IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CASE NUMBER 56 OF 2021

[BEING JUDICIAL REVIEW CAUSE NUMBER 52 OF 2021, HIGH COURT OF MALAWI, PRINCIPAL REGISTRY]

BETWEEN:
THE STATE
[ON THE APPLICATION OF THE
MALAWI REVENUE AUTHORITY]

RESPONDENT/CLAIMANT

AND

CHAIRPERSON OF THE
INDUSTRIAL RELATIONS COURT

DEFENDANT

AND

ROZA MBILIZI

APPLICANT/INTERESTED
PARTY

CORAM:
HON. JUSTICE L. P. CHIKOPA SC, JA.

Gondwe/Dikiya/Kalampa of Counsels for the Applicant/Interested Party

Mpaka of Counsel for the Respondent

Masiyano[Ms.] Court Clerk

RULING

The Interested Party was at all material times the Respondent's Deputy Commissioner General[DCG]. She has, courtesy of a letter dated August 13, 2021, since been summarily dismissed from her employment. The grounds for her summary dismissal are of no consequence to the resolution of the application before us. We will not therefore say anything about them. Suffice it to say for now that the Interested Party approached the Industrial Relations Court[IRC] seeking to challenge the propriety of her summary dismissal and claiming damages for *inter alia* unlawful dismissal against the Respondent[MRA].

On August 18, 2021 the Interested Party approached the IRC *ex parte* and sought and obtained a 'stay of the dismissal'. The application was based on Rule 25[1][m][i] and [4] of the Industrial Relations Court[Procedure Rules] which provides:

> *'1. Without prejudice to the decision-making power of the court under section 67, the court may on application or of its own motion at any time-*
>
> *[m] Grant-*
>
> *(i) urgent interim relief pending a decision by the Court after a hearing;*
>
> *4. the court, in the exercise of its powers and discretion and in the performance of its functions, may act in such manner as it may consider expedient in the circumstances in order to achieve the objectives of the Act and in so doing it shall have regard to substance rather than form, save as is otherwise provided for in the Act'.*

The Respondent was dissatisfied with the order of interim relief. It therefore on September 7, 2021 approached the High Court, also *ex parte*, and asked, on the basis of Order 19 rule 20[3] of the Courts[High Court][Civil Procedure] Rules 2017 for:

'leave to apply for the judicial review against the decision of the Respondent sitting as an inferior or subordinate court to effectively reinstate and restore full pay and benefits to one Roza Mbilizi in the employment of the Applicant by staying the decision of the Applicant to summarily dismiss its employee on account of pending final determination of IRC Matter No. 820 of 2021....' **[Sic]**

In the accompanying Application Form the Respondent set out the decision complained of, the reliefs sought and the grounds therefor. We shall where necessary make reference to them.

Contemporaneous with the application for leave the Respondent also asked for interim relief in the form of a stay of the IRC[which the Respondent referred to as a court *'inferior'* to the High Court] Chairperson's decision of August 18, 2021 referred to above and an injunction preventing the said Chairperson from enforcing or acting on the said order. The High Court granted the leave, a stay of the order of August 18, 2021 and the injunction against the Chairperson of the IRC referred to above.

The Interested Party was also not satisfied. She therefore approached the High Court[as an Interested Party] and asked for a vacation of the stay. A lot of things were said in the said Court about the stay. We will not list them all. The fact is that the High Court declined to vacate the stay of the order of August 18, 2021 and the injunction. The reasons the Court gave for its decisions/conclusions are interesting. First was that the Respondent would, should the Interested Party suffer any loss/damage as a result of the stay of the order of August 18, 2021, be able to pay the Interested Party any damages thereby occasioned. Secondly that there was no proof that the Interested Party would be able to reimburse the Respondent any financial and other benefits she might receive courtesy of the interim relief ordered on August 18, 2021 in the event she lost the case the genesis of the said order and thirdly that it was less in the public interest to avail the Interested Party a salary and other

benefits before the propriety of her summary dismissal was determined to finality.

The Interested Party is now before this Court. She is not contesting the grant of leave for judicial review. She only seeks the restoration of the IRC's order of August 18, 2021. She believes that the balance of justice weighs in favour of the grant of her prayer. That not granting it will result in the needless torture of her and her dependents who, *inter alia,* may not be able to go to school. Her and her dependents' suffering is, in her view, difficult to translate into damages. It is therefore impossible to compensate her the fact that the Respondent can pay the damages notwithstanding.

The Respondent, on the other hand, will in her view lose nothing if the stay is vacated. If she loses the case and the Respondent thereby suffers loss/damage such loss is not only easily quantifiable it is also one that she will fully make good. She, to that, extent is willing to offer landed property namely Title Number Likabula 3204 as security.

