IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2011

BETWEEN

THE STATE

-AND-

THE CHIEF SECREATRY TO THE PRESIDENT AND CABINET RESPONDENT

Ex – parte: Dr Bakili Muluzi APPLICANT

CORAM: THE HONOURABLE MR JUSTICE L P CHIKOPA
Kaphale of Counsel for the Applicant
Dr Nkowani Senior Deputy Chief State Advocate for the Respondent
OJ Mogha (Mr) Court Clerk
CB Mutinti, Court Reporter

JUDGMENT

Chikopa J

INTRODUCTION

The applicant is a former State President of this Republic. He is not in the best of health. At the same time he is answering criminal charges under Criminal Case Number 1 of 2009 at the Principal Registry and presided over by our Brother the Honourable Mr Justice Kamwambe [the Court]. The applicant sought and was granted leave by the Court to attend his doctor in Cape Town Republic of South Africa. The respondent has, in the applicant's

view, and on behalf of the Government of Malawi declined to facilitate such a visit. They said GOM could only do that after the visit has been sanctioned by a panel of independent local doctors.

The applicant then came to this court, sought and was granted leave to judicially review the respondent's above decision.

On February 3, 2010 we heard the application for judicial review. This is our opinion thereon.

THE DISPUTE/CLAIM

We have been asked to review 'the decision of the respondent contained in the letter of 2nd November 2010, refusing to release funds for the applicant's prearranged specialist doctor recommended medical review in Cape Town in the Republic of South Africa'.[**Sic**]

RELIEFS SOUGHT

The applicant sought:

i. 'A declaration that the respondent's said decision is unlawful and unconstitutional to the extent that it is in breach of the Applicant's rights under the Presidents' [Salaries and Benefits] Act [the Act];
ii. a declaration that the said decision breaches the applicant's legitimate expectation emanating from previous dealings between the Applicant and the Respondent;
iii. a declaration that the said decision is Wednesbury unreasonable and is not justifiable in relation to reasons given;
iv. an order for *certiorari* quashing the said decision for the above reasons;
v. an order of *mandamus* requiring the Respondent to direct the release of funds for the applicant's next specialist medical review trip to Cape Town, South Africa;
vi. if leave to apply for judicial review is granted an Order that the applicant be not required by the State to undergo his impending criminal trial until the medical review is conducted and a report

on the applicant's physical wellbeing and fitness to sit through a trial is determined;

vii. if leave to apply is granted a direction that the hearing of the application for judicial review be expedited;

viii. Further or other relief; and

ix. An order for costs'.[**Sic**]

During the hearing of the application for leave we declined to grant a stay of the criminal proceedings at the Principal Registry. We could understand the practical reasons for the applicant approaching a court other than the Court to decide on the propriety of the decision complained of herein. We however thought it disrespectful for us to order the stay of proceedings in our Brother's Court. If a stay is to be granted we thought that would best be done by the Court itself.

GROUNDS ON WHICH RELIEF IS SOUGHT

The applicant thought that the respondent had, in refusing to fund the applicant's next specialist doctor recommended medical review trip to Cape Town in the Republic of South Africa, not correctly appreciated and discharged its constitutional, statutory and administrative law duties.

THE FACTS

As much as possible we refer to facts that are not in dispute. Accordingly and like we have said above the applicant is a former State President of this Republic. He is not in the best of health. We do not think it appropriate for purposes of this ruling that we go into the details of such ailment. Suffice it to say for our purposes that it has something to do with the spinal column. He has been to hospitals in the United Kingdom, Taiwan and South Africa. He was in January 2010 at our own Queen Elizabeth Central Hospital [QECH] in relation to the same ailment. Following the visit to QECH the applicant was sent to South Africa where he was operated on January 15, 29 2010 and on February 8, 2010. He was reviewed, again in South Africa, in August 2010

by Dr Vorster who produced a report exhibited herein as BM1. Therein Dr Vorster said:

> *'I have advised Dr Muluzi to return to the hospital at the end of November or beginning of December this year for re-assessment of his spinal instrumentation'*. [**Sic**]

The report is dated September 2, 2010.

Pursuant to the above report the applicant wrote the respondent a letter dated October 12, 2010 exhibited as BM2 herein requesting for funding to enable him go to Cape Town as above. He proposed that he be in Cape Town for that purpose from November 27, 2010 to January 15, 2011. He also sought and was granted leave by the Court to proceed on such trip. This was in the Court's ruling of November 15, 2010 exhibit BM4 herein.
The respondent responded via a letter dated November 2, 2010 exhibited herein as BM3. It is headed '**Medical Review in Cape Town'**. We find it necessary that we quote extensively from such letter":

