

REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CAUSE NUMBER 17 OF 2023

(Before Honourable Justice Muhome)

BETWEEN:

THE STATE (On Application of:

FORTUNATE CHANZA	**1ST CLAIMANT**
GEORGE BISSENT	**2ND CLAIMANT**
FRANK KALIATI	**3RD CLAIMANT**
JUDITH KOLOWIKO	**4TH CLAIMANT**
EMILY YESAYA	**5TH CLAIMANT**
MCLEAN LAZARO	**6TH CLAIMANT**
JAMES MBEWE	**7TH CLAIMANT**
PRECIOUS KAMOTO	**8TH CLAIMANT**
MARTHA CHIMBALANGA	**9TH CLAIMANT**
FAITH NGWIRA	**10TH CLAIMANT**
PRECIOUS MSISKA	**11TH CLAIMANT**

AND

REGISTRAR OF FINANCIAL INSTITUTIONS	**DEFENDANT**

CORAM: HON. JUSTICE ALLAN HANS MUHOME

Mr Welkam Phiri, of Counsel for the Claimants
Mr James Katunga, of Counsel for the Claimants
Mr Lawrence Sheriff, of Counsel for the Defendant
Mr Peter Masiye, of Counsel for the Defendant
Mr Dalitso Mataka, of Counsel for the Defendant
Ms Fareeda Chida, Official Interpreter

RULING

Background

1. This is an Application by the Claimants under Order 19 rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules 2017 (CPR). The Claimants are seeking permission to commence judicial review proceedings against the Defendants' decision to suspend them from the Board of Mphunzitsi Savings and Credit Cooperative Society (the Society), a cooperative society with limited liability which is duly registered under the provisions of the Cooperative Societies Act.[1]

2. At the material time, the Claimants were Board members of the Society. In August 2022, the Defendants conducted an onsite examination of the Society in accordance with their statutory powers. The report highlighted a number of issues which the Claimants as a Board needed to address. Key among the issues, was that the Board should take a robust corrective action to address the regulatory, prudential and operational issues that had been raised in the said report.

3. The Board engaged the services of the Malawi Union of Savings and Credit Cooperatives (MUSCCO) to carry out the internal audit. MUSCCO issued a report highlighting, among other issues, that the Board and Management had received honoraria and bonuses amounting to K27 million and K8.5 million, respectively, without a written policy. On 19th December 2022, the Defendants requested the Claimants to provide grounds on which the

[1] Cap 47:02 of the Laws of Malawi.

honoraria were paid and whether it was approved during the Annual General Meeting that took place in May 2022. This was followed by a meeting on 23rd December, 2022. At that meeting, the Claimants were requested to pay back the honoraria and inform the Annual General Meeting of the reversed transaction. The Claimants were also cautioned that their conduct constituted a breach of the Financial Services (Corporate Governance Requirements for SACCOs) Directive, 2016, among other breaches.

4. Another meeting was held on 7th February 2023, culminating into a letter, bearing the same date, wherein the Defendants gave the Board some deadlines; among others, requiring:

    a) that the Board must pay back the honoraria and bonuses amounting to K27 million and K8.5 million, respectively, by the date of the next Annual General Meeting scheduled for May 2023; and

    b) that the Board must disclose the aborted payment of honoraria and bonuses at the next Annual General Meeting in order to facilitate a comprehensive deliberation on draft policy on Board and Management remuneration which the Board was developing.

5. On 10th February 2023, the Defendants held a meeting with the Claimants where the Defendants demanded immediate commencement of the repayment of the honoraria.

6. By 28th February 2023, two Board members, namely Fortunate Chanza (1st Claimant) and Martha Chimbalanga (9th Claimant) had each paid back K1 million as partial repayment of the honoraria that they had received.

7. On 1st March 2023, the Board wrote the Defendants updating them on the corrective steps taken thus far and seeking a reprieve not to repay the honoraria. On 6th March 2023 the Defendants wrote a letter inviting the Claimants to a meeting scheduled for 7th March 2023 where the Defendants would communicate the enforcement action that they had taken following the findings of the onsite examination as well as the findings of MUSCCO internal audit report.

