



THE HIGH COURT OF MALAWI
FINANCIAL CRIMES DIVISION

25 AUG 2023

LILONGWE REGISTRY
PRIVATE BAG 15 LILONGWE

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FINANCIAL CRIMES DIVISION
JUDICIAL REVIEW CAUSE NO. 6 OF 2023**

BETWEEN

THE STATE

On application by

DAVID DAUD MPAKANI

JAMES FORTUNATE MAGANGA

1ST CLAIMANT

2ND CLAIMANT

-AND-

THE DIRECTOR OF THE ANTI-CORRUPTION BUREAU DEFENDANT

CORAM: HON. JUSTICE VIOLET PALIKENA-CHIPAO

Kadzipatike, Counsel for the Applicant

Chandilanga, Counsel for the Respondent

Ms. Mkochi, Court Clerk and Official Interpreter

Chipao, J

RULING

Introduction

1. The Claimants, David Daud Mpakani and James Fortunate Maganga have petitioned the court seeking leave to commence judicial review proceedings against the Director of Anti-Corruption Bureau and for an injunction staying the decisions of the Defendant pending hearing and determination of substantive judicial review proceedings. The application for leave is made pursuant to Order 19 rule 20(3) of the Courts (High Court) (Civil Procedure) Rules 2017 (hereinafter the CPR) as read together with section 16(2) of the Statute Law (Miscellaneous Provisions) Act. The application for leave is opposed.

2. The decision which is subject of the intended judicial review proceedings is the Defendant's decision of prosecuting the Claimants under the Corrupt Practices Act without the consent of the Director of Public Prosecutions (the DPP) when the Corrupt Practices (Amendment) Act, 2022 which empowers the Defendant to do so is inconsistent with the Constitution.
3. The Claimants will seek the following reliefs during the substantive judicial review proceedings;
 - a) A declaration that the decision of the Defendant prosecuting the Claimants under the Corrupt Practices Act without the consent of the Director of Public Prosecutions is unreasonable and unconstitutional as the Corrupt Practices (Amendment) Act, 2022 empowering the Defendant to do so is inconsistent with the Constitution and therefore invalid;
 - b) An order like certiorari quashing the decision of the Defendant.
 - c) An order like certiorari quashing the Corrupt Practices (Amendment) Act, 2022 for being inconsistent with the Constitution.
 - d) If leave to apply for judicial review is granted;
 - (a) An order that the leave should operate as an injunctive relief staying the prosecution of the Claimants under Criminal Case No. 430 of 2023 in the Senior Resident Magistrate Court sitting at Lilongwe until the determination of the judicial review.
 - (b) Alternatively, if the Court is of the view that the matter herein relates to the application and interpretation of the provisions of the Constitution, the matter be referred to the Chief Justice for certification in accordance with Order 19 rule 7(1) of the CPR
 - (c) An order that the hearing and determination of the judicial review be expedited
 - (d) An order that the hearing and determination of the judicial review be before a single judge of the high court in open court.
 - e) An order for costs.

Background of the matter

4. The Claimants were on 14th April 2023 arrested by the Anti-Corruption Bureau (ACB) and taken before the magistrate court on several charges bordering on corrupt practices in accordance with the Corrupt Practices Act. The ACB did not produce a copy of consent to prosecute from the DPP (the DPP).
5. The Accused persons took plea and the matter was set down for hearing. Twice the matter was set down but on both occasions the hearing could not proceed at the instance of the

Claimants. The Claimants then on 30th June filed an application for leave for judicial review without notice. The Claimants were directed to file the application with notice. The application with notice was filed on 26th July 2023.

