

# **S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union**

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice R.E. Kapindu, PhD
<b>Cause Number:</b>	(Misc. Civil Cause No.1 of 2015) [2015] MWHC 494
<b>Date of Judgment:</b>	July 27, 2015
<b>Bar:</b>	E. Banda, Counsel for the Applicant T. Roka, Counsel for the Respondent

## **Head Notes**

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**Constitutional Law** - Right to be Heard - Procedural Fairness - Section 43 of the Constitution - Natural justice demands right to be heard before any disciplinary condemnation or punishment

**Administrative Law** - Judicial Review - Powers of Public Body - Ultra Vires - Public authority lacked power to unilaterally declare employee strike illegal

**Administrative Law** - Separation of Powers - Usurpation of Judicial Function - Employer usurped statutory jurisdiction of Industrial Relations Court or High Court

**Administrative Law** - Strike Action - Withholding Wages - Administrative Justice - Decision to deduct wages was unreasonable and illegal when strike status determination was invalid

**Employment Law** - Industrial Disputes – Reporting Disputes – Principal Secretary for Labour must receive a report to initiate conciliation process

**Administrative Law** - Judicial Review - Mandamus - Respondent ordered to immediately reimburse all deducted and withheld employee salaries

## Summary

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The Applicant sought judicial review in the High Court, Zomba Registry, challenging the Respondent's administrative actions stemming from a labour dispute. The dispute arose in late 2014 after the Applicant, the University of Malawi Workers' Trade Union, rejected a salary increment offer from the Respondent, the Council of the University of Malawi. Following the issuance of a 21-day notice that went unresolved, the Applicant commenced a sit-in (strike) on 4 December 2014. While the industrial action was underway, the Respondent issued a series of memoranda declaring the strike illegal, relying on legal opinion that the requisite procedures under the *Labour Relations Act* had not been followed. Consequentially, the Respondent threatened disciplinary action and informed the employees that they would not be paid for the days they were absent from work. The Principal Secretary for Labour later confirmed that he had not received the requisite report of the dispute, declaring the sit-in illegal and advising the Applicant that they risked being disciplined by the employer. The Applicant sought judicial review, contending that the Respondent's decision to declare the strike illegal and to withhold pay was *ultra vires*, unreasonable, and amounted to a usurpation of the functions of the Industrial Relations Court (IRC).

The application was allowed. The Court held that the Respondent, being a public authority and a party to the labour dispute, possessed no legal competence to unilaterally determine the legality of the strike, noting that this function is reserved

exclusively for the Industrial Relations Court or the High Court. The Court found that the Respondent's action constituted a clear usurpation of a judicial function. Furthermore, the consequential decisions to treat the employees as absent from work and to deduct their salaries were declared incompetent and invalid, as they were fundamentally premised upon the prior *ultra vires* declaration of the strike's illegality. The Court ordered the Respondent immediately to pay all affected employees the full amount of salaries that had been deducted and withheld. Costs were awarded to the Applicant.

## **Legislation Construed**

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Constitution of the Republic of Malawi (s 43)

Statutes

Employment Act (Cap 55:02)

Labour Relations Act (Cap. 54:01) (s 47, s 52)

Judicature Administration Act (Cap. 3:10)

Subsidiary legislation

Rules of the Supreme Court (Form 86A)

## Judgment

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### 1. INTRODUCTION

1.1. This is the Court's decision on an application for judicial review brought by the Applicant, the University of Malawi Workers' Trade Union (UMWTU). Counsel Edwin Banda appeared for and argued the case on behalf of the Applicants. The motion is supported by an Affidavit in Support, and Affidavit in Response to the Respondent's Affidavit in Opposition, and the Applicant's Skeletal Arguments.

1.2. The application is opposed by the Respondent, the Council of the University of Malawi, who is represented by Mr. Ted Roka of Kalekeni Kaphale Lawyers.

1.3. According to the Applicants' Notice of Application for Leave to Apply for Judicial Review, in the Form of Form 86A under the RSC, the Applicants seek to challenge the following decisions of the Respondent:

(a) The decision to withhold the pay of the members of the Applicant who were on strike;

(b) The decision to refuse the Applicant the right to appeal or the act or omission on the part of the respondent that resulted in failure to hold the appeal hearing;

(c) The decision of the respondent that members of UWTU were on an illegal strike;

(d) The finding by the respondent that the strike was illegal;

(e) The finding of the respondent that the employees on strike were absent from work; and

(f) The finding that the employees on strike were not entitled to pay or that the respondent was entitled to deduct and withhold their pay.

1.4. The Applicants invite this Court to decide that:

(a) The decision by the Respondent to declare the strike as illegal was clearly ultra vires in that the Respondent had no power to make the decision under the law;

(b) The Respondent usurped the function and power of the Industrial Relations Court (IRC) and acted as a court, being also the prosecutor and judge at the same time;

(c) The finding that the employees on strike were absent from work or that they did not do work is absurd, the legal absurdity of which is embarrassing and defeats the

enjoyment of freedom to strike and actually takes away the right to strike.

(d) The Respondent's resolution that salaries should be deducted and withheld and to continue withholding salaries in that manner is unreasonable and is such that no reasonable public authority acting reasonably would arrive at that decision.

(e) The withholding of pay in the circumstances is illegal.

1.5. The Applicants stated that the evidence would show that towards the end of 2014, there was a labour dispute between the Applicant's members and the Respondent relating to the increment of salaries. The Applicants wanted a pay rise and the Respondent offered an increment of 14% which the Applicants declined. The Applicants instead proposed 45%. The Applicants state that these facts are evident from both of their affidavits in support of the application and the Respondent's affidavit in opposition.