8. On the 7th March 2023, at the said meeting, the Defendants through a letter of even date, informed the Claimants that they had taken a decision to suspend all of the Claimants for

failure to comply with their directions, pending further investigations, as follows (among others):

a) the Board was not making an effort to comply with the Defendant's direction to repay the honoraria.

b) the Board conducted frequent meetings where it was drawing huge allowances when the financial condition of the Society was uncertain and that this was in breach of section 35(a) of the Financial Cooperative Act as read together with paragraph 7(3) of the Financial Services (Corporate Governance Requirements for Savings and Credit Cooperative Societies) Directive, 2016.

c) Management had violated section 22(1) of the Financial Cooperative Act by paying meal allowance to staff who worked during normal working hours and over the weekends.

d) the Board had violated section 25 of the Financial Cooperative Act when MUSCCO internal audit report had established that there were glaring lapses in the internal control systems of the Society.

e) the Claimants would be at liberty to make representations to the Defendants within 21 days from the date of the said letter.

f) the Defendants would proceed to appoint an interim board to manage the affairs of the Society pending the removal of the claimants from the Board.

g) the Claimants were ordered to provide a written undertaking regarding the repayment of honoraria amounting to K27 million within 21 days from 7th March 2023.

9. According to the Defendants' Sworn Statement, the enforcement action was taken based on the fact that the Claimants did not want to implement some of the directions that the Defendants had ordered them to do, including a failure to pay back the honoraria.

10. On 17th March 2023, in compliance with the requirement under paragraph 8(e) above, the Claimants made representations to the Defendants, essentially detailing the corrective

steps taken thus far and pleading with the Defendants to reverse their decision to suspend the Board. The Defendants did not revert.

11. The Claimants therefore feel that the delay by the Defendants in resolving the issues herein would prejudice them in their bid to participate in the forthcoming elections for Board membership at the Annual General Meeting slated for May 2023. This is further so, because by the earlier communication, the Defendants had raised legitimate expectations that the Claimants would continue to serve as Board members while the matters were being addressed.

12. If permission is granted, the Claimants will seek several declarations: that the decision to suspend them is illegal, irrational, *utra vires* the relevant provisions of the Financial Cooperative Act, unconstitutional and unreasonable in the *Wednesbury sense*; an interlocutory injunction lifting their suspension; an order prohibiting the Defendants from proceeding with the appointment of a new Board; an order prohibiting the Defendants from requiring the Claimants to provide him with a written undertaking regarding the repayment of honoraria amounting to K27 million.

13. On the other hand, the Defendants oppose this Application, since their decision to suspend the Claimants is not final as it is conditional on the outcomes of further investigations. They depone that the application is premature and that the Claimants non-disclosure of the honoraria to the General Meetings of 2021 and 2022, was propelled by malice.

Arguments from the Claimants

14. During the hearing of this Application, Counsel for the Claimants adopted the Sworn Statement of the 1st Claimant and skeleton arguments. He highlighted two issues. Firstly, that the Claimants had standing being current Board members of the Society and that the impugned decision directly affects them and their legitimate expectations.

15. Secondly, Counsel submitted, at length, on whether the Claimants have an alternative remedy. He stated that the Financial Services Act[1] establishes the Financial Services Appeals Committee (the Appeals Committee) with the function of 'reviewing decisions made by the Registrar in accordance with financial services laws.' It is trite that the remedy

[1] Cap 44:05 of the Laws of Malawi. Part X – See section 78(2)(a).

of judicial review is not available in cases where other remedies exist and have not been exhausted.

16. However, he submitted that this is a general rule and it is subject to exceptions. One such exception is where a public authority's decision is attacked for being a nullity. On the facts of this case, the availability of an appeals procedure does not preclude judicial review – he relied on ***The Registrar of the Financial Institutions ex parte Prime Insurance Company Ltd and Goss Katoki Mwalilino***[1] and ***The State and the Deputy Governor of the Reserve Bank of Malawi ex parte NBS Bank Limited***.[2]

17. He submitted further that the Appeals Committee's power is limited to determinations of the merits or demerits of decisions of the Registrar of Financial Institutions under the financial services laws and not where, like here, a decision is being attacked for being null and void. The decision by the Defendants to suspend the Board was illegal and in excess of the Defendant's jurisdiction for among other grounds – reliance on the MUSCCO audit report thereby the Defendants abdicating from their statutory duties; holding the Board accountable for Management's decisions; suspending the Claimants without according them the right to be heard, having previously created a legitimate expectation that they would continue as Board members and implementing the enforcement action before the Claimants could disclose the honoraria at the forthcoming Annual General Meeting. He, therefore, concluded that the Claimants are not precluded from seeking permission from seeking permission to commence judicial review proceedings.