The Respondent raised three arguments against the application in this Court. First that this court has no power to hear this application. This is a court of appeal. Matters should only come here in the context of an appeal. Or an intended appeal. The application before us not being an appeal it should, in the view of the Respondent, be dismissed. The case of **Superior Trading Co. Ltd& 2 Others v Arab v NBS Bank Ltd** MSCA Civil Appeal Number 65 of 2017[unreported], decided by this very court, was cited in support of such argument.

Secondly the Respondent contends that the application is without merit. The Interested Party is no longer its employee. She, through this application, however wants to be treated like one despite the fact that the propriety of her summary dismissal has not been determined one way or the other. That should not, the Respondent further argues, be allowed. But in the unlikely event that it turns out she was wrongfully summarily dismissed the Interested Party's losses are capable of quantification and the Respondent capable of paying such

damages. There is therefore no need to avail her interim relief of the sort granted by the IRC or at all.

Thirdly the Respondent contends that we should not entertain this application. Doing so is tantamount to this Court interfering in the High Court's conduct/management of the judicial review in the said Court.

Having set out the arguments as above we must emphasize that the question before us is whether or not to restore the IRC's order of August 18, 2021. It is not the merits of the case between the Interested Party and Respondent presently in the IRC. Neither is it the judicial review in the High Court. That notwithstanding and without in any way, for the time being, commenting on the merits of the parties' cases in this Court we feel obliged to say a few things about this case generally.

Firstly, and despite suggestions to the contrary, it is clear that the parties and the issues in the case between the Interested Party and the Respondent namely **Rosa Mbilizi v Malawi Revenue Authority** IRC Case Number 820 of 2021 and **The State[On the Application of the Malawi Revenue Authority] v Chairperson of the Industrial Relations Court** Judicial Review Case Number 52 of 2021 are much the same. At the center of it all is the propriety of the Interested Party's summary dismissal from the Respondent's employment.

The immediately foregoing brings to mind the case of **MACRA v Daniel Datch, Godfrey Itaye & Others** MSCA Miscellaneous Application Number 39 of 2021[unreported]. In that case the Court decried the tendency by some to bring much the same issues before this and that court. The court thought, very correctly in our view, that such practice has the potential to bring the justice system into disrepute, to cause needless delays and to waste time and treasury.

Applied to this case the questions arises whether it was necessary for the Respondent to take the interim relief order on judicial review in the High Court; whether it was not possible, and more convenient all-round for the Respondent to raise the propriety of the order of interim relief in the very

IRC[the said order was obtained *ex parte*?] and only go to the High Court on appeal? If we might say so proceeding like was done in this case adversely affects case management. In this case it also opened a not very necessary new area of conflict between the parties which will inevitably lead into needless delays and a waste of treasury seeing as now we have a further two cases. One in this Court and another in the High Court. And if truth be told none of which is about the Interested Person's summary dismissal which is the real bone of contention between the parties.

Secondly, can a party take a judicial officer on judicial review in relation to a decision made in the exercise of their judicial functions? In other words, is or should a judicial decision be amenable to judicial review? Should it not, where a party is dissatisfied, just be appealed against?

The third issue concerns Section 61 of the Courts Act[Cap 3:02 of the Laws of Malawi. It *inter alia* provides that:

> *'no Judge, magistrate or other person acting judicially shall be liable to be sued in any court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.'*

What effect, if any, does this section have on the present and similar proceedings? Is the judicial review against the Chairperson of the IRC regular even when it does not allege bad faith? Should, in the absence of alleged bad faith, the High Court even have granted leave for judicial review? On the other hand is it true that the Respondent did not have reliefs alternative to judicial review to address its dissatisfaction with the IRC's order of August 18, 2021? Is, strictly speaking, the Respondent's complaint herein one that is amenable to judicial review? Couldn't the Respondent have appealed? Or, if an appeal was not immediately available due to inchoacy for instance, could they not have resorted to a review or supervision *vide* Section 26 of the Courts Act which provides:

'[1] In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether criminal or civil, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require'.

All we can say is that judicial review is about review of administrative actions. Not judicial decisions. Judicial decisions are appealed against, reviewed or supervised under section 65 of the Industrial Relations Act or section 26 abovementioned.

The fourth issue revolves around the legal/constitutional ramifications of proceeding with judicial review herein. It has the practical effect of excluding one of the parties. In the instant case because the judicial review is between the Respondent and the Chairperson of the IRC the Interested Party finds herself excluded from the determination of matters in which she has more than sufficient interest. She actually runs the risk of being condemned unheard. Admittedly this might be due to the very nature of judicial review. There is however no denying the fact that it is the Interested Party's summary dismissal and interim reliefs that are in issue. If anyone should be at the dinner table then it should be her. As of right. Not as a permitted/invited spectator.