> *'I refer to your Excellency's letter dated 12th October, 2010 and another of 28th October, 2010 authored by Mr T S Ninje, Acting Staff Supervisor at Your Excellency's Office. In both letters it has been indicated that you, Sir, are expected to return to Cape Town South Africa on 27th November, 2010 for your medical review and that your period of stay in that country will be up to 15th January, 2011.*
> *Having considered various aspects of Your Excellency's condition, the proposed medical review as well of the rationale, practice and procedure for external referrals, Government is of the opinion that Your Excellency should first be assessed by local Orthopaedic Surgeons and Physiotherapists before Government can commit itself to facilitate your travel to Cape Town as per your request.*
> *In the light of the foregoing, the Secretary for Health is requested to constitute a team of Orthopaedic Surgeons and Physiotherapists who*

should be tasked to review Your Excellency's condition at a well equipped local medical facility in Malawi. The team of Orthopaedic Surgeons and Physiotherapists should, after the review, submit its report to the External Referral Committee which should in turn assess the proposals from the team and submit appropriate recommendations to Government. This is in tandem with the established practice and procedure. It is the wish of Government that a fair and objective assessment of your condition should be made by medical experts and physicians prior to any referral to external hospitals'. [**Sic**]

This view was reiterated in the respondent's letter exhibit BM5 of November 30, 2010 addressed to the applicant's lawyers entitled '**Dr Bakili Muluzi's Medical Review in Cape Town**'. Again we quote therefrom:

'The Government has no objection to your client travelling to South Africa for medical review or for other purpose. The Government however states that it will only pay for your client's travel and medical expenses to South Africa or elsewhere outside Malawi if your client's medical check-up or treatment outside the country is justified on the assessment of independent medical doctors.

The assessment will seek to determine whether such check up and condition cannot be attended to in Malawi, and if so, whether the duration of the stay in South Africa is so justified for the Government to pay for it'. [**Sic**]

THE LAW

The law relating to Judicial Review is not in dispute. We discussed it in **John Mwandenga v Secretary for Health and Population** Civil Cause Number 9 of 2003 High Court of Malawi Mzuzu Registry [unreported], **The State v Registrar General *ex parte* Msenga Mulungu & 8 Others** Miscellaneous Civil Cause Number 14 of 2010 High Court of Malawi Mzuzu Registry [unreported], **The State and Road Traffic Directorate ex parte Vincent Mibulo**

Miscellaneous Civil Application Number 12 of 2010 High Court of Malawi Mzuzu Registry [unreported], **The State and Ministry of Public Works ex parte Sonia Fumbo** Civil Cause Number 147 of 2009 High Court of Malawi Mzuzu Registry [unreported]. The sum total of such discussion is that 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. We made reference in those cases to the English decision in **Chief Constable of North Wales Police v Evans** [1982] 1 WLR 1155 AT 1160 where it was said:

> *'it is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question'.*

A decision of a public authority may therefore be quashed where the authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice where such rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense. The function of the courts, including this court therefore is not to act as an appellate tribunal in relation to decisions complained against. It is also not to interfere in any way with a public officer's/office's exercise of any power or discretion conferred on it unless the same has been exercised beyond jurisdiction or unreasonably. In other words the courts must not do that which the public authority whose decision is the subject of review is by law mandated to do. If the courts did that they would under the thin disguise of preventing abuse of power be themselves guilty of exercising powers they did not have. Their function in judicial review proceedings is merely to see to it that lawful authority is not abused by unfair treatment. See Chief Constable of North Wales Police v Evans above.

But having spoken of Wednesbury unreasonableness we think it proper that we say some more about it. The classic formulation is that by Lord Greene in the Wednesbury case [**Associated Provincial Houses Ltd v Wednesbury Corp.** [1948] 1 KB 223. He said courts can only interfere if a decision is so unreasonable that no reasonable authority could ever come to it. Examples are bad faith, perversity [see Lord Brightman's sentiments in **Pulhofer v Hillingdon LBC** [1986] 3 All ER 353], absurdity implying that the decision maker has taken leave of his senses [see Lord Scarman's sentiments in **R v Secretary of State for the Environment ex parte Notts CC** [1986] AC 240]. In **Council of Civil Service Unions v Ministers for the Civil Service** [1985] AC 374 Lord Diplock equated unreasonableness to irrationality which he described as applying to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Back home Judicial Review is a matter of the Constitution. Section 108(2) of the Constitution allows the Courts *'to review any **inter alia** action or decision of the Government for conformity with this Constitution'*. Sections 40 and 43 thereof deserve special mention in the context of this case. We cited them verbatim in Msenga Mulungu's case. We will not do likewise herein. Suffice it to say that in Malawi administrative actions/decisions must:

i. Be lawful;
ii. Be procedurally fair;
iii. Be justifiable in relation to the grounds/reasons given; and
iv. Have reasons therefor given in writing.

THE ISSUES AND THE COURT'S CONSIDERATION THEREOF

Generally let us observe that courts are not best suited to make clinical decisions. That is for medical personnel to make. We say this to emphasise the point that we are not here to decide whether or not the applicant should go for a review, or that he should or should not go for a particular kind of treatment and where. The medics will make that decision. And if

truth be told a decision has been made to the effect that the applicant should go for review. The problem seems to be where and before whom? Within Malawi or in South Africa? Before Dr Vorster or a not?

In the light of the above we therefore wish to emphasize that the question before us is in our judgment the propriety of the respondent's 'decision' that a local panel of medics should determine whether or not the applicant should attend Dr Vorster in South Africa before he can fund such trip.

The Parties' Arguments

The Respondent

In the respondent's view there are no issues between him and the applicant. Firstly because he has made no decision which can be the subject of review by this court. He did not refuse to release funds for the review in South Africa. All he did was to request the applicant to submit himself to a local panel of medics before such funds could be released.