Arguments from the Defendants

18. Counsel for the Defendants also adopted their skeleton arguments and Sworn Statement by one Mtchaisi Chintengo, the Defendants Chief Examiner. Counsel submitted as follows:

    a) That the Claimants do not have an arguable case. The test for the grant of permission to apply for judicial review is that the Claimants must show that there is an arguable case for further investigation at a full hearing. There is no need for the Court to go into the matter in depth. If the Court is not satisfied that there is an arguable case then

[1] Judicial Review Case Number 44 of 2016 (HC).
[2] Judicial Review Case Number 91 of 2016.

permission should be denied. See ***The state (On the application of Dr. Justice Michael Mtambo) v Judicial Service Commission and The President of the Republic of Malawi***.[1] In addition, Courts have denied permission for leave to apply for Judicial Review against the Registrar of Financial Institutions in cases where the Defendants have exercised a lawful function, reasons were duly communicated as to why certain decisions were taken and the interested parties were duly and promptly informed by the Registrar, as is the present case. He relied on ***Finsbury Investments Limited v Registrar of Financial Institutions.***[2]

b) That the Claimants have an alternative remedy. Counsel submitted that the Claimants ought to have appealed the Defendant's decision to the Appeals Committee which has the function of 'reviewing decisions made by the Registrar in accordance with financial services laws.' He asserted that where there is no any valid legal basis for the Claimant to question the procedural fairness and legal validity of the Registrar's decision, the remedy does not lie in judicial review but an appeal to the Appeals Committee. See page 10 of ***Finsbury Investments Limited v Registrar of Financial Institutions*** (above) and page 16 of ***The State and The Deputy Governor of the Reserve Bank of Malawi, Ex Parte NBS Bank Limited.***[3]

Reply

19. In reply, Counsel for the Claimants reiterated their position and added that the Claimants were not heard as the Defendants had called a meeting on 6th for the 7th of March 2023 and handed their decision to suspend the Board pending investigations. That there is no evidence that the investigations are underway and so the Claimants should be allowed permission to commence judicial review proceedings.

Issue for the Court's Determination

20. As correctly submitted by both parties, the issue for determination before this Court is whether leave for Judicial Review should be granted, in the circumstances.

[1] Judicial Review Case Number 25 of 2022.
[2] Judicial Review Case Number 1 of 2023.
[3] Judicial Review Cause Number 91 of 2016.

Analysis and Application of the Law to the Facts

21. This Court is aware that the purpose of a permission application, like the instant one, is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. See ***State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi;***[1] ***Ombudsman v Malawi Broadcasting Corporation***[2] and ***Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited***.[3]

22. This Court is further aware that there have been developed very well-known key legal principles in a judicial review, as submitted by Counsel. The same were aptly summarised by Tembo J. in the case of ***The State and The Deputy Governor of the Reserve Bank of Malawi, Ex Parte NBS Bank Limited***[4] as follows:

    a) The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.

    b) The court in judicial review proceedings does not act as a court of appeal. If the court were to attempt itself the task entrusted to that authority by law, the court would, under the guise of preventing abuse of power, be guilty itself of usurping power. Judicial review looks at the procedure in the decision-making process of the public body.

    c) The remedy of judicial review is not available in cases where other remedies exist and have not been used, such as an appeal to the superior court or the statutory appellate tribunal or recourse to another forum.

[1] Miscellaneous Civil Cause Number 127 of 2005 (High Court) (unreported).
[2] [1999] MLR 329.
[3] [1981] 2 All ER 93.
[4] Judicial Review Cause Number 91 of 2016 at page 16. Ssee also ***State -v- Malawi Energy Regulatory Authority ex parte Malawi Housing Corporation*** Judicial Review Cause No. 37 of 2013 (High Court) (Unreported), pages 8 and 12.

23. This Court agrees with Counsel for the Claimants that the Claimants have sufficient interest to apply for leave; they are current Board members of the Society and that the impugned decision directly affects them.

24. It is trite that the remedy of judicial review is not available in cases where other remedies exist and have not been exhausted. It has been correctly submitted by both counsel that the Financial Services Appeals Committee established under the Financial Services Act, has the function of 'reviewing decisions made by the Registrar in accordance with financial services laws.'

25. Counsel for the Claimants has sought to justify why the Claimants have resorted to judicial review rather than the Appeals Committee. He submitted that there are exceptions to the general rule. One such exception is where a public authority's decision is attacked for being a nullity. He relied on ***The Registrar of the Financial Institutions ex parte Prime Insurance Company Ltd and Goss Katoki Mwalilino***[1] and ***The State and the Deputy Governor of the Reserve Bank of Malawi ex parte NBS Bank Limited***.[2]

26. This Court has reviewed the evidence before it and the court decisions above. We disagree with the Claimants that the Defendants decision is a nullity, for reasons appearing below.