It is also obvious that the instant judicial review has the effect of affording the Respondent an appeal against the order of August 18, 2021 via the back door. Through it the High Court will reexamine[which is what happens on appeal] the propriety of the said order without at the same time complying with the

formalities of an appeal. A party should not, in our humble view, be allowed to get via the backdoor what they are reluctant to get through the front door.

There also seems to us to be an under appreciation of the practicalities around the judicial review herein and their legal/constitutional implications. Are we, for instance, envisaging the Chair of the IRC, indeed judicial officers, standing in the dock to defend their judicial decisions? Filing, like all other respondents, affidavits in their defence? Answering questions in examination in chief and cross examination? Instructing counsel? Will perhaps The Honorable the Attorney General act for them? Will The Honorable the Attorney General be free of conflict? In the instant he is the Respondent's legal advisor through the Ministry of Finance. And what will happen if the Chair of the IRC is found liable?

The fifth issue is about judicial independence. Whichever way one looks at especially the instant judicial review it looks like an attack on judicial independence. Judicial officers cannot exercise the independence and impartiality expected of them in sections 9 and 103 of the Republican Constitution if they are subsequently expected to defend such decisions in higher courts. It actually is not surprising that in the instant case there has been no response from the Chairperson, IRC.

Having said the above about judicial review of judicial decisions it is only fair and just that we mention that there are cases where judicial review of judicial decisions was allowed. **Willy Kamoto v The Chairperson of the Industrial Relations Court** High Court of Malawi, Principal Registry, Civil Cause No. 12 of 2006 and **The State v The Industrial Relations Court ex parte Malawi Regulatory Authority and Charles Nsaliwa**, High Court of Malawi, Principal Registry Judicial Review Cause Number 30 of 2017 are examples. It is worth noting however that while the debates therein were largely premised on Order 59 of the Rules of the Supreme Court[RSC] the current one is premised on Order 19 rule 23 of the Courts[High Court][Civil Procedure] Rules 2017[hereinafter called the Rules].

It is also important to note that neither Court in the above cases considered section 61 of the Courts Act. Also that neither side in the instant case addressed us on the said section 61. We are of the view that had the High Courts done so they would have come to the conclusion that judicial officers are generally immune from suit in relation to judicial decisions unless bad faith is alleged and proved. Further that judicial review is not the way to address unsatisfactory judicial decisions.

We must, with the greatest respect, also opine that the High Courts most certainly misapprehended/misapplied Order 59 and the Rules assuming they are applicable in this case. The RSC were made for the English jurisdiction to facilitate *inter alia* the management of tribunals and inferior courts. Our IRC clearly is not a tribunal. It is also not an inferior court. Actually we do not have a class of courts called inferior courts in Malawi. We have subordinate courts. The IRC is an example of a subordinate court. Subordinate, not inferior, to the High Court. Its management and that of all subordinate courts is via the Courts Act[Cap 3:02 of the Laws Malawi]. Where a party is dissatisfied with the decision of a subordinate court including the IRC the said Act plus the Labour Relations Act[Cap 54:01 of the Laws of Malawi] provides for appeals, reviews and supervision. That is why we are of the view that the wording of Order 59 of the RSC notwithstanding it must never be taken to have authorized the judicial review of our subordinate courts'[the IRC inclusive] judicial decisions.

We will say much the same about Order 19/20 and 23. Because judicial review is about administrative action, and not judicial decisions, whatever the above Order provides must be taken to be in relation to administrative decisions. Actually the said order talks more about how to do a judicial review as opposed to who to do it against. One should not therefore use Order 19 rr.20 and 23 to justify the judicial review of judicial decisions merely because the decisions against which judicial review may be had look like the ones judicial officers make. That was meant, in our opinion, to cater for their, i.e. the judicial officers', administrative decisions.

We have commented generally about the application before us. We must now come back to the main question which is whether or not to vacate the High Court's stay on the IRC's order of August 18th. In doing so we must reemphasize the fact that we are not here to decide on the propriety of the summary dismissal. Neither to determine the merits of the judicial review before the High Court. Those are for the IRC and the High Court to determine.

