

4. An order of prohibition issue barring the respondent and its servants or agents or any other person acting on their behalf from advertising or filing any positions in the respondent pursuant to the impugned organogram.
5. A declaration that the actions and approvals of the subcommittee of Council selected by the Council Chairperson on Monday 24th August 2020 are ultra-vires, null and void.
6. A declaration that the Subcommittee of Council as selected by the Chairperson of Council did not have powers to approve the organogram of the National Council for Higher Education on behalf of Council and its actions are contrary to Sections 20 and 21 of the University and Other Tertiary Institutions Act 2001 (as amended in 2003) and (as amended in 2006).
7. A declaration that all decisions based on the impugned organogram of the National Council for Higher Education as approved on the 24th day of August 2020 are contrary to the University and Other Tertiary Institutions Act 2001 (as amended in 2003) and (as amended in 2006).
8. An order of mandamus directing and compelling the respondent to follow the lawful procedure when making any changes within its organizational structure.
9. An injunction do issue restraining the Respondent and its servants or agents or any other person from implementing the impugned organogram as approved by the subcommittee selected by the Council on the 24th day of August 2020.

The application was supported by the sworn affidavit of the applicant.

The respondent filed an affidavit in reply deposed by its Executive Director **Professor Mary J.N. Okwakol** contesting the applicant's assertions stating that the respondent followed due process and complied with the provisions of the University and Other Tertiary Institutions Act (as amended) (herein after referred to as UOTIA).

The applicant was represented by Rashid Ssemambo while the respondent was represented by Ali Kankaka

The parties filed final written submissions that were considered by this court.

The preliminary issue for this court to determine is whether the application is amenable to judicial review.

The respondent in this case is a public body vested with the exercise and performance of a statutory functions therefore within the scope of scrutiny by court under judicial review.

However, the respondent submitted that the application had been filed outside the statutory time as provided for under Section 129 of UOTIA. It provides that any person or institution aggrieved by an act or decision of the National Council under this Act may appeal to the High Court within 30 days from the date of the decision or act.

Counsel submitted that the use of the word "Appeal" in the section is simply a matter of drafting style and must be interpreted to mean Judicial Review. The Act does not provide any specific procedure of preferring an appeal under the statute and it is legally impossible to see how an appeal as technically used in the ordinary legal meaning can be preferred against a decision or an act of National Council under **Section 129 of the UOTIA**.

Counsel submitted that the spirit and legislative intent of Section 129 of the UOTIA is to ensure expeditious lodging of complaints and challenges against the Respondent's actions/decisions and therefore the word "Appeal" as used in the **Section 129** of the UOTIA interpreted in the context of the entire Act with fidelity to the apparent legislative intent should be construed to mean the same as Judicial Review.

Counsel submitted that the applicant had to file his application within 30 days from the 24th day of August 2020 which he did not. Counsel submitted that the applicant's reliance on Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009 that the application was brought within 3 months from the 24th day of August when the grounds in the application first arose cannot suppress a clear provision of an Act of Parliament and must be rejected.

Counsel for the applicant in their rejoinder submissions submitted that Section 129 cited by the respondent's counsel concerns itself with a grievance emanating from a decision arising from the National Council acting under its mandate as provided for under Section 5 and 6 of the Act whereas where the National Council is acting generally as a body corporate the Constitution and administrative laws take effect and that the

process upon which an administrative decision has been arrived at is challenged, the same apply.

Counsel concluded that the respondent's submission of Section 129 defeats the true intent of the legislature since it conflates the legal remedy of judicial review and an appeal and also attempts to put the respondent above the scrutiny of judicial review which is a constitutional right that cannot be derogated from.

In the alternative counsel for the respondent submitted that the application should be dismissed since there is no evidence that the applicant exhausted the existing remedies available within the law.

ANALYSIS

The applicant in this case seeks to challenge the decision making process of the respondent which resulted into the adoption of the Organogram on 24th day of August, 2020. The applicant stated that the decision was reached in contravention of the provisions of the University and Other Tertiary Institutions Act (as amended) (herein after referred to as UOTIA).

The respondent opposed the application contending that due process was followed as per the provisions of the University and Other Tertiary Institutions Act (as amended) (herein after referred to as UOTIA).

Counsel for the sought that the application be dismissed as it was filed out of the time provided for under Section 129 UOTIA and in the alternative without prejudice the application be dismissed since there is no evidence that the applicant exhausted the existing remedies available within the law.

First and foremost the principal is that judicial review involves the exercise of the Court's inherent supervisory jurisdiction in respect of activities of public authorities in the field of public law. It is concerned not with the decision made by an administrative body but by the decision-making process.