Grounds upon which the reliefs are sought

6. The Claimants have argued that the Defendant’s decision prosecuting the Claimants under the Corrupt Practices Act without consent of the DPP is unreasonable and unconstitutional as the Corrupt Practices (Amendment) Act, 2022 which empowers the Defendant to do so is clearly inconsistent with section 99 of the Constitution on the following grounds;
 - (a) The Corrupt Practices (Amendment) Act, 2022 waters down the exclusive constitutional powers of the Director of Public Prosecutions who is the overall head of criminal prosecutions in the country under section 99 of the Constitution.
 - (b) The Corrupt Practices (Amendment) Act 2022 contravenes section 99 of the Constitution as it raised the status of the Director of Anti-Corruption Bureau to be at par with the constitutional status of the Director of Public Prosecutions regarding offences under the Corrupt Practices Act, when the Constitution had not been amended to so raise the status of the Anti-Corruption Bureau.
 - (c) The Corrupt Practices (Amendment) Act, 2022 causes discrimination against the Claimants herein as they are being prosecuted for offences under the Corrupt Practices Act without the consent and authority of the constitutional head of criminal prosecutions- the Director of Public Prosecutions, yet persons charged under other statutes in the jurisdiction are prosecuted under the authority of the constitutional head of criminal prosecutions.
 - (d) The Corrupt Practices (Amendment) Act 2022 is an unnecessary breach of the Constitution which creates unconstitutional equality before the law among persons accused of offences under the Corrupt Practices Act considering that the said Act does not bar the Director of Public Prosecutions from taking over or discontinuing selected cases filed by the Anti-Corruption Bureau.
 - (e) The Corrupt Practices (Amendment) Act 2022 is unreasonable and unnecessary breach of the Constitution as it does not achieve its objectives of ensuring complete independence of the Anti-Corruption Bureau since the Constitution gives the Director of Public Prosecutions power to take over and discontinue cases commenced by the Defendant in chosen cases.

Claimants Arguments

7. The Claimants argued in their statement in support of the application for permission to apply for judicial review, that they were expecting that the Defendant will obtain consent to prosecute them on the charge of abuse of office under the Corrupt Practices Act before

starting prosecution but that did not happen. According to the Claimants, the Defendant has no mandate to prosecute them without consent of the DPP.

8. The Claimants acknowledged that they were aware that the amendment of the Corrupt Practices Act allows the Defendant to prosecute offences under the Corrupt Practices Act without consent of the DPP but argued that their right to equality before the law with other suspects in the jurisdiction will be violated as they are being prosecuted without consent of the DPP who is the constitutional head of criminal prosecutions. It was argued in the oral submissions that the amendment creates inequality in that prior to the amendment, all cases under Part IV required obtaining of consent and it was uniform for all accused persons but with the amendment, the ACB can proceed without obtaining consent as a result the DPP is not engaged in all cases except a few where he has interest.
9. It is the Claimants argument that the action of the Director of ACB to prosecute them without the consent of the DPP violates the Constitution in several ways as the Defendant is no longer subservient to the office of the DPP. They argued that their rights to fair trial and equality before the law will be violated if the Defendant is allowed to prosecute them without consent of the DPP.
10. It is the Claimant's submission that the decision of the Defendant prosecuting them without the consent of the DPP was made pursuant to a law that is inconsistent with the Constitution and that it is unlawful, unreasonable, unconstitutional and procedurally improper and as such they pray for an order for leave to apply for judicial review. The Claimants also submitted that the Court should refer the matter to the Chief Justice for certification as a constitutional matter as it involves the interpretation of the provisions of the Constitution.
11. In the skeleton arguments, the Claimants have referred to Order 19 rules 20, 21 and 22 of the CPR and the case of *Dr. H. Kamuzu Banda and the Foundation of Integrity of Creation for Justice and Peace v. the Attorney General (No. 1)* Miscellaneous Application No. 89 of 1994. The case was cited as an authority for the proposition that the overriding rule governing the standing of a person to apply for judicial review is that he has sufficient interest in the matter. It was argued that the Claimants are accused of offences against the Corrupt Practices Act and that they have in their grounds for reliefs sought raised an arguable case warranting extension of time, leave to move for judicial review and an injunctive relief of stay.
12. In his oral arguments Counsel for the Claimants argued that they are of the view that the Corrupt Practices (Amendment) Act is unconstitutional. It was argued that when forming the decision to prosecute them, the Defendant should have taken note of all

relevant matters and should have noted that there was still need to obtain consent to prosecute from the DPP. It was argued that the scheme under the Constitution is that the DPP is above all other institutions when it comes to matters of prosecution and he has powers to oversee all criminal prosecutions. According to Counsel for the Claimants, the amendment has raised the status of the Director of the ACB to be at par with the DPP yet parliament did not raise her status to that level.