By way of reminder only the Interested Party put two arguments before us. We have set out the essence thereof above. We will not repeat them except to say that she contends firstly that the application is properly before us and secondly that it has merit and should be granted. On the first argument she referred us to the cases of **The State[On The Application Of Flatland Timbers Ltd V Department Of Forestry[Director of Forestry]** MSCA Civil Cause Number 25 of 2021[unreported] and **Malawi Communications Authority[MACRA] v Datch, Itaye & Others MSCA** Miscellaneous Application Number 39 of 2021[unreported]. In both cases this Court, according to the Interested Party, held that where an application for leave for judicial review or interim relief has been refused the applicant can move on to this Court with a fresh application. Not an appeal. That, in her view, must also be the case when interim relief has been granted. Those disadvantaged, like her in this case, should be at liberty to make a fresh application for a setting aside of the leave or interim relief in this court. That is why she has, in the instant case, approached this Court with a fresh application to have the stay granted by the High Court as interim relief vacated.

On the second point the Interested Party contends that this Court should be guided only by the balance of justice. The order in issue is an interim one. Made only in order to preserve the *status quo*. To ensure that the Interested Party does not suffer needless harm/damage/loss. On the facts it is her contention that the Respondent will not suffer any damage if the interim relief order of August 18, 2021 is resuscitated. It can always resort to the property she is offering as security in case of any such financial loss or damage.

She on the other hand will suffer irreparable damage. The lack of interim relief will affect the wellbeing of her family including her children who, even as this matter makes its way through these courts, require *inter alia* fees and upkeep. The damage that she and her dependents will suffer if the interim relief is not granted are incalculable. The fact that the Respondent can pay the damages is therefore irrelevant.

The Respondent on the other hand argues firstly that the application is improperly before us. It should have come by way of appeal for this is an appellate court. Secondly that this application is without merit. If she wins her case her entitlements, whatever they are, can be easily calculated. And such is the depth of the Respondent's pocket the same can be paid.

The Interested Party on the other hand does not have unlimited financial resources. She will not be able to make good the Respondent's losses if she loses the cases. As for the offer of security the Respondent believes it does not amount to much. The Interested Party has not even shown the property's worth. Or whether it is unencumbered or not. The Respondent therefore prays that the application be dismissed with costs.

Is the application improperly before us? Should we entertain the application? We remind ourselves that the issues so far considered in the High Court are about leave for judicial review and interim relief. It is a fact that if leave or interim relief had not been granted the Respondent would have been entitled to come to this Court with fresh applications in both regards. See the **Flatland Timbers** case, **The State[on the Application of Gertrude Hiwa] v Office of the President & Cabinet & Secretary to the President and Cabinet** MSCA Civil Appel Case Number 1 of 2021 and **The State[on the Application of Ashraf Lunat] v Inspector General of Police** MSCA Civil Appeal Case Number 48 of 2021. It appears to us that the Interested Party should equally be allowed to bring a fresh application for a vacation of the High Court's interim relief order her application in the High Court having been declined. The Interested Party's application is, in our considered opinion, therefore properly before us. To

conclude otherwise would be equal to treating similarly positioned parties differently. Discriminating in other words.

The Respondent brought to our attention our decision in **Esa Arab & Another V NBS Bank** and sought to rely on it as authority for the proposition that this application should have been brought by way of appeal. And that not having been so brought it is improperly before us. The **Esa Arab & Another v NBS** case is, with the greatest respect, clearly distinguishable. It was not about judicial review, leave and interim reliefs.

The Respondent also contended that entertaining the application and vacating the stay herein would be equal to interfering with the judicial review proceedings in the High Court. And that to that extent the same is irregular. That is a tad rich coming from the Respondent. It never thought twice about taking the IRC's interim relief order for re-examination by the High Court in a matter where the order was and remains under consideration by the IRC. But just to put its mind at rest there can be no interference in this instance. We are saying nothing about the judicial review before the High Court. The question of interference does not therefore even arise.

Coming to whether to stay/vacate the interim relief we must reiterate the law. Firstly that whether or not to grant interim relief is in the discretion of the court before whom the application is made. And secondly that a discretionary decision will not be set aside merely because the court taking a second look at it would have come to a different decision. It must be shown that the decision and therefore the exercise of discretion is perverse, under a mistake of the law, under a misapprehension of the facts or in disregard of principle. See **Finance Bank of Malawi v Tembo** [2007] MLR 99 and **Ministry of Finance & Others v Mhango & Others** [2011] MLR 174.

In the instant case the question is whether or not the High Court in staying the interim order of August 18, 2021 wrongfully exercised its discretion. To answer that question we have to take a look at the reasons the High Court gave for its decisions. We must also take a more than passing interest in the goings on in

the IRC specifically the order of August 18, 2021 which was itself the product of an exercise of discretion by the IRC.

