The State (On the Application of ADMARC Limited) v The Ombudsman

Ruling/Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice M.A Tembo
Cause Number:	Judicial Review Case number 137 of 2018 (High Court)
Date of Judgment:	June 23, 2021
Bar:	Chipembere, Counsel for the Claimant Chandilanga, Counsel for the Defendant

1. This is the decision of this Court made under Order 19 Rule 20 (1) Courts (High Court) (Civil Procedure) Rules, on an application by ADMARC Limited for judicial review of the defendant's decision, namely, the determination of an employment matter concerning the unfair dismissal by ADMARC of its employee.

2. By the said application, ADMARC Limited sought the following reliefs, namely, a declaration that the defendant's decision is unconstitutional and unlawful under section 26 of the Constitution and section 63 of the Employment Act, a

declaration that the defendant's decision is irrational and Wednesbury unreasonable and has no legal basis, a like order to certiorari quashing the decision and for costs.

3. The facts of this matter are not contested. An ADMARC Limited employee went to lodge a complaint with the defendant alleging that he was unfairly dismissed from his employment with ADMARC Limited on 7th January, 1997. The defendant received the complaint in July, 2013 and engaged the parties and eventually made its determination in February, 2019 finding for the ADMARC Limited employee that he was indeed unfairly dismissed.

4. In her determination, the defendant only alluded to the constitutional provisions on employment and labour related rights and made the following orders without reference to the Employment Act which she reasoned was not in operation at the time the complainant was unfairly dismissed. She made the following orders, namely, that ADMARC Limited calculates and pays the complainant salary he lost from the date dismissal to the date of the determination and that the payment should be based on the current salary of a Unit Market Officer; ADMARC Limited pays the complainant an equivalent of five years' salary as compensation for unfair dismissal to be calculated based on the current salary of a Unit Market Officer; ADMARC Limited negotiates with the complainant other claimants relating to food and accommodation allowances whilst he was on field trips during suspension, leave grant, transfer allowance, lost property and repatriation costs, all monies to be paid by 30th May, 2019.

5.ADMARC Limited having been dissatisfied with the defendant's decision exercised its right to seek a review of the defendant's decision as is provided under section 123 (2) of the Constitution.

6. At this stage this Court will consider the submissions of the parties.

7. Both parties referred to section 123 of the Constitution which provides for the defendant's powers of investigation as follows:

1) The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.

2) Notwithstanding subsection (1), the powers of the office of the Ombudsman under this section shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined.

8. They also referred to section 126 of the Constitution which provides for remedies available before the Ombudsman as follows:

Where the investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall-

(a) direct that appropriate administrative action be taken to redress the grievance;

(b) cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance; and

(c) refer a case to the Director of Public Prosecutions with a recommendation for prosecution, and, in the event of a refusal by the Director of Public Prosecutions to proceed with the case, the Ombudsman shall have the power to require reasons for the refusal.

9. They then alluded to the provision on the duties and functions of the Ombudsman in section 5 of the Ombudsman Act which provides that:

(1) Subject to the Constitution, the Ombudsman shall inquire into and investigate in accordance with the provisions of this Act, and take such action or steps as may be prescribed by this Act on any request or complaint in any instance or matter laid before the Ombudsman in accordance with section 7 (1) or (2), and concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society.

(2) Without derogating from the provisions of subsection (1), any request or complaint in respect of any instance or matter referred to in that subsection may include any instance or matter in respect of which it is alleged-

(a) that any decision or recommendation taken or made by or under the authority of any organ of Government or any act or omission of such organ is unreasonable, unjust or unfair, or is based on any practice which may be deemed as such;

(b) that the powers, duties or functions which vest in nay organ of Government are exercised or performed in a manner which is unreasonable, unjust or unfair.

(3) This section shall not apply in respect of any decision taken in or in connexion with any civil or criminal case by a court of law.