The Defendant's Response and Arguments

13. The Defence in their response filed a sworn statement in opposition and skeleton arguments. In their response the Defendant expressed puzzlement as what decision the Claimants are challenging. The Defendant's Counsel argued that she was not sure whether the Claimants are challenging the lawfulness of their arrest or the constitutionality of the Corrupt Practice (Amendment) Act, 2022. Counsel argued that the two issues have been juxtaposed within each other such that the judicial review is ambiguous, vague and unclear. It was argued that even if it is to be considered that the decisions being challenged are two, the first being decision by Parliament to promulgate the Corrupt Practices (Amendment) Act, 2022 and the decision by the Defendant in exercise of her prosecutorial discretion, the same is irregularly placed before the court.
14. Counsel for the Defendant argued that the decision challenging the decision of Parliament to promulgate the Corrupt Practices (Amendment) Act, 2022 was supposed to be made promptly and in any case within 3 months from the date the Act was promulgated or with prior order extending time within which to commence judicial review. Secondly that the prevailing practice in the court is that judicial review challenging a decision by Parliament to promulgate the Corrupt Practices (Amendment) Act is commenced against a wrong party as it was supposed to be commenced against the Attorney General.
15. The Defence argued that the decision to prosecute was made under an Act of Parliament which is presumed to have been properly made by Parliament and that since there is no proper or competent challenge to the Act, it is inappropriate for the Claimants to challenge a decision which has not even been suggested to be otherwise than in fulfilment of the Defendants statutory obligations under the Corrupt Practices Act.
16. The Defence further argued that the Claimants have an alternative remedy in that they could simply place an application before the very court they were being prosecuted to challenge the decision of the Defendant to arrest them. The Defence has argued that there is no serious

question to be tried and that the Claimants have raised no arguable case whatsoever fit for judicial review

17. The Claimants also prayed for an interim relief called injunctive relief of stay. The Defence has argued that there is no such a thing as an injunction for stay and if the issue is a prayer for interlocutory injunction, then on the facts before the court, no arguable case has been shown for granting such a relief. It is also argued that the Claimants have made no undertaking as to damages. It is further argued that the Claimants have not shown whether they will suffer harm or prejudice due to the absence of the consent of the DPP
18. In the skeleton arguments, the Defence have cited a number of cases on issues of timeliness in filing an application for judicial review, existence of an alternative remedy, requirement that the Claimants must raise an arguable case and naming the Attorney General as Defendant where the Claimant is challenging an Act of Parliament.

The Law and Analysis of the Law and the Evidence

19. As rightly argued by the Defendant, judicial review is concerned with the decision-making process and not the merits of a decision of a public body. As in the words of Lord Hailsham L.C. in *Chief Constable of North Wales Police v Evans* [1982] 3 All ER141 at 143, “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 to and that it is no part of that purpose 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.” This principle was applied in the case of *State, Ex parte Pindani Kamwaza; Traditional Authority Dambe and others* [2007] MLR 378 (HC).
20. Judicial review proceedings are governed by Order 19 rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter the CPR). Order 19 rule 20(1) & (2) of the CPR provides as follows;
 - (1) *Judicial review shall cover the review of*__
 - (a) *a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or*
 - (b) *a decision, action or failure to act in relation to the exercise of a public function in order to determine*__
 - (i) *its lawfulness;*
 - (ii) *its procedural fairness;*
 - (iii) *its justification of the reasons provided, if any; or*
 - (iv) *bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.*