27. The Defendants are vested with statutory authority to supervise financial institutions. In doing so, the Defendants are called upon to act fairly. In the present case, the Defendants cannot be said to have acted unfairly. The facts are clear that in August 2022, the Defendants conducted an onsite examination of the Society in accordance with their statutory powers. The report highlighted a number of issues which the Claimants as a Board needed to address. Further, the findings of the subsequent MUSCCO audit report are not disputed by the Claimants and the Defendants are not precluded by any law from relying on external audits, to supplement their own findings. It is admitted by the Claimants that the Board and Management had received honoraria and bonuses amounting to K27 million and K8.5 million, respectively, without a written policy in breach of relevant laws.

[1] Judicial Review Case Number 44 of 2016 (HC).
[2] Judicial Review Case Number 91 of 2016.

28. The Claimants argued that the Defendants are holding the Board accountable for Management's decisions. We disagree with this argument as under the Financial Cooperative Act, the Board and Management have been vested with respective responsibilities, breach of which was clearly communicated by the Defendants to the Claimants (see paragraph 8 above).

29. A number of meetings have been held aimed at settling the matter, thereby according the Claimants the right to be heard. The Defendants, acting within their powers, demanded that the Claimants pay back the honoraria and disclose the same at the Annual General Meeting. As deponed by the Defendants' Sworn Statement, the enforcement action was taken by the Defendants since the Claimants did not want to implement some of the directions that the Defendants ordered them to do. For instance, at the date of the hearing of this matter, only K2 million has been paid back. The Claimants have boldly requested the Defendants that they should not pay back the honoraria, received in breach of the law. The view of this Court is that, in the circumstances, the Claimants do not have an arguable case fit for judicial review. See ***The state (On the application of Dr. Justice Michael Mtambo) v Judicial Service Commission and The President of the Republic of Malawi***.[1] The Claimants are inviting this Court to perpetrate their non-compliance through judicial review proceedings, which is against the interests of justice.

30. The Claimants also faulted the Defendants for implementing the enforcement action before the Claimants could disclose the honoraria at the forthcoming Annual General Meeting, slated for May 2023. We do not see anything wrong with the Defendants decision in that regard. We find it reasonable for the regulator to apply more stringent directives in the event that the regulated are not compliant, as is the case herein.

31. Further, this Court finds that the enforcement action taken by the Defendants is justifiable in all the circumstances. As a matter of fact, the suspension of the Board is subject to further investigations. We therefore agree with the Defendants that the Claimants case is premature. After all, their complain should have been directed to the Appeals Committee, which is a statutory body mandated to handle such appeals. It is important that the judicial review process should not be clogged with unnecessary cases, that is, cases which are

[1] Judicial Review Case Number 25 of 2022.

perfectly capable of being dealt with by other tribunals. See ***State v Malawi Energy Regulatory Authority ex parte Malawi Housing Corporation.*** [1]

32. We see no valid legal basis for the Claimants to question the procedural fairness and legal validity of the Defendants' decision and their remedy does not lie in judicial review but an appeal to the Appeals Committee. See page 10 of ***Finsbury Investments Limited v Registrar of Financial Institutions*** (above) and page 16 of ***The State and The Deputy Governor of the Reserve Bank of Malawi, Ex Parte NBS Bank Limited.***[2]

33. This Court further opines that the Defendants did not undertake that the Claimants will continue in their positions as Board members. To assume so would be absurd as the Defendants have supervisory powers to regulate such positions from time to time. Their communication did not therefore raise any legitimate expectations, in that regard.

34. All in all, this Court holds that the Defendants have exercised a lawful function, reasons were duly communicated as to why certain decisions were taken and the Claimants were duly informed. See ***Finsbury Investments Ltd v Registrar of Financial Institutions.***[3]

35. In the foregoing premises, this Court is compelled to decline the Claimants' application for permission to apply for judicial review for being unfit for further consideration at a full hearing for judicial review, as envisaged in the case of ***Ombudsman v Malawi Broadcasting Corporation*** (above) and that the Claimants have an alternative remedy – See ***Finsbury Investments Limited v Registrar of Financial Institutions*** (above).

36. The Claimants shall bear the costs of this Application.

Made in Chambers this 29th May, 2023.



Allan Hans Muhome

JUDGE

[1] Judicial Review Cause No. 37 of 2013 (High Court) (Unreported) pages 8 and 12.
[2] Judicial Review Cause Number 91 of 2016.
[3] Judicial Review Case Number 1 of 2023.