Secondly the respondent prays this matter be dismissed on the ground that the applicant did not at the time he was seeking this Court's leave for judicial review make a full disclosure of facts. The applicant did not disclose for instance the fact that there was a procedure to be followed before one could be referred abroad for treatment. That procedure is contained in the document exhibited herein as CS1. In making no reference to it the applicant, in the respondent's view, gave the false impression that he could just wake up from his bed, inform the respondent that he wanted to go to South Africa for review and voila he would be on his way. Similarly the respondent thinks that the applicant was less than forthright when he told us that the respondent has made a decision refusing him funds for the review in South Africa. At page 25 of his submissions the respondent said:

> *'although he had exhibited the document relied upon, he had misrepresented its import to the court'.* [**Sic**]

Thirdly we understood the respondent to have been arguing that the matter before us is not justiciable. According to him judicial review is about reviewing the decision making process. It is not about deciding on the merits of the decision under review. Herein, according to the respondent, we are being asked to review the merit of the respondent's decision not to fund the review. We should therefore dismiss these proceedings for not to do so would effectively see this Court deciding on issues of resource allocation which is not within our remit.

Fourthly the respondent argued that if we considered this matter in the context not of the Act but the Constitution we should easily come to the conclusion that this proceeding is no more than an abuse of process. According to him the Constitution does not provide for the right to free medical services here or abroad. Instead in section 13(c) it obliges Government to develop '*policies and legislation that provides adequate health care commensurate with the health needs of Malawian society and international standards of health care'*. Proceeding on that the respondent argues that we should not interpret the Act to mean that the applicant has a right to free medical treatment. Rather that he, like everyone else, will only be entitled to such medical treatment and care as is possible regard being had to the amount of resources available to our country. In so far as therefore the applicant sought to put his medical/health needs ahead of those of everybody else we should dismiss this matter.

Fifthly the respondent contends that the decision complained of is not illegal. In his understanding the respondent argues that illegality denotes that the public body did not have the jurisdiction to make the decision complained of. In the instant case the respondent no decision has been made denying the applicant funds. Only one asking him to submit to a local assessment of his condition. That is a decision which the respondent thinks he was legally entitled to make more so in view of the fact that the Act does not itself provide a specific procedure for external referrals.

The respondent also had something to say about legitimate expectations. He thought the applicant could not have expected that he would be referred abroad by the mere fact he had before not been subjected to the procedure

in exhibit CS1. No law according to the respondent gives the applicant the right to medical treatment abroad. There can therefore be no question of any legitimate expectations in respect thereof. The respondent also argued that the previous instances where the applicant had been referred abroad were emergencies. Life [the applicant's?] was at stake. The waiver of CS1 procedure should not therefore be taken to be a foundation for a legitimate expectation that the applicant would be referred abroad for treatment without undergoing the procedure laid down in exhibit CS1.

The seventh argument concerned whether or not the decision complained of is unreasonable in the Wednesbury sense or is justifiable in relation to the reasons given. The respondent thinks his decision reasonable and justifiable in relation to the reasons given. On page 20 of his written arguments the respondent said:

> *'the test is that the impugned decision …….. must be one that no reasonable public body or officer in view of the facts could have made. It must be a decision that when objectively viewed, would suggest that at the time of making the decision , the decision maker had taken leave of his mental faculties or sanity had left him'*. **[Sic]**

The question in the instant case according to the respondent is whether any public body or officer would have acted in the way he did. He answered the question in the affirmative. He was only being prudent in the use of scarce resources. The guidelines and their application are and should be acceptable nationally and internationally.

The eighth argument concerned abuse of the process of the court. The respondent opines that the applicant is abusing the process by coming to court when on the one hand claiming that his life is at stake if he does not attend Dr Vorster in South Africa while on the other refusing to be assessed by local medics for that very purpose. On yet another hand the respondent argues that the applicant is abusing the court process by seeking to use the present proceedings to achieve a stay of the criminal proceedings at the Principal Registry.

The Applicant

He contends that the decision that the applicant should first be assessed by a local board of medics before he can be funded for a medical review trip to South Africa is illegal, untenable and therefore invalid. Firstly the applicant says the Act confers on the applicant the benefit '**free medical services and a personal physician**' and medical insurance. The Government's obligation is therefore not to pay for his medical treatment but for health insurance premiums. It would then be up to the insurer to pay for his treatment. In that case the review is none of the Government's concern but that of the insurer. And the insurer not having, on the evidence before us questioned the necessity of the review, Government's decision to attach conditions to the review visit to Dr Vorster is without legal basis. On the other hand the applicant argues that the Act does not give any qualification as to the kind of medical services that are free or where they will be had. There being no such limitation under the Act the same can not be done by the respondent via exhibit CS1 a document which has no legal basis. In the applicant's view any limitation to his rights under the Act can only be done via a statutory instrument or section 44(2) of the Constitution. Why because whereas it is indeed true that the rights in issue are not granted by the Constitution they derive from an Act that itself derives its mandate from the Constitution.