- (2) *A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.*
- (3) *Subject to sub-rule (3), an application for judicial review shall be commenced ex-parte with the permission of the Court.*
- (4) *The Court may upon hearing an ex parte hearing direct an inter-partes hearing.*
- (5) *Subject to sub-rule (6), an application for judicial review under sub rule (3) shall be filed promptly and shall be made not later than 3 months of the decision.*
- (6) *The Court may extend the period under sub-rule (5)*

A law, an action or decision of the Government or public officer, will be reviewed to determine its conformity with the Constitution. The court can also review a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons; or bad faith.

21. An application for judicial review proceedings cannot be filed without leave of the Court.

A Claimant is firstly required to obtain leave to commence judicial review proceedings.

The purpose for requiring leave is twofold;

- a) *to eliminate frivolous vexatious or hopeless applications for judicial review without the need for an inter partes judicial review hearing; and*
- b) *to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter partes hearing. (See **State, Ex Parte Pindani Kamwaza; Traditional Authority Dambe and others** [2007] MLR 378 (HC))*

At this stage, my duty therefore, is to determine whether the Claimants have disclosed a case fit for further investigations at a full hearing of the substantive application for judicial review, for which the Claimants seek leave. Once the court is satisfied that on the material before it, the Claimants have disclosed a case fit for judicial review, then leave should be granted (see **Ombudsman v. Malawi Broadcasting Corporation** [1999] MLR 329).

22. In determining that question whether a case for judicial review has been made, I bear in mind what was stated in the case of **The State v. Malawi Revenue authority Exp. Victor Ntuwa** Judicial Review Cause No. 1 of 2017 which laid down conditions' precedent for the granting of leave to commence judicial review proceedings. The court stated as follows;

It is also important at this juncture to backtrack and remember the matters that must obtain for an applicant to be granted leave. It is trite that a court faced with an application for leave ought to be satisfied that (a) the person intended to be made a respondent is amendable to judicial review, (b) the applicant has sufficient interest in the matter to which the application relates, (c) the matters/issues raised in Form 86A show a prima case fit for further investigations at the intended judicial review proceedings (d) the

*applicant does not have an alternative remedy or avenue that would resolve his or her complaint, (e) the application is made promptly, and in any event within three months from the date on which the grounds for the application first arose: see **Malawi Communication Regulatory Authority v. Makande and Another** MSCA Civil Appeal No. 28 of 2013 (Unreported).*

23. The Claimants have sufficient interest in the present proceedings as they are subject of the decision which is being challenged. As such they are entitled to commence the proceedings of judicial review.
24. The Director of ACB being a director of a public body is amenable to judicial review proceedings and as such the Claimants can commence judicial review proceedings against the Defendant.
25. The Defendant in response argued that the Claimants have an alternative remedy in that they would have challenged their arrest before the court in which they were being prosecuted. As it has been argued by the Claimants, the reliefs sought in the intended judicial review proceedings are not obtainable before the magistrate courts. It cannot therefore, be argued that the Claimants have an alternative remedy.
26. The issues remain to be determined are whether the application was filed promptly; and whether the matters raised by the Claimants are fit for further investigations during the intended judicial review proceedings.
27. To determine the issue of whether the application has been filed promptly one needs to understand what decision is being challenged. The Defendant in her sworn statement in opposition to the application expressed wonder as which decision the Claimants are challenging arguing that it is not clear as whether the Claimants are challenging the lawfulness of their arrest or the constitutionality of the Corrupt Practices (Amendment) Act 2022.
28. According to the application, the decision grounding the application is said to be the Defendant's decision prosecuting the Claimants under the Corrupt Practices Act without the consent of the DPP when the Corrupt Practices (Amendment) Act, 2022 which empowers the Defendant to do so is inconsistent with the Constitution. It is argued that the decision is unreasonable and unconstitutional because the Corrupt Practices (Amendment) Act, 2022 which empowers the Defendant to act in the way she did is inconsistent with section 99 of the Constitution.
29. When raising the issues for court's determination in the skeleton arguments, the Claimants listed the following two issues;