In National Drug Authority & Another v Nakachwa Florence Obiocha Civil Appeal No. 281 & 286 of 2017, the Court of Appeal held that:

"Judicial review is not concerned with determining the merits of the decision the Applicant is aggrieved about, but the decision-making process itself. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he or she

has been subjected. It is a legal process of subjecting to judicial control, the exercise of powers affecting people's rights and obligations enforceable at law by those in public office."

The learned authors Ssekaana Musa and Salima Namusobya Ssekaana in the book **Civil Procedure and Practice in Uganda at page 287 1st Edition**, list the instances under which the court will review an exercise of power to include, where a public body has made an error of law and fact, has not considered all relevant factors and taken into account any irrelevant factors or abused its discretion, acted for a purpose not expressly or impliedly authorised by statute, has acted in a way that is so unreasonable that no reasonable public body would act in that way and; the public body has not observed procedural requirements and the common law principles of natural justice or procedural fairness and legitimate expectation has improperly delegated its power.

The applicant contended that the respondent improperly delegated its power when the respondent's chairperson unilaterally appointed a subcommittee to finalise and approve the organogram whereas the respondent cannot delegate such powers of approving policies to any subcommittee under the law. The applicant contended that the above actions were ultra vires, illegal and procedurally improper.

The applicant also contended that the respondent never informed its staff members about the process of restructuring/impugned organogram when the process directly affects therefore defeating the rules of natural justice.

The applicant stated that the differing qualifications set for different positions created by the impugned organogram are meant to benefit some individuals as against others which is unfair, irrational and illegal.

The contentions raised by the applicant satisfy the court that this is a proper case for judicial review.

The respondent's submissions and reliance on **Section 129 of the UOTIA** is misconceived in this case. I concur with the counsel for the applicant concerns itself with a grievance emanating from a decision arising from the National Council acting under its mandate as provided for under Section 5 and 6 of the Act whereas where the National Council is acting generally as a body corporate the Constitution and administrative laws take effect and that the process upon which an administrative decision has been arrived at is challenged, the same apply.

The respondent also raised an issue of *locus standi* challenging the applicant's basis of instituting judicial review proceedings as a former employee. The applicant is a former employee and served the respondent for 10 years.

The essential purpose of judicial review or public law review is not much the enforcement of rights as the control of administrative action. Therefore whosoever challenges an administrative action which is patently bad, the courts ought not to raise an objection in reviewing such action on the technical grounds of *locus standi*. The court should also adopt liberal trends towards strict *locus standi* in order to shut out professional litigants and meddlesome busy bodies who invoke the jurisdiction in matters that do not concern them who must be discouraged.

The applicant worked for the organization for a period of 10 years and in courts view this is sufficient interest to question legality of actions taken by the organization. It should not matter that the applicant is no longer an employee. He has some concern deeper than that of a busybody (professional litigant). The applicant was acting bonafide for the purpose of redressing the wrongful exercise of power vested under the Universities and Other tertiary Institutions Act. The liberalisation of the rule of *locus standi* enables the court to effectively police the corridors of power and prevent violations of law.

I shall now proceed to determine if the grounds of this application warrant the grant of judicial review.

Mubiru J held in **Dr. Kitara David Lagoro vs Gulu University Misc. cause No. 10 of 2017**; "...the judicial attitude when reviewing an exercise of discretion must be one of restraint, only intervening when the decision is shown to have been illegal, unfair or irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order, would only be justified if there is a charge of bad faith or abuse or misuse by the authority of its power. The challenge ought to be over the decision making process and not the decision itself. The jurisdiction to decide the substantive issues is that of the authority and the Court does not sit as a Court of Appeal, since it has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made..."

Judicial review can be granted on three grounds, namely; ***Illegality; irrationality and procedural impropriety*** – *Council of Civil Service Unions vs Minister for the Civil Service [1985] 1 A.C 374*

In this case the illegality pertains to the respondent's appointment of the subcommittee to finalise and approve the new organogram. The applicant stated in his affidavit paragraphs 8 and 9 that the unilateral appointment of the subcommittee by the chairperson to finalise and approve the new organogram contravened the law, were ultra vires and illegal.

*First issue; Whether any of the decisions complained of is bad for illegality. [35] A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). See **Dr. Kitara David Lagoro vs Gulu University Misc. cause No. 10 of 2017***

Counsel for the applicant submitted that the National Council has powers under **Section 20 UOTIA** to appoint such committees composed of its members as it may consider necessary for a specific purpose and period which powers are expressly granted to the National Council and does not delegate such powers of appointment to any other person.

Counsel further submitted that the National Council as per **Section 7 of the UOTIA**, is not just the chairperson or any other member but rather the whole composition and thus any statutory duty expressly enjoined to be performed by the National Council must be performed by the National Council and not an individual delegate.