Secondly, the applicant argues the respondent's decision is untenable for being in breach of the applicant's legitimate expectations. He has under the Act the right to go for a medical review by a physician of his choice. That right is not under the Act subject to a prior mandatory local medical review. It is his expectation therefore that he will be allowed to assert that right as and when necessary. Further the applicant informed us that he has due to his ailment been to London, Taiwan and South Africa a dozen times to receive treatment in respect thereof. Except for the January 2010 trip which the applicant accepts was an emergency one the rest were normal. There was never a time when he had to go through a referral process as laid out in exhibit CS1 before the external treatment. That created in him the legitimate expectation that he would not be required to undergo the CS1

process before exercising his rights under the Act. For Government to require that he now does is a breach of his legitimate expectations and such requirement should be declared invalid. The case of **R v Devon County Council ex parte Barker** [1985] 1 All ER 73 per Simon Brown LJ was cited.

Thirdly the applicant argues that the respondent's decision is unreasonable in the Wednesbury sense in the alternative that the decision is not justifiable in relation to the reasons given. The applicant gave four reasons in respect of that. First that the respondent not being a medical expert and not on the evidence acting on the advice of one was not fit to judge whether a set of doctors who have never before dealt with the applicant's case can determine whether or not he should go for a review; secondly he cast doubt about the competence of the local assessment board. It does not comprise a neurosurgeon despite the fact that the applicant's ailment is neurological and has always been attended to by a neurosurgeon in this case Dr Vorster; thirdly that there is no basis factual, legal or otherwise to be drawn from previous practice that justifies that the applicant be assessed by a local board before he can proceed for review in South Africa; and lastly that it was doubtful whether local doctors would have the necessary wherewithal in terms of equipment and expertise to deal with the applicant's case as opposed to Dr Vorster who has always dealt with the case.

The applicant thus thought the respondent's decision not only illogical but also without sense, oppressive, outrageous and bordering on the capricious.

The Court's Consideration of the Issues

First appreciation is due to the Counsels herein for the research they did into this matter. It lightened our task. Secondly we think we should make it clear that the Act applies, almost in identical fashion, to sitting and former Presidents and Vice Presidents. To a large extent therefore we are in this matter not just talking about the applicant's rights thereunder but also those of all Presidents and Vice Presidents past and present. Thirdly and at the cost of being repetitive we will reiterate that this Court, indeed any court, is not best placed to make clinical decisions. That is best left to

medics. Fourthly we should also emphasise that we are not here to decide on health policy or how best the powers that be should use scarce resources in relation to the provision of health care services. That is for the people's elected representatives and those that advise them.
We bear all the above in mind as we decide on the issues in dispute herein.

Did The Respondent Decide? Is There a Decision of the Respondent Before This Court?

The respondent contends that he never made any decision refusing to release funds for the applicant's trip to South Africa for a medical review. Rather he only advised the applicant to make himself available to a local assessment panel. We think the respondent is engaging in linguistic gymnastics. When the applicant approached the respondent for funds for his travel to South Africa the same were not release. Instead the respondent told the applicant that he could only do that if the applicant's review was sanctioned by an assessment panel before which the applicant was asked to present himself. It is obvious that the applicant made a decision. And that decision was not to release funds for the review as requested unless and until the review was sanctioned by a local assessment panel before which the applicant was now being asked to appear. It is that decision which the applicant has brought to this Court for review. See also the quotes from exhibits BM3 and 5 above.

Justiciability

According to the respondent judicial review is about reviewing the decision making process and not the merits of the decision under review. In the instant case the respondent thinks we are being asked to decide on the merits of his decision.
The respondent is being selective in his recital and analysis of the law. While it is true that judicial review is about reviewing the decision making process it is equally true that a court can under the Wednesbury principle decide on the reasonableness or otherwise of an administrative decision. Thus a decision will be quashed if it is so unreasonable that no reasonable

office or officer properly apprised of the facts could have arrived at it. Under our Constitution an administrative decision will be quashed if *inter alia* it is not justified by the reasons given in respect thereof. By way only of example a controlling officer who transfers an officer 'due to exigencies of duty' will have failed to justify his decision in relation to the reasons given if it turns out the transfer was out of malice. He will also most likely have acted unreasonably in the Wednesbury sense in that no reasonable public officer is expected to transfer another on grounds of personal ill-will. It should be clear from the above example that a court in reviewing a decision is allowed to look beyond the decision making process. It can also look at the merits of the decision itself if the same is necessary in deciding whether or not the same is reasonable and justified. The fact that we have not herein been asked to review the decision making process does not by itself make the respondent's decision nonjusticiable. It is justiciable because we have been asked to determine whether or not such decision is reasonable in the Wednesbury sense or justiciable in relation to the reasons given.

Disclosure

The respondent alleges that there was no full disclosure of facts at the time the applicant was applying for leave for judicial review. The first arm of the argument is that the applicant never disclosed that there was a procedure for referring patients out of Malawi for treatment. Instead he sought to give the impression that it was automatic. The second arm is that the applicant was less than forthright when he alleged that the respondent had refused him funds for the review when no such decision had in fact been made.