- a) *Whether the Court would grant the Claimants leave to move for judicial review against the Defendant's decision prosecuting the Claimants without the consent of the Director of Public Prosecutions.*
- b) *Whether the Court should grant the injunctive relief staying the execution of the impugned decision.*

30. In the Court's view, the Claimants correctly formulated the issues for determination at this stage of the proceedings. The formulation of the first issue is particularly important because the way the grounds upon which the reliefs for judicial review are being sought have been fashioned, one could be misled to think that what is being challenged is not the decision of the Defendant to prosecute the Claimants without the consent of the DPP but rather the Corrupt Practices (Amendment) Act which empowers the Defendant to prosecute without seeking consent of the DPP.

31. The grounds forming the basis for the judicial review is formulated as follows;

The Defendant's decision prosecuting the Claimants under the Corrupt Practices Act without the consent of the Director of Public Prosecutions is unreasonable and unconstitutional as the Corrupt Practices (Amendment) Act, 2022 which empowers the Defendant to do so is clearly inconsistent with section 99 of the Constitution, on the grounds that;

- a) *The Corrupt Practices (Amendment) Act, 2022 waters down the exclusive constitutional powers of the Director of Public Prosecutions who is the overall head of criminal prosecutions in the country under section 99 of the Constitution.*
- b) *The Corrupt Practices (Amendment) Act 2022 contravenes section 99 of the Constitution as it raised the status of the Director of Anti-Corruption Bureau to be at par with the constitutional status of the Director of Public Prosecutions regarding offences under the Corrupt Practices Act, when the Constitution had not been amended to so raise the status of the Anti-Corruption Bureau.*
- c) *The Corrupt Practices (Amendment) Act, 2022 causes discrimination against the Claimants herein as they are being prosecuted for offences under the Corrupt Practices Act without the consent and authority of the constitutional head of criminal prosecutions- the Director of Public Prosecutions, yet persons charged under other statutes in the jurisdiction are prosecuted under the authority of the constitutional head of criminal prosecutions.*
- d) *The Corrupt Practices (Amendment) Act 2022 is an unnecessary breach of the Constitution which creates unconstitutional equality before the law among persons accused of offences under the Corrupt Practices Act considering that the said Act does not bar the Director of Public Prosecutions from taking over or discontinuing selected cases filed by the Anti-Corruption Bureau.*
- e) *The Corrupt Practices (Amendment) Act 2022 is unreasonable and unnecessary breach of the Constitution as it does not achieve its objectives of*

ensuring complete independence of the Anti-Corruption Bureau since the Constitution gives the Director of Public Prosecutions power to take over and discontinue cases commenced by the Defendant in chosen cases.

32. Whilst the ground in the first paragraph talks about the decision of the Defendant being unreasonable and unconstitutional, paragraphs (a) to (e) are all about the unconstitutionality of the Corrupt Practices (Amendment) Act, 2022. Nothing in the grounds for judicial review faults the Defendant's decision-making process in arriving at the decision to prosecute the Claimants without the consent of the DPP. There is no suggestion that there was some procedural impropriety in arriving at the decision or that the justification for the decision is unreasonable or that there was some bad faith on the part of the Defendant in arriving at her decision. It would appear from the grounds that the unreasonableness and unconstitutionality of the decision of the Defendant to prosecute the Claimants without consent of the DPP lies not in the manner in which the decision was made but rather on the basis that the Corrupt Practices (Amendment) Act is inconsistent with section 99 of the Constitution.