10. They also referred to section 8 of the Ombudsman Act which provides remedies available before the Ombudsman as follows:

(1) The Ombudsman shall after holding any inquiry or investigation in accordance with this Act-

(a) notify the person who laid the matter before him under section 7 (1) or (2) of the outcome of such inquiry or investigation in such manner and form as the Ombudsman may determine and to such extent as the Ombudsman may deem necessary or appropriate in the public interest, or that the matter will not be inquired into or investigated in accordance with section 7 (3);

(b) take appropriate action or steps to call for or require the remedying or reversal of matters or instances specified in section 5 through such means as are fair, proper and effective, including by-

(i) negotiation and compromise between the parties concerned;

(ii) causing the complaint and the Ombudsman ’ s findings thereon to be reported to the superior of the offending person;

(iii) referring the matter to the Attorney General or the Director of Public Prosecutions or both, as the case may be.

(2) The Ombudsman may, but without derogating from any of the provisions of subsection 1 (b) if he is of the opinion that any instance or matter inquired into or investigated by him under

section 5 can be rectified or remedied in any lawful manner, notify the organ of Government his findings and the manner in which the matter can be rectified or remedied.

11. They also referred to section 63 (4) of the Employment Act which provides that an award of compensation shall be such amount as the Court considers just and equitable in the circumstances having regard to the loss suffered by the employee in consequence of the dismissal in so far as the loss is attributable to the action taken by the employer and the extent, if any, to which the employee caused or contributed to the dismissal.

12. They then also referred to the minimum amounts of awards of compensation to be awarded on a finding of unfair dismissal as provided in section 63 (5) of the Employment Act which includes three weeks' pay for each year of service for an employee who has served for more than ten years but not more than fifteen years.

13. The claimant submitted on the nature and purpose of judicial review. It correctly submitted that traditionally, and for long, it has widely been held that judicial review is concerned with the manner in which a decision was made, but not with its merits. For instance, it was held In the Matter of the Constitution of the Republic of Malawi and in the Matter of the Removal of Mac William Lunguzi as Inspector General of Police and in the Matter of Judicial Review Misc. App. 55

of 1994, per Mkandawire J., that:

> Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power.

14.It correctly submitted that now, judicial review has to be based on sound constitutional principles.

15. This Court notes that perhaps one of the most prominent proponents of this 'modem view' about the nature and purpose of judicial review in Malawi is Prof Danwood Chirwa. In his article titled 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' Journal of African Law 55 (1) (2011) 105, he proposed that judicial review under the Constitution of the Republic of Malawi is different from, and is broader in scope than, the traditional common law one. For him, judicial review in Malawi falls into two categories: (i) judicial review concerning acts, decisions, and omissions of Government for their conformity with the Constitution of the Republic of Malawi; and (ii) judicial review

simpliciter (of an administrative action), which involves the review of administrative actions, decisions, and omissions on more grounds than those which are available in common law judicial review.

16. This kind of categorization of judicial review in Malawi has received judicial endorsement in several recent cases including: S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union (Judicial Review) (Misc. Civil Cause No. 1 of2015) [2015] MWHC 494 (27 July 2015) and S v Judicial Service Commission and Another (Judicial Review No. 22 of 2018) [2019] MWHC 34 (04 February 2019)

17. In the State v Council of the University of Malawi; Ex Parte: University of Malawi Workers Trade Union case, supra, the Court, with Justice Kapindu presiding, had this to say:

I should mention that I deliberately use the full term “judicial review of administrative action here” because in modem day Malawian constitutional law, which inextricably intersects with administrative law, there are two types of judicial review, viz: (a) judicial review of administrative action and (b) constitutional judicial review. The former is the review procedure by courts of conduct by public authorities or bodies that requires the procedure under Order 53 of the Rules of the Supreme Court, 1965 (or for those of another procedural school of thought, the procedure provided for

under Order 54 of the Civil Procedure Rules, 1998). The latter review process (Constitutional judicial review) is premised on Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(l)(a) and 199 of the Constitution, where the Courts review conduct by the Government or law for consistency with the Constitution. It need not be administrative action.

18.If any person harbored any doubt about this 'modem view' of judicial review in Malawi, Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is now conclusive on this point. It provides for constitutional judicial review on one part, and judicial review simpliciter on the other part. It expressly provides that judicial review shall cover the review of:

(a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or

(b) A decision, action, failure to act in relation to the exercise of a public function in order to determine:

(i) Its lawfulness;

(ii) Its procedural fairness;

(iii) Its justification of the reasons provided, if any; and

(iv) Bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

19. The claimant and the defendant agree, and correctly in this Court's view, that the defendant has authority to investigate any and all cases falling within her jurisdiction and this includes employment and labour related matters. And that the only limitation is that it does not appear that there is any reasonable remedy available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy. See The State v Ombudsman ex parte The Principal Secretary for Agriculture and the National Assembly MSCA Civil Appeal number 24 of 2017.