Having done so it is clear that the High Court was of the view that any damage/loss the Interested Party would suffer courtesy of a stay of the order of August 18, 2021 was on the one hand capable of quantification in monetary terms and on the other of being made good owing to the depth of the Respondent's pockets. The Interested Party would therefore lose nothing even if the interim relief was not granted.

Secondly the High Court thought it not in the public's best interests to continue paying an employee who had been summarily dismissed their full benefits before the propriety of such dismissal had been determined.

Thirdly and lastly the Court thought the Interested Party did not show that she could, if any loss/damage was occasioned to the Respondent via the operation of the order of August 18, 2021 make good such loss. There was of course a property offered as security in that regard but the Court opined that insufficient details were provided about the property. There was no mention of whether or not it was encumbered. And of its value.

Like we have said above we are taking a holistic view of this matter. Accordingly it is to be noted that in granting relief to the Respondent the High Court was in effect setting aside the IRC's exercise of its discretion. The question is whether the same was done in the manner set out in the Tembo and Mhango cases cited above. In other words did the High Court find as a fact that the IRC wrongfully exercised its discretion in granting the interim relief? In yet other words is there a finding that such order was perverse, made under a mistake of the law, under a misapprehension of facts or in disregard of principle? The answer can only be in the negative. The High Court thereby erred in our judgment.

It similarly erred in our further view when it spoke of a principle of law to the effect that the continued payment of a dismissed employee's benefits pending the resolution of a disputed dismissal is not in the public's best interests and

used it to justify its dismissal of the Interested Party's application before it. The truth, and we are repeating ourselves here, is that whether or not to continue paying is a conclusion a court arrives at after due consideration of all the circumstances of the case. The sufficiency of damages, the case's prospects and generally the interests of justice are some of such considerations.

We are also of the view that the High Court could have dealt with the matters of security and damages better. Instead, for instance, of declining to grant the application due to the Interested Party's failure to provide the value of the property offered as security or to state whether it was unencumbered or not the Court could instead have simply asked her to provide such information. Or set such information as part of the conditionalities to be met before the interim relief was actualized. Courts always do that in admissions to bail. They grant bail, set out conditions and let the accused meet them.

About sufficiency of damages we said in **Sabreta v New Building Society** that the question should not be limited to whether or not damages can be assessed and paid. A question should also be asked whether damages are appropriate in that particular case. There will be instances where damages, though quantifiable and payable, will not be appropriate. For reasons appearing hereinafter this is one such case.

So, when all is said and done, did the High Court wrongly exercise its discretion? To the extent that the High Court did not consider whether or not the IRC wrongfully exercised its discretion in granting the order of August 18th, 2021 and misapprehended/misapplied the issues of security for purposes of interim relief and damages we must respectfully conclude that there was an improper exercise of discretion.

Should we grant the application? In our view we should only do so if the facts before the Court below and now before us lead to that conclusion. Remembering always that whether or not to grant is in the discretion of the court with the interests of justice being the guiding principle.

In this case the best way forward is to look at what the parties stand to lose if they do not get their request and the effect of such loss on their livelihood. Admittedly they will both lose money. The Interested Party's loss will however affect third parties. According to her affidavit she needs to provide for her wards/dependents. Now. Future sums, which damages are, cannot be of much use to her. She will not be able to do with such sums what she wants to do with the money now. To that extent damages, even with interest payments, cannot be able to compensate her the fact that the Respondent is able to pay them notwithstanding.

The Respondent would suffer slightly differently. True it might lose the ability to use the money now but that can be compensated. Via appropriate interest payments for instance.

It is our most considered view that in the present circumstances the scales of justice weigh more towards resuscitating the interim relief. Accordingly and taking into consideration the totality of the facts and issues before us we are of the view that the interim relief herein be reinstated. It is. The Interested Party will provide security in relation thereto in the form of a first charge in the sum of K75,000,000.00 on the property offered as security by the Interested Party or some other real property of a comparable nature in terms of value. Further the parties are hereby ordered to, before the expiry of 28 days from this day, appear before the Registrar, IRC to set out the quickest manner, complete with time lines, of dealing with the dispute between them.

To further aid the speedy disposal of this matter in the IRC and in furtherance of better case management we strongly urge the parties to seriously consider letting go of the matter in the High Court. They should concentrate on the one in the IRC. It will resolve the actual dispute between the parties, namely the propriety of the summary dismissal, and by necessary implication the question of reliefs interim or otherwise. Subject of course to appeals.

Costs shall be in the cause. This matter is ongoing.

Dated this January 31, 2022 at Blantyre.

L P CHIKOPA SC

JUSTICE OF APPEAL