33. In the substantive judicial review proceeding, the Claimants are seeking the following reliefs;

- a) *A declaration that the decision of the Defendant prosecuting the Claimants under the Corrupt Practices Act without the consent of the Director of Public Prosecutions is unreasonable and unconstitutional as the Corrupt Practices (Amendment) Act, 2022 empowering the Defendant to do so is inconsistent with the Constitution and therefore invalid;*
- b) *An order like certiorari quashing the decision of the Defendant.*
- c) *An order like certiorari quashing the Corrupt Practices (Amendment) Act, 2022 for being inconsistent with the Constitution.*

34. The relief sought in (a) states that the Corrupt Practices (Amendment) Act is inconsistent with the Constitution and is therefore invalid. Relief sought in (c) however suggests that the Corrupt Practices Amendment Act, 2022 is not invalid perse but that this Court must determine that it is inconsistent with the Constitution and therefore invalid.

35. The starting point is to say that as we stand, the Corrupt Practices (Amendment) Act, 2022 is valid law having been passed in Parliament, assented to by the President and gazetted as required by law and not having been declared invalid by any court of law. The basis for faulting the decision of the Defendant cannot therefore be that the Corrupt Practices (Amendment) Act is inconsistent with the Constitution and therefore invalid. If the

Claimants want to challenge the validity of the law, then the Attorney General should have been sued and the notice for judicial review should have indicated that the subject of the intended judicial review is the law (the Corrupt Practices (Amendment) Act. As argued by the Defendant, where a Claimant is seeking a declaration in relation to an Act or subsidiary legislation, the Attorney General must be named as the Defendant. This comes clear from Order 19 rule 23 (2) which provides as follows;

An application under sub rule (1) shall name as defendant —

(a) for a declaration in relation to an Act or subsidiary legislation, the Attorney General;

(b) for an order that a person shall do or shall not do something, the person in question; and

(c) for an order about a decision, the person who made or should have made the decision.

36. By not mentioning the Amended Act as the subject of the intended judicial review and by not naming as Defendant the Attorney General and in view of the framing of the issues for determination in these proceedings, this Court finds that the decision subject of the intended judicial review proceedings is the Defendant's decision to prosecute the Claimants without the consent of the DPP.
37. In as far as that decision is concerned, it was made promptly. The Claimants were arrested on 14th April 2023 and taken before the magistrate court where they were charged and later released on bail. The present application was initially filed on 30th June 2023 which is within the three months provided for in the law. The application was therefore filed promptly in compliance with the procedural requirements.
38. The decision to prosecute the Claimants is said to be unconstitutional and unreasonable. I have combed through the sworn statement in support of the application and the grounds upon which the review is being sought and it does not appear to me that what is being challenged is the decision-making process of the Defendant but rather the decision itself. In the facts in support of the application, the Claimants have argued that the Defendant does not have the mandate to prosecute them without the consent of the DPP; that the prosecution without consent of the DPP violates the Constitution in several ways as the Defendant is no longer subservient to the DPP; that the decision is inconsistent with the Constitution and that they believe that they will suffer breach of their constitutional right to fair trial if the Defendant is allowed to prosecute them without consent. It is the Claimants submission

that the decision to prosecute them without consent is unlawful, unreasonable, unconstitutional and procedurally improper.

39. At the centre of the application is the Corrupt Practices (Amendment) Act, 2022 which came into force on 13th September 2022. The Corrupt Practices (Amendment) Act, 2022 has two sections only. Section 1 is the short title and section 2 is the main provision of the Act which provides as follows;

The Corrupt Practices Act is amended by repealing section 42.

40. The Director of the ACB derives the power to prosecute from section 10(1)(f) of the Corrupt Practices Act. The only limitation to the power to prosecute is that it is subject to the direction of the DPP. The said section 10(1)(f) provides as follows;

The functions of the Bureau shall be to— subject to the directions of the DPP, prosecute any offence under this Act.

