process as they had to apply the law. The question would be, if one is applying the law should there be a consultation process? Surely not. If anything, the lawmakers were the ones responsible for the consultation process before passing the said law. The question as to what a 'gathering' means under the Public Health Rules 2020 and whether there was evidence supporting lower covid infection rates would not be a discussion in a judicial review matter as the court would be considering the merits of the matter. This court takes judicial notice of the fact that the corona virus became a global pandemic affecting all countries irrespective of their economies. To date no cure has been found and the least the nations have resorted to are to implement preventive measures. If the application of the preventative measures as provided by statute were in dispute, then these matters would be well addressed in an action. For example, there would be need for expert evidence to prove that the covid infection levels had reduced. Regarding the statements made by the Vice President, without much ado, this court notes it is trite law that a Presidential decree or statement is not law and cannot supersede the law.
16. Regarding costs, this court notes that costs are awarded at the discretion of the Court. The claimants had brought a constitutional application before the court.

Finding

17. The claimant's application fails. Costs are awarded to the defendants.

Pronounced this 12th day of October 2021 at LILONGWE

R.M CHINANGWA

JUDGE