1.6. The Applicants state that what followed was that Notices were issued by the Applicants to the Respondents. First according to the Applicants, was a letter of 20 October 2014 which was served on the Respondent on the same day. The same is marked as exhibit "FK1". According to the Applicants, this provided a 21 day notice within which to resolve the matter failure which it threatened disruption of services.

1.7. According to the Applicants, there was also another Notice from the Applicants to the Principal Seretary for Labour dated 20 October 2014, but delivered on 21 October 2014. It is marked "FK9". The proof of service on the PS is marked "FK10". According

to the applicants, "FK9" was received by a Mr. Magombo on behalf of the PS for Labour. Mr. Magombo duly signed in acknowledgment of receipt of the letter. The Applicants argue that "FK9" clearly showed that there was a labour dispute regarding the 14% salary adjustment offered by the Respondent. The Applicants argue that there was no action on the Notice and the dispute remained unresolved on the expiry of the 21 days' notice.

1.8. The Applicants state that on 25 November 2014, they issued a threat of a sit in, or a strike as it were. They state that this came with a 7 days' notice which notice was to expire, at the latest, by 3rd December 2014. The Applicants indicate that the strike started On 4 December 2014.

1.9. It is the Applicants' case that whilst the strike was ongoing, the Respondent issued threats of disciplinary measures to be taken by the Respondent against the applicants. According to the Applicants, the Respondents said that they were to do so because the strike was illegal. They said that they had come to that position in a University of Malawi leadership meeting that took place on 12 December 2014. The Applicants argue that the Respondents further stated that they had come to that position after considering the opinion from their legal Counsel. Exhibit "BOM 5" of the Respondent in this matter was referred to as evidencing that point. The relevant part of "BOM 5" read:

RE: ACTION ON ILLEGAL STRIKE

On behalf of the University of Malawi leadership which met today at University office, I write to inform you that after considering the legal opinion of its Legal Counsel, it has asked me to inform you that your union members should return to work with immediate effect, because the strike is illegal. The basis for the illegality of this action is that you have not followed normal legal procedures for going on strike as stipulated in the Labour Relations Act. If you and your members do not return to work, Management will take the appropriate disciplinary measures in accordance with the prevailing Terms and Conditions of Service.

(signed)

B.W. Malunga

UNIVERSITY REGISTRAR

1.10. The Applicants state that on 16 December 2014, the Respondent reiterated the threats. They again called the strike an illegal strike. The Applicants cite exhibit "BOM6" (exhibited to the affidavit of Benedicto Wokomaatani Malunga) or for the Applicants "FK3" (exhibited to the Affidavit of Franklin Kapeni), which they submit did not mince any words. In its relevant parts, the said Memorandum stated:

RE: ILLEGAL STRIKE

I write to inform you that after considering the legal opinion of the University Legal Counsel, I write to request you that you should return to work by Thursday, 18th December 2014...If you choose not to return to work by the said date, Management will take appropriate disciplinary measures in accordance with the prevailing Terms and Conditions of Service. You are also being informed that you will not be paid for the days that you have been absent.

(signed)

N. Kaphuka (Mrs.)

For/UNIVERSITY REGISTRAR

1.11. The Applicants submit that it is very clear that the said decision (in Exhibit "BOM 6" was made without the involvement of the Principal Secretary for Labour. They therefore argue that it is lame for the Respondents to argue that the decision to declare the strike illegal was not their decision, as they suggest in their papers.

1.12. Applicants state that it is this decision to declare the strike illegal, and further the decision to declare them as absent from work, and in addition the decision to, therefore, deduct their pay, that they find adverse and are complaining against.

1.13. The Applicants state that the correspondence from the PS for Labour, letter marked as exhibit "FK2", was dated 18 December 2014. The Applicants state that even that latter stated that "the employer may take disciplinary action against you", suggesting that the decision to deduct pay was clearly the Respondent's and no one else's.

1.14. The Applicants state that "FK2" is also significant as it likewise declared the sit in (or strike) illegal. A relevant part of "FK2" in this regard reads:

I never received a report of the dispute between you (University Workers Trade Union) and your employer, namely the University Council, which would have enabled me to appoint a conciliator. In view of this, the sit in is illegal. I therefore urge you and your members to call off the sit in and follow the set procedure, otherwise you risk being disciplined by your employer. I trust you will take my advice very seriously and that in future you will follow set procedure according to law.

1.15. The applicants submit that good governance and administrative law, particularly based on section 43 of the Constitution and the principles of natural justice and the rule of law, emphasise the right to be heard before condemnation, punishment and disciplinary action of any sort. They submit that the right to be heard includes the right to receive notice of the charge(s), the evidence against the charged person being brought to his or her attention, and the opportunity to contradict the same.

1.16. The Applicants have submitted that the Respondent's decisions were made ultra vires. They argue that the University Registrar who is just a keeper of records under University statutes had no power to do so. They contend that even the University Council itself could not be competent to make such a decision. They further argue that Council could not even ratify such a decision. The Applicants submit that the only institution with the power to declare a strike illegal is the Industrial Relations Court.

1.17. The Applicants therefore pray that this Court should grant the reliefs that they seek.

1.18. The Respondent was represented by Counsel Ted Roka of Kalekeni Kaphale lawyers. I must also mention here that both Counsel for the Applicants and Counsel for the Respondent argued the case with candour and ability. I am greatly appreciative of their research and industry.

1.19. Counsel Roka began by stating that what his learned colleague, Mr. Banda, had taken the Court through was pretty much a correct restatement of the facts.

1.20. Counsel Roka began by focusing on the question of the legality of the strike. He submitted that the law is clear that an employee or union cannot engage in a lawful strike without the involvement of the Secretary for Labour.