41. The Claimants have argued that the Defendant has no mandate to prosecute without consent of the DPP. Prior to the amendment, the Director of ACB was required to obtain consent to prosecute from the DPP. Section 42 of the Corrupt Practices Act, clearly provided that no prosecution could be instituted under Part IV except by or with the consent of the DPP. The 2022 amendment has removed the requirement of obtaining consent of the DPP as the section creating the requirement has been repealed. The requirement for obtaining consent having been removed, the Claimants cannot be heard to say that the Defendant has no mandate to prosecute them without consent. The commencement of prosecution by the Defendant against the Claimants without the consent of the DPP is on the basis of the law as it stands following the amendment. The argument that the prosecution without the consent of the DPP is unlawful is therefore without basis.

42. The Claimants have also argued that the decision to prosecute them without consent of the DPP who is the constitutional head of criminal prosecution violates their right to equality before the law with other suspects in criminal proceedings in the jurisdiction. It was argued in the oral submissions that with the amendment, the DPP is no longer engaged in all cases but only gets engaged in selected cases where he is interested in and that this is inequality. It was further argued that the amendment creates discrimination against the Claimants in that the Claimants are being prosecuted without the authority of the DPP yet persons prosecuted under other statutes are prosecuted under the authority of the DPP.

43. The power to prosecute all criminal cases is vested in the DPP under section 76 of the Criminal Procedure and Evidence Code which provides as follows;

- a) *The DPP shall in accordance with, and subject to, section 99 of the Constitution, have vested in him the right and be entrusted with the duty of prosecuting all crimes and offences against the laws of Malawi.*
- b) *Any officer, legal practitioner or other person appointed to be a public prosecutor under section 79 shall, in carrying out his duties as such, be under the direction and control of the Director of Public Prosecutions and be bound to conform to any direction which may be given to him by the Director of Public Prosecutions*

44. Section 79 of the CP & EC provides as follows;

- a) *The Director of Public Prosecutions may, by writing under his hand, appoint generally, or in any case or any class of cases, any person employed in the Public Service or such other legally qualified person to be a public prosecutor.*
- b) *Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions*

45. What comes clear from both sections 76 and 79 of the CP & EC is that the power to prosecute criminal cases is vested in the DPP and for any other person to prosecute cases, he has to do so under the authority of the DPP. Any person whether employed in the public service or not can only prosecute cases in court upon being appointed by the DPP and once appointed, the appointee has to act under the directions of the DPP.

46. The Police Act in section 4 confers powers to police officers to prosecute cases whereas section 10(1)(f) of the Corrupt Practices Act confers powers to prosecute on the officers of ACB. Section 10(1)(f) of the Corrupt Practices Act specifically subjects the ACB's powers to prosecute to the directions of the DPP. Even though the Police Act and the Corrupt Practices Act confer power to prosecute on police and ACB officers respectively, the officers have to be generally or specifically appointed by the DPP to prosecute offences in accordance with section 79 of the CP & EC. With or without section 42 of the Corrupt Practices Act, officers of the ACB cannot prosecute without the authority of the DPP granted under section 79 of the CP & EC. The removal of section 42 of the Corrupt Practices Act therefore has not changed the position of the law in as far as section 79 of the CP & EC is concerned.

47. Once they are appointed, police prosecutors proceed to prosecute offences under the Penal Code which are the bulk of criminal offences in the country, without requirement to obtain specific authority to prosecute individual cases except for few instances where the charging provisions so specifically require. The Bulk of the criminal offences under the Penal Code are prosecuted under the general grant of authority to prosecute granted under section 79 of the CP & EC but of course the exercise of such powers is subject to the directions of the DPP. Prosecutors from the ACB are no different. They are appointed under section 79 of

the CP & EC and do exercise their powers subject to the directions of the DPP. With the removal of the requirement of consent to prosecute, prosecutors from ACB just as their colleagues, will prosecute without the requirement to obtain authority to prosecute individual cases as long as they have the general authority to prosecute as granted under section 79. The removal of the requirement to obtain consent to prosecute has not created any distinction in the manner in which persons prosecuted under the Corrupt Practices Act and under the Penal Code will be treated. The argument that the amendment will occasion discrimination or inequality in treatment of the Claimants and other suspects charged under other statutes cannot therefore hold water.