The law in this area is clear in our view. Firstly suppression is only as to facts. The question would have to be answered therefore whether whatever is alleged to have been suppressed are facts. Or merely opinions. Secondly it is not every suppression of facts that is of essence. Only that of material facts. Another question would also have to be answered whether if any facts were suppressed the same are material. Material meaning facts which could have influenced the tribunal's decision one way or the other. Thirdly it

appears to us that suppression is a conscious act. One can therefore only suppress a fact that they are aware of. Applying the above to the instant case the applicant is alleged to have suppressed two facts; firstly the existence of exhibit CS1 the **'Manual of the Criteria for the Referral Programme of Medical Cases Abroad'** and the fact that the respondent had not refused him funds to travel to South Africa for a medical review. The first question, granted the fact that CS1 existed at the time the applicant swore his affidavit on January 5, 20111 is did the applicant know of the existence of CS1? The onus is on the respondent to prove that he did. In his address to us he said the applicant should have inquired about its existence. We think with respect the answer is that there is no evidence showing that the applicant knew of the existence of CS1. He can not therefore be accused of suppressing that whose existence he was not aware of. But even if he was guilty of suppressing the existence of CS1 is it a material fact as understood above? We do not think so. The applicant's case is premised on the Act. He is claiming that the respondent have in breach of his benefits/rights under the Act refused to facilitate his review in South Africa. To that extent we think that the existence of CS1 was not a material fact. It is not even part of the Act. The conclusion is, we think, inescapable. There was no suppression of facts in relation to CS1. Much the same will be said about the refusal to fund the review. Firstly we do not think that the applicant can be accused of suppression. He, as the respondent admits, exhibited the letters containing the decision complained of as BM3 and BM5. We fail to see how the applicant can be properly accused of suppressing the contents thereof. Secondly, and as we have said above, there is a difference between a fact and an opinion. That the respondent was refusing to fund his review in South Africa is an opinion the applicant formed after reading exhibits BM3 and 5. He is entitled to that opinion just as we are sure the respondent is entitled to his opinion that his letters exhibit BM3 and 5 did not amount to a decision refusing to fund the medical review. But the applicant can not be held to have suppressed facts merely because he held an opinion different from that of the respondent. That is not the law. More importantly it should be remembered that we have found as a fact that the

respondent did make a decision refusing to fund the medical review unless and until the local assessment had been done. The question of suppression does not therefore arise.

Illegality

The respondent argued that the Constitution does not create a right to free medical services for anyone including the applicant. Instead in section 13(c) it obliges government to develop policies and legislation that provides adequate health commensurate with the health needs of Malawian society and international health care standards. The applicant should not therefore demand free external medical services but be entitled only to such medical treatment as is possible regard being had to available resources. Secondly the respondent argues that he had the mandate to decide on whether or not to fund the applicant's review in South Africa. And because the Act did not lay down the procedure for so doing he was within his legal remit in resorting to the procedure in CS1 before he could allow the applicant to go for the medical review.

The applicant on the other hand said the Act provides for free medical services, a physician and health insurance. It provides for no limitations as to where this should be had. Or as to what kind of illness. Any limitation especially that imposed by CS1 is therefore illegal.

It is trite that what the Constitution provides binds all and sundry without exception. That is in tandem with the concept of equality under the law. So that what the Constitution provides for in section 13(3) in relation to health care should applies with equal force to all our people including those that are privileged to serve or have served us as Presidents or Vice Presidents. It is equally true however that the legislature in its wisdom and while aware of the provision of section 13(c) abovementioned decided to make special provision for our Presidents' and their Vices past and present salaries and benefits. Such benefits included the free medical services mentioned above. These medical/health care benefits could only have been intended to be over and above those accruing to them and us all under section 13(c) of the

Constitution. It is therefore not true that our Presidents and their Vices past and present do not have the right to free medical services. This notwithstanding the fact that the Constitution makes no such provision. To the above extent therefore the Act allows our Presidents and their Vices past and present to put their medical/health needs ahead of the rest of us for that is the very purport of the Act. It put them by virtue of their offices on a different/higher pedestal than the rest of us.

Secondly we think it vital that we emphasise the fact that when the Act talks of free medical services it means no more than that our Presidents and their Vice Presidents past and present will have medical services at no cost to themselves. There is no limitation in the Act as to what ailments these free medical services are in respect of. Or as to cost. Or as to where the services will be had. Whether the tab is then picked up by the tax payer is perhaps an unfortunate trivialisation by the respondent of what is clearly an important matter of State. But that is perhaps not important. What is important in our view is that the medical services are at no cost to sitting/former Presidents and their Vices. If the insurance is up-to-date the insurer will pick up the tab. If it is not as seems to be the case now the Government will pick up the tab. The applicant argues, and we agree with him to large extent, that this right is without geographical, fiscal or other limitation. He can have the medical services practically anywhere and for whatever ailment and at whatever cost. Government or the insurer will pay. The respondent thinks the right should or is limited. Especially with respect to foreign treatment. And because the Act itself does not provide for such limitation the same, he thinks, is to be found in the procedure set out in CS1. While in our view the applicant is at the extreme end of the pendulum the respondent has clearly misapprehended the purport and practice of the right to free medical services and a physician. Where the medical services are provided for courtesy of an insurance policy it is clear that the policy itself will set out conditions for both internal and external treatment. Provided always that such conditions do not result in the beneficiary having to pay for such services. If in the instant case there was an insurer we would have gone by such conditions. Where the services are being paid for