It was counsel's submission that the subcommittee appointed by the chairperson to finalise and approve the organogram was illegally constituted since the chairperson of Council has no such mandate to solely appoint committees of council and the National Council cannot delegate such powers of appointment to it by an Act of Parliament to any other person.

On the other hand counsel for the respondent submitted that **Section 6 (i) of UOTIA** is very explicit and clear on the respondent's legal basis to delegate its powers and functions; the respondent is only barred from delegating its power to approve estimates or any power required by the Act to be exercised by resolution.

That the establishment of the respondent's sub-committee to consider and approve the organogram on behalf of the respondent was properly and legally done. Counsel

submitted that the respondent's minutes of its 55th Sitting under Minute 351/55/2020 (4) on pages 25 to 27 proved that the respondent properly considered and delegated its power to the sub-committee to be constituted by the Chairman of the respondent.

In rejoinder counsel submitted that the whereas the National Council may delegate some of its functions as per **section 6(i) of the Act**, the appointment of a subcommittee of council is not a function per se but is the composition of council itself which cannot be delegated hence the delegation was illegal, irrational and flouted with procedural impropriety.

The National Council derives its powers from the University and Other Tertiary Institutions Act.

According to **section 7 UOTIA** the National Council consists of; (a) a Chairperson of the National Council; (b) a Vice Chairperson of the National Council; (c) one representative of the Vice Chancellors of public Universities elected from among themselves; (d) one representative of the Vice Chancellors of private Universities elected from among themselves; (e) one representative of Private Universities Senates elected from among themselves; (f) two students one representing University students and one representing tertiary institutions students and one of whom shall be a female; (g) four members of religious non degree awarding institutions appointed by the Minister; (h) three representatives one each from commerce, industry and agricultural sectors; (i) four persons representing other sectors of higher education, at least one of whom shall be a woman, and one person with disability appointed by the Minister; (j) the Officer in charge of higher education or his or her representative, from the Ministry responsible for education; (k) the Executive Director; and (l) one person from the public appointed by the National Council.

Its powers are provided for under **section 6 of the Act** which among others is; *the National Council shall have the powers to do all such things and acts that are necessary for, or incidental to the objects of this Act and without prejudice to the generality of the foregoing, may delegate any of its powers and functions, other than the approval of estimates or any powers required by this Act to be exercised by resolution of the National Council, to any member, officer or committee of the National Council as it may deem necessary.*

The Minutes of the 55th Council meeting held on 29th June 2020, show that the council resolved the following;

- a) *Not to approve the organogram*

- b) *That management should benchmark and come up with a best structure*
- c) *That a council sub-committee be selected by the chairperson to finalise and approve the organogram on behalf of council*
- d) *That the approved organogram be circulated to members of council for noting.*

Section 20 of the Act provides;

- 1) *For the better carrying out of its functions, the National Council may, appoint such committees composed of its members, as it may consider necessary for a specific purpose and period.*
- 2) *A committee appointed under subsection (1) shall deliberate on any matter assigned to it by the National Council and make findings and recommendations to the Council.*
- 3) *The Chairperson of a committee under this section shall be appointed by the National Council.*

The council in this case resolved that the chairperson select a sub-committee to finalize and approve the organogram. By this, the council seemed to have delegated its powers under section 6 (i) of the Act to appoint the sub-committee to the chairperson of the council.

However from **section 20** above, such committees as may be appointed by the council are not a function of council but are composition of the council itself. The council could therefore not delegate appointment of a sub-committee to the chairperson.

Furthermore, the sub-committee was appointed to finalize and approve the organogram on behalf of council when **section 20(2)** provides that the sub-committee shall deliberate on any matter assigned to it by the National Council and make findings and recommendations to the Council which was illegal and ultra vires. The subcommittee would only have had the powers to make findings and recommendations on the organogram but not finalize and approve the same. This made the purpose of the committee void *ab initio*.

It is therefore evident that it was illegal, irrational and procedurally improper for the Council to resolve that a council sub-committee be selected by the chairperson to finalize and approve the organogram on behalf of council. The law envisaged strictly a committee chosen by the entire council and the delegation to the chairperson singly was illegal. The findings and recommendations of sub-committee must be submitted to council for approval and should never be acted upon without any approval.

Counsel for the respondent in their submissions delved into issues of interpretation of section 6 however I find that these submissions were misplaced as issues of interpretation were not the gist of the application.

The applicant further stated that the respondent's decision making process was irrational. It was counsel's submission that the respondent never consulted its staff members about the restructuring processes and implementation of the impugned organogram who would be directly affected by these changes. Counsel submitted that the alleged meetings held its staff members only served the purpose of informing the respondent's staff members of the impugned organogram and the decisions after they had been illegally passed by the subcommittee which actions were unreasonable, irrational and an abuse of its powers.

