Mr Theu

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CAUSE NO. 51 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

THE STATE
(ON APPLICATION OF SHEPHER MUMBA) ..... CLAIMANT

-AND-

MALAWI LAW SOCIETY (DISPLINARY COMMITTEE) .... DEFENDANT

CORAM: Honorable Justice Jack N'riva, Judge
Mr. Chimwemwe Kalua, counsel for the claimant
Mr. B Theu and Mr P Maliwa, of counsel for the defendant
Mrs. D Nkangala, Court Clerk

ORDER

The claimant commenced this judicial review proceeding for the Court to review the decision of the defendant calling him to a disciplinary hearing.

On obtaining the permission to commence the judicial review proceedings, the claimant told the Court that the issue, that is the subject of the hearing, took place in 2008. Thus, he raised two issues. The first one is that it would be unfair to call him to the disciplinary hearing when the acts complained of happened in

2008. The second issue was that the hearing is statute-barred by virtue of the Limitation Act, *Cap* 6:02, Laws of Malawi.

Let me point out at the outset that Limitation Act does not apply to disciplinary actions.

The Act clearly applied to limitation of "certain actions" and arbitrations agreements.

In section 2 of the Act, "action" includes any proceeding in a court; and "arbitration agreement" has the meaning assigned to that expression in the Arbitration Act: Cap 6:03. Further in the Arbitration Act, "arbitration agreement" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

Going through the definition part and indeed the whole Limitation Act, or the common law, disciplinary hearings either by public bodies or by private institutions are not covered by the limitation period.

The reason I allowed the permission to commence judicial review was about the time when the alleged misconduct was said to have taken place. When applying for the judicial review, the claimant gave an impression that the matter took place in 2008 and that in 2020 the defendant called him to a disciplinary hearing. However, appreciating all the facts that are before the Court, it is quite apparent that, much as the actual act of misconduct complained of took place in 2008, the complainant in the matter approached the Malawi Law Society in 2016. It is also on record that the Society has been following up the issue from that time culminating in the defendant calling the claimant to a disciplinary hearing that was supposed to take place in 2020.

There have been issues arising as to whether this Court should interfere with regulatory bodies handling of disciplinary hearings. Where the regulatory body is established by statute, and where the body conducts itself in acts that would be unlawful or unreasonable, the Court has powers to review its decisions. However, as I have said, permission for this review was granted on the premise that it was represented as if the matter took place in 2008 and abruptly in 2020, the defendant called the claimant to a disciplinary hearing. However, having heard the parties, that was a misrepresentation of facts.

It has been the case that the defendant has had several engagements with the claimant including having a conduct meeting with the claimant.

It has been stated that in some cases, the notices from the defendant were sent to Mr Kalua instead of the claimant. However, as counsel for the claimant stated, both Mr Kalua and Mr Mumba are partners in the same legal firm, Messrs. Golden & Law. I agree that the argument does not hold good that the claimant may not have been aware of the process.

In summary, this Court finds that the complaint against the claimant was made in 2016. Since then, there has been communication between the claimant and the Law Society. In 2018 and 2019 the defendant had held conduct meetings with the claimant. Of course, it is the case that some of the notices might have been sent to Mr Kalua and not the claimant. However, as I said above, the two are in the same legal firm and to state that the claimant was not aware of the proceedings does not make good sense. It is quite apparent that the defendant came to the Court in December 2020 when it was certain that the disciplinary hearing was about to take place. However, as counsel for the defendant had suggested the claimant was aware of the idea of having a disciplinary hearing as early as December 2019.

In that event, I agree with the defendant that the claimant commenced the judicial review proceedings way after the limitation period be it under the Courts (High Court)(Civil Procedure) Rules, 2018 order 19 or section 96 of Legal Education and Legal Practitioners Act, 2018. The former requires one to commence judicial review proceedings within three months, the latter requires a person to commence judicial review within 30 days. Of course, the provision in the Legal Education and Legal Practitioners Act envisages a scenario where a legal practioner is aggrieved by an outcome of a disciplinary hearing.

This judicial review was commenced way after the time prescribed in the statute and in the procedure rules.

Claimant

Counsel for the ~~defendants~~ argued that the defendants waived the right to depend on the limitation. It has to be remembered that the defendant did not make a well-prepared representation during the application. Due to circumstances beyond their control, the representative for the claimant was able to make extempore arguments because the one who was to represent the defendant had some bereavement. It is the case that counsel dwelt much on the issue of Courts being slow to interfere with decisions of the defendant which has the legal mandate to regulate professional conduct of the of the legal profession.

I, therefore, find that the defendants did not in any way waive their right to raise the issue of limitation period. In any event, the court can extend limitation period under the rules but it seems to me that it cannot extend the limitation period under the Legal Education and Legal Practitioners because the Act does not contain such a provision. Moreover, it appears to me that these legal issues can arise at any point in time during the judicial review proceedings. Mwaungulu JA said in *Sheriff of Malawi and Another v Universal Kit Supplies* (Civil Appeal No. 6 of 2017) that a judicial review is "a detailed designated motion. There are no pleadings. The judicial review motions are supposed to be supported by evidence." His Lordship went on to say that the scheme under judicial review is that all parties can raise any legal matter without having to plead it.

The Court went on to say

> The argument, therefore, that a legal principle touching the case will never be raised before a court of law because it was not in the pleadings is untenable. Also untenable is the contention that a legal issue not canvassed by the parties cannot be considered by the court.

In all this I dismiss the claimant's claim in the judicial review with costs. I order costs to the defendants because the claimants misrepresented some facts leading to the application. Furthermore, counsel for the defendants argued that the claimant has had several attempts to have the disciplinary hearing frustrated.

MADE the 12th day of May 2021

J NRIVA

JUDGE