Government it seems there are no problems with internal treatment. It would appear when the beneficiary requires treatment he most likely on the advice of his physician approaches a hospital gets treated and the bill is picked up by Government. For external treatment however the respondent thinks a President or Vice President should submit himself/herself to the procedures in CS1. That can not with respect be. To begin with where does it provide thus? Meaning that this limitation must be the respondent's creation. Sadly it is without legal basis. It must be appreciated that medical services are not by right free in this country. The Presidents and their Vices past and present are a special class. Patients may at government hospices get treatment for free if they are lucky. They may also be called upon to even at government hospices pay a little something from time to time. Where such patients think they need to get treatment abroad the selection is via CS1. In other words CS1 applies only to those patients that are not entitled to free medical services. That automatically takes out our Presidents and their Vices past and present. That is why CS1 specifies the kind of diseases in respect of which a patient can be referred abroad, the hospitals which may refer a patient which are Zomba, Queen Elizabeth, Kamuzu and Mzuzu Central Hospital and the criteria to be used in deciding whether or not to refer which included the availability of funds and the treatability of the disease. See Chapters 2, 34 and 9 of CS1. In other words patients have to qualify for free treatment. So that even a clinically deserving case may not be referred for treatment abroad if one's illness is other than one of those specified on page 7 or if they have gone to a hospital other than one of the four Central Hospitals or if there is little chance of saving the patient or indeed if there were no funds of which the Secretary for Health only has K10million per three months. Contrast that with the right to free medical services under the Act. Thereunder you qualify for free treatment not by virtue of CS1 but because you are or have been a President or Vice President. It covers all manner of diseases and ailments. It matters not that you were not being treated locally by a central hospital. It matters not that the Secretary for Health has no money. It is our most considered conclusion therefore that if there is a limitation to the

right to free medical services the same is not courtesy of CS1. And that in so far as the respondent sought to use CS1 to limit or regulate such right he was acting illegally.

We are buttressed in the above view by some of the manifest absurdities that would arise if we were to use the CS1 procedure to implement the Act A simple example. The Secretary for Health has made it clear in Annex 1 to cs1 that he will not the foot the cost of referrals for persons who being out of jurisdiction find it necessary to receive medical treatment. The reason is of course that such persons would not have passed through the referral process. But can one imagine what would happen if the President or the Vice President past or present had while out of jurisdiction a cold as a result of which he/she had to attend before a doctor? Would the Secretary for Health insist that they go through the CS1 procedure? Would that be possible? Would he refuse to pay because the beneficiary had not gone through the procedure in CS1? The answer is in the negative. He would pay. And not because, as some would say, because it is an emergency because it is not but because the President/Vice President is entitled to free medical treatment for whatever ailment wherever he/she might be and also because applying CS1 would not only produce a manifest absurdity but also result in a denial of the very right which the Act confers on the beneficiaries in that the beneficiary would be denied prompt medical treatment while the Secretary for Health set out to apply the CS1 procedure. And God forbid the situation would not be helped of the beneficiary were out of pocket.

The question of course is whether our Presidents and their Vices are free to just wake up from their beds complain about a common cold and demand that they be taken, for free, to an exclusive hospital in Harley Street. There is and should be a filtering mechanism. That mechanism though can not be and is not CS1. Where there is insurance the policy will provide such filtering system. And because it is a contract the filtering regime would be acceptable to both parties. For Government sponsored treatments we would imagine that such a system would be one that would at the same time take cognizance of *inter alia* the disease/ailment complained of, the dignity and views of the offices of the beneficiaries i.e. the President and their Vices

past and present, the views of their physician and the availability locally of means to treat and manage the ailment [to be determined by the physician and the local hospice dealing with the case]. But once a clinical decision has been made that the beneficiary be referred Government is in our view bound to abide by it. To proceed otherwise would be to allow those that are not clinically qualified make a decision about a patient's suitability to proceed to a particular kind of treatment at a particular hospice. Similarly the question of funds would not be an issue once a clinical decision has been made to refer the patient. That would if it were allowed take away the free from the free medical services. It would also be equal to taking away with the left hand that which the right hand has given. It would make the right to free medical treatment illusory. It is a system that would while not permitting abuse by way of allowing wanton referral not allow at the same time unjustified denial thereof.

Legitimate Expectations

The applicant says the respondent's decision is untenable for being against his legitimate expectations. According to him he has under the Act the right to free medical treatment and a physician. His legitimate expectation is that he should have without let or hindrances enjoy that right. Further he says except for the January 2010 treatment he has attended twelve treatments in London, Taiwan and South Africa without having to be assessed or going through the procedure in CS1. He expects no assessment this time around. He also raised a rather interesting point. According to him he was not aware of any President or Vice President sitting or not who has had to go through the CS1 procedure.

The respondent on the other hand dismisses such argument by saying since neither the Act nor the Constitution gives the applicant the right to free treatment abroad he has no business having such expectations. Neither could he have them from the mere fact he had previously been allowed to proceed for treatment abroad because the same had only been done because the applicant's life was in danger.