The respondent's counsel on the other submitted that the applicant was a former employee of the respondent who did not inform the court how he came to the conclusion that there was no consultation with staff regarding the new organogram. That the Executive Director Professor Mary J.N in paragraph 16 of her affidavit stated that the process leading to the adoption of the new organization structure by the respondent was transparent, consultative and proper and was arrived at after an exhaustive review of the Institutional Strategic Plan Development Retreat held at Jinja Nile Resort Hotel from 24th to 27th November 2019 to which she attached a record of attendance of the respondent' staff.

Counsel further submitted that the applicant's counsel's submission that the record of attendance did not prove that there was exhaustive review since there was no record of the minutes was unfounded since that was a retreat and not a meeting. Counsel submitted that it was the applicant's burden to prove that there was no consultation of staff before the adoption of the organogram.

However counsel for the applicant rejoined submitting that the applicant fully discharged his evidential burden by leading evidence and material facts to prove that the respondent did not comply with the provisions UOTIA but the respondent insufficiently adduced evidence to disprove such material facts.

Counsel submitted that the evidence attached by the respondent did not respond to the fact in issue. That if the respondent had consulted its staff members as alleged it would not have had any difficulty in adducing to prove such consultation. Counsel relied on

sections 101-103 of the Evidence Act as well as the case of *Rise v. Steckel*, 59 or App. 675, 684, 652 P.2d 364, rev. den. 294 or 212, 656 P.2d 943 (1982) where it was observed that; if the moving party bears the burden of persuasion at trial, *it must offer evidence that would entitle it to a directed verdict at trial if uncontroverted. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party to offer evidence and demonstrate a triable issue of fact.*

I find no sufficient evidence for this court to conclusively determine whether or not the respondent consulted its staff members about the restructuring processes and implementation of the impugned organogram staff members. The record of attendance does not satisfy this court that indeed the respondent was conducting consultations at the staff retreat whereas the applications asserts facts that he does not disclose how they came to his knowledge.

*In our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place. A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other. Generally speaking in most cases a judicial officer is able to make up his or her mind where the truth lies without expressly needing to rely upon the burden of proof. However, in the occasional difficult case, sometimes the burden of proof will come to his or her rescue. "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" (see *Miller v. Minister of Pensions* [1947] 2 All ER 372). When left in doubt, the party with the burden of showing that something took place will not have satisfied the court that it did. See ***Ojera v Labeja (Civil Appeal-2013/20) [2018] UGHCCD 61.****

The court is left in doubt as to whether consultations were conducted or not therefore this ground fails.

Counsel for the applicant also submitted that the impugned organogram places a discriminatory and differing qualifications of the different positions in the council and also presents a discriminatory or uncertain appraisal policy which is unfair unjustified and unreasonable since it was intended to benefit the architects of the impugned organogram.

The respondent's counsel submitted that this allegation was false, baseless and mere conjecture as there is nothing on record proving that the respondent's organogram is discriminatory.

There is no evidence to support the applicant's allegations of discrimination.

With regard to procedural impropriety, counsel reiterated their submissions on illegality submitting that the respondent failed to adhere and observe procedural rules expressly laid down in the UOTIA.

I have already determined above that the respondent acted procedurally improper by appointing a subcommittee to finalise and approve the organogram on behalf of council.

On that premise, this application is allowed.

The applicant is granted the following orders;

1. A writ of certiorari issues setting aside and quashing the organogram as approved by the subcommittee selected by the Council Chairperson on behalf of Council on Monday 24th August 2020.
2. A writ of Certiorari issues setting aside, and quashing any of the respondent's decisions based on the impugned organogram as approved by the subcommittee selected by the Council Chairperson on the 24th day of August 2020.
3. An order of mandamus issues directing and compelling the respondent to follow the lawful procedure when making any changes within its organizational structure.
4. It is declared that the subcommittee of council as selected by the chairperson of Council did not have powers to approve the organogram of the National Council for Higher Education on behalf of Council and its actions are contrary to Sections 20 and 21 of the University and Other Tertiary Institutions Act 2001 (as amended in 2003) and (as amended in 2006).
5. It is declared that all decisions based on the impugned organogram of the National Council for Higher Education as approved on the 24th day of August 2020 are contrary to the University and Other Tertiary Institutions Act 2001 (as amended in 2003) and (as amended in 2006).

6. It is declared that the actions and approvals of the subcommittee of Council selected by the Council Chairperson on Monday 24th August 2020 are ultra-vires, null and void.
7. The applicant is awarded costs.

I so order

SSEKAANA MUSA

JUDGE

15th June 2021