20. This Court also agrees with the parties' submission that the remedies to be given by the defendant depend on the circumstances of the case and are left to the discretion of the defendant in that regard. See The State v Ombudsman ex parte The Principal Secretary for Agriculture and the National Assembly.

21 .The claimant then submitted that the remedy of reinstatement of a dismissed employee or compensation to such dismissed employee is not one of the remedies available before the Ombudsman. See The Trustees of Malawi Against Physical Disabilities v The State and The Office of the Ombudsman [2000-2001] MLR 391.

22. The claimant also submitted that the award of compensation was excessive, unreasonable and without any basis in law as provided in the Employment Act.

23. The contention of the defendant was that she assumed jurisdiction in this matter and made the awards of compensation following the statutory and constitutional dictates alluded to by the parties herein. She therefore sought that the instant application be declined by this Court.

24. This Court observes that the defendant should have appreciated that the matter herein concerns unfair dismissal which is a matter for which a remedy is always readily available before the Courts. Before the advent of the Labour Relations Act and the Employment Act it was still open to the complainant to seek remedies in the High Court. This matter therefore fell outside the jurisdiction of the defendant as provided in section 123 of the Constitution.

25. The reason for this finding of the Court is that the Constitution created only one Court system to deal with legal disputes including labour disputes of such a nature as the complainant brought before the defendant herein. The complainant was allegedly unfairly dismissed at a time when the Constitution was operational and he would have come to court to seek remedies. He never went to any court to seek a remedy. His claim probably became statute barred. It was wrong in such circumstances, for the defendant to deprive ADMARC Limited, the employer herein, the right to the defence of limitation by allowing the complainant so many years later to come after the limitation period has run and lodge the claim herein under the guise that there is no remedy reasonably available before the courts. The complainant cannot be allowed to sit on his rights and allow the limitation period to run its course and then many years later come before the Ombudsman and claim that there is no remedy reasonably available before the courts and seek to invoke the jurisdiction of the defendant under section 123 of the Constitution. A reading of section 123 (1) of the Constitution does not allow that. If this scenario were allowed it means the spirit of the Constitution in creating the Courts and the Ombudsman as separate entities would be defeated.

26. This matter of exclusion of the defendant's jurisdiction where a court remedy is available was exhaustively considered in the case of The Trustees of Malawi Against Physical Disabilities v The State and The Office of the Ombudsman [2000-2001] MLR 391.

27. In the circumstances, this Court is of the view that the defendant did not properly assume and exercise her jurisdiction in this matter.

28. Even if it were granted that the jurisdiction was properly assumed, this Court finds that the remedies that the defendant granted were excessive and hence wednesbury unreasonable and without legal basis as submitted by the claimant.

29. Although it is not in doubt that the defendant's remedies are guided by the circumstances of the case, in the present matter, the Employment Act was law at the time of the defendant's determination and the Employment Act was the law that guided awards of compensation for unfair dismissal. It is not correct that that the defendant would in such circumstances disregard the Employment Act and proceed to award compensation as if the said Act was not operational but only have regard to the Constitution which was in operation at the time of the alleged unfair dismissal.

30. The Employment Act requires compensation awards to be just and equitable. The award of salaries computed at the current salary for the relevant grade does not seem to be just and equitable given that salaries varied over the years. Further, the award of five years' salary as compensation for unfair dismissal appears to be double compensation given that the complainant was already awarded lost salary for the whole period since his dismissal to the date of the defendant's impugned determination. The awards do not also factor in the

mitigation on the part of the complainant who would be expected to look for alternative work.

31. In the circumstances, this Court agrees that the awards made by the defendant were excessive, making them unreasonable in that if the defendant was properly guided the same would not have been made.

32. This Court therefore does not agree with the contention by the defendant that she exercised her jurisdiction herein in accordance with the constitutional and statutory dictates as alluded to by the parties herein.

33. Consequently, this Court quashes the decision of the defendant and grants the orders sought by the claimant on this application.

34.Costs are for the successful claimant and shall be assessed by the Registrar.

Made in open Court at Blantyre this 23rd June 2021