We have discussed above whether or not Presidents and their Vices past or present have the right to free medical treatment. We have answered that question in the positive. We have also said that the Act does not limit such treatment to within jurisdiction or to specified ailments and as to cost. Applying the above to the instant case it is our holding that the applicant has just like any other President or Vice President past or present under the Act the right to free medical treatment abroad. He was again just like any other beneficiary under the said Act correct to expect that he would as and when necessary be allowed to exercise such right without let or hindrance. That he would not as has been the case through out need to go through the CS1 procedure. We also think that the applicant was entitled to believe that he was not amenable to CS1 procedure. It is a fact that he had never before gone through it. Mr Chinthu suggested in his affidavit that was because the trips were emergencies. Except for the January 2010 trips we have no basis on which to believe Chinthu. We think Chinthu should have brought evidence to that effect. In the absence of such evidence we are, we think, within our rights to agree with the applicant that for beneficiaries under the Act there would be no CS1 procedure. And having gone through CS1 we doubt whether it provides for emergencies anyway. It is not possible therefore for the applicant to have gone there because he was an emergency case. He went we think because he was entitled to free medical treatment abroad irrespective of whether his case was an emergency or treatable.

The applicant also said that he has no knowledge of any President or Vice President past or present going through CS1 procedure. Like we have said above that is an interesting argument. It raises interesting questions. One is whether since the enactment of the Act we have had Presidents and/or Vice Presidents past and present falling ill and requiring hospitalisation abroad. The other is whether such President/Vice Presidents past or present were referred and whether such reference was through the CS1 procedure. As a matter of fact the applicant referred to his case and that of Dr Banda the

first president of this republic. The latter fell ill and passed on in South Africa. The applicant says Dr Banda, to his knowledge, never went through the said procedure. Neither has he so far. These are facts which the respondent has not disputed despite the fact that he has the capacity to do so. The third and maybe the most important question is whether we expect or want the President or the Vice Presidents to go through the CS1 procedure before they access treatment abroad. We have our serious doubts. Doubts not only whether they have which we have no knowledge of but whether they should. We do think however that the respondent would have said so if there have been such other cases. We speaking for ourselves have no doubt that it is not by coincidence or accident that neither the late Dr Banda nor the applicant have hitherto undergone through the CS1 procedure. They did not go through it because it was thought that such would be beneath such high offices and demeaning to such personages. Our conclusion is that requiring the applicant to go for an assessment before he can go for a review breaches his legitimate expectations.

Is the decision unreasonableness in the Wednesbury sense? In the alternative is the decision justifiable in relation to the reasons given?

Before the respondent was exhibit BM1 in which Dr Vorster a neurosurgeon that had been treating the applicant required that the applicant attends him for a review in November/December 2010. The applicant requested for a facilitation of such trip. Instead of the respondent making funds available he asked that a panel of local medics sit to decide whether such review was necessary and if yes whether it should be had in South Africa and for how long. The decision of Dr Vorster is a clinical decision. The applicant is not a discharged patient. That is clear from exhibit BM1 which says the applicant

in undergoing treatment with Dr Vorster. In empanelling a local team to assess the applicant was, without himself being not just a medic but a specialist neurosurgeon calling into question Dr Vorster's competence. We doubt whether he could reasonably do that. But even if he could we think he should have had the courtesy to lay bare his basis for so doing. In calling for an assessment the respondent was also going against what he claimed was the applicable procedure i.e. exhibit CS1. Chapter 7 thereof emphasizes the opinion of the attending specialist who in the instant case is Dr Vorster when dealing reviews which the applicant's case is. Thirdly it is strange in the extreme that the respondent should ask other medics to determine the propriety of Dr Vorster's requisition for a review of the applicant. Should a patient who has been told to attend a doctor for review be ordered to attend another doctor not for the review but for that other doctor to determine whether it is necessary that the patient attends the review with the original doctor? That smacks of a lack of reasonableness. And then there is the question of whether the local panel would be competent to assess the applicant. None of them have on the evidence before us have treated the applicant. Where seeing as the applicant is not a discharged patient would they get information about his condition? Would they ask Dr Vorster for his notes so they can use the same to question his competence? There are also questions about the local medics' competence. No disrespect intended but one would have thought that the very reason the applicant's case went beyond jurisdiction is because of a lack of either expertise or equipment or both within Malawi. Are such expertise and/or equipment now available? And how about the absence of a neurosurgeon amongst the proposed team? The applicant's case is a neurological one. Would it not be only reasonable to expect that a neurologist would be part of such team?

Then there is the small matter of the difference between a referral and a review. The former are provided for in Chapter 1, 2, 3 and 4 while the later is in Chapter 7 of CS1. It is clear that different consideration should go into deciding whether or not a patient should go for one. If we for example only go by CS1 a referral is about a first instance patient going for treatment abroad. A review on the other hand is a patient seeing a specialist post

treatment. For one to qualify for a referral one has *inter alia* to be suffering from a specified treatable disease and be referred by a Central Hospital. For a review on the other hand they can only take place 'upon recommendations from specialists abroad that treated the cases and would like to evaluate progress'[**Sic**]. It goes on to say that 'recommendations for reviews from specialists abroad should be closely followed by local attending specialists or doctors of the patient' and also that Referral Committees should determine the number of reviews based on the report from the doctor abroad. Proceeding on exhibit BM1 it is clear that Dr Vorster wants the applicant for a 'reassessment'. A review in other words. When you look at the communications from the respondent and the affidavits in support of the respondent's case it is clear that they were proceeding on the basis that the applicant wants to proceed for a referral. Exhibit BM3 despite the title and first paragraph talking of a review refers in the second paragraph to *inter alia* the 'rationale, practice and procedure for external referrals on the basis of which Government decided that the applicant be reviewed by a local panel on whether he should go for the review or not. That panel would submit a report to the External Referrals Committee. It is with respect clear that despite being aware that the applicant was seeking a review the respondent misapprehended the issues. He proceeded as if the matter was a referral. In exhibit BM5 the same misapprehension obtains. The respondent says he will only facilitate the trip if the check-up or treatment is justified by the assessment of independent medical doctors. That is a test for referrals. Not for reviews where emphasis is on the views of the doctor treating the patient in this case Dr Vorster. The affidavits of Clement Chinthu and Willie Samute the Secretary for Health also proceed on the same erroneous assumption that the applicant is seeking a referral which is not the case. This is clear from their constant reference to external referral system/procedures/programme when they should have been talking of review system/procedure/programme. Assuming therefore that CS1 is applicable, which we have said is not the case, it is clear that the respondent were taking into consideration matters that were irrelevant to

arriving at the decision whether or not they should facilitate the review. They were thereby deciding on a matter that was not before them.

One of the questions we are asking in this part of our opinion is whether the respondent's decision is unreasonable in the Wednesbury sense. The English law uses some harsh words in describing what is unreasonable in the Wednesbury sense. We would loathe using such words in respect of anyone. That is not however to say that we are in assessing the respondent's decision going to use a different test. We have no doubt however that no reasonable public officer or office would on the facts before him/her have dealt with the applicant's request for a review in South Africa in the manner the respondent did. He would not have used CS1 as a guiding light. He would not have ordered a review by local medics who have no idea of the applicant's ailment without at the same time ensuring that such medics have the necessary wherewithal in terms of expertise and equipment to assess the case. He would not have asked a panel of medics to determine whether the applicant should attend a review when the same had been requisitioned by a specialist against whom no questions of independence and/or integrity had been raised. He would have instead facilitated the review in South Africa. His decision is therefore unreasonable in the Wednesbury sense. Is it also not justifiable in relation to the reasons given? Our answer is in the positive. Once a clinical decision had been made by a competent medic/specialist that a review was due he could not under the Act use the CS1 procedure to deny the applicant the right to attend such review. The applicant was not amenable to such procedure. It cannot therefore be used as a reason to deny the applicant the review. More than that because Dr Vorster's decision was clinical it did not lie within the

respondent, a non-medic to refuse to facilitate such review while he looked around for a team of medics who would probably give him a medical reason not to facilitate such review.

Abuse Of Process

The respondent raised two issues. First that the applicant is abusing the process of the court by on the one hand refusing to be assessed in lieu of a review while on the other claiming that his life is at stake if he is not reviewed by Dr Vorster. Secondly he contends that the applicant seeks via these proceedings to achieve an improper purpose namely a stay of the criminal proceedings against him at the Principal Registry.

The respondent's arguments have no legs to stand on. We do not think that any one including the applicant should submit to conduct which he feels is against their vested rights just because they may be accused of indulging in a bit of martyrdom. There will be instances therefore where people will deny themselves certain benefits on grounds of principle. In the instant case it has not been demonstrated that acceding to the respondent's demands for a local assessment first will be more beneficial to him than insisting that he directly goes for a review before Dr Vorster as he believes is his right under the Act . He can not if he chose the latter be accused of abuse of the court process. He is only protecting his rights under the Act.

As to the alleged improper motive let us say that the application for a stay of the criminal proceedings has ceased to be an issue herein. We declined to grant it because we thought it would be disrespectful to our brother court. But having said so let us say even as *obiter* that we fail to understand while

it is not being understood that it is in the interests of justice that the review before Dr Vorster goes ahead. It appears to us from the available facts that it is only him who having treated the applicant can decide whether the applicant is now fit to stand trial. We would have thought in those circumstances that the quicker Dr Vorster was allowed to make that decision the better for the speedy disposal of the case against the applicant.

CONCLUSION

The applicant sought declarations that the respondent's decision is unlawful and unconstitutional to the extent that it is against the Act, that it is against the applicant's legitimate expectations and also unreasonable in the Wednesbury sense and is not justified in relation to the reasons given. Those declarations are granted. He also sought an order of *certiorari* quashing the said decision. For the reasons given above the order is granted. He also sought an order of *mandamus* requiring the respondent to fund the review in South Africa. The respondent thought we should not grant such an order. In his view we, if we did so, be making a clinical decision to the effect that the applicant should go for review in South Africa before Dr Vorster. We do not think so. That the applicant should go to South Africa and attend Dr Vorster is not a decision which we have made. Like we have said we would not be able to make such a decision. We have no capacity. Rather it is a decision made by Dr Vorster. What we have decided on is the untenability of the respondent's decision refusing to facilitate such review. The applicant is in accordance with the law entitled to an effective remedy. In this case an effective remedy can only be one that facilitates the review. It is for that reason that we have granted the order of *mandamus* requiring the respondent to facilitate the review in South Africa.

COSTS

Costs are in the discretion of the court. They usually follow the event unless there is just cause for not so doing. In the instant case we see no reason why they should not follow the event. The applicant will therefore have the costs herein the same to be taxed if not agreed.

Dated this February 10, 2011 at Mzuzu.

L P Chikopa
JUDGE