48. Counsel for the Claimants argued that the Claimants are of the view that the removal of the requirement to obtain consent means that only in their case is no consent required but in cases under other statutes, consent is required. Those other statutes where consent is required have not been stated. The Claimants ought to have provided a list of such statutes and provisions which provide for the requirement of consent to demonstrate that indeed the amendment which removes the requirement of consent is discriminatory against the Claimants.
49. Offences under the Penal Code which forms the bulk of criminal cases in the jurisdiction are prosecuted by police prosecutors without the need to obtain consent to prosecute from the DPP. Once appointed as public prosecutors under section 79 CP & EC, police prosecutors prosecute offences under the Penal Code without obtaining specific consent from the DPP to prosecute individual cases except in few selected offences where charging provisions so provide. Without reference to specific provisions of the law which demonstrated the alleged inequality, the court has difficulties appreciating the argument. The argument is therefore found to be without merit.
50. The Claimants have also argued that the decision to prosecute them without the consent of the DPP will result in breach of their right to fair trial. It has not been demonstrated as to how their right to fair trial will be violated by the absence of consent. Section 42(2)(f) of the Constitution provides for the right to fair trial. According to the section the right to fair trial includes;
 - (i) *to public trial before an independent and impartial court of law within a reasonable time after having been charged;*
 - (ii) *to be informed with sufficient particularity of the charge;*
 - (iii) *to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;*

- (iv) *to adduce and challenge evidence, and not to be a compellable witness against himself or herself;*
- (v) *to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;*
- (vi) *not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;*
- (vii) *not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted, save upon the order of a superior court in the course of an appeal or review proceedings relating to that conviction or acquittal;*
- (viii) *to have recourse by way of appeal or review to a higher court than the court of first instance;*
- (ix) *to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and*
- (x) *to be sentenced within a reasonable time after conviction*

51. There is no suggestion that any of the above stated rights would be violated with the absence of consent to prosecute from the DPP. The Court therefore fails to appreciate how the right to fair trial has been or will be violated by the fact that the Claimants would be prosecuted without the consent of the DPP.
52. The Claimants also argued that the decision to prosecute them without consent of the DPP violates the Constitution in several ways as the Defendant is no longer subservient to the office of the DPP. In the grounds upon which the reliefs are sought, the Claimants argued that the Corrupt Practices (Amendment) Act, 2022 waters down the exclusive constitutional powers of the DPP who is the overall head of criminal prosecutions in the country under section 99 of the Constitution and that the amendment raises the status of the Director of ACB to be at par with that of the DPP.
53. I do not know what the Claimants meant by the word subservient but one of the dictionary meanings of subservient is subordinate in capacity or function. As already noted above, the power of the ACB to prosecute is exercised subject to the directions of the DPP both as provided in section 10(1)(f) of the Corrupt Practices Act and section 79 of the CP & EC. With or without the requirement for consent, under sections 10(1)(f) of the Corrupt Practices Act and section 79 of the CP & EC, the ACB still prosecutes cases subject to the directions of the DPP and this position has not changed with the repeal of section 42 of the Corrupt Practices Act.

54. Under section 99 of the Constitution, the DPP may discontinue cases commenced by any prosecuting authority and the ACB is no exception. The removal of the need for consent has also not affected section 99 of the Constitution which means that even without section 42 of the Corrupt Practices Act, the DPP still has the power to take over or discontinue proceedings commenced by the ACB in exercise of their prosecutorial powers. The DPP still remains the overall in charge of prosecution of criminal offences in Malawi as provided for in section 99 of the Constitution and section 76 of the CP & EC. It cannot be said therefore that the repeal of section 42 has raised the status of the Director of ACB to be at par with that of the DPP.
55. The Claimants further argued in the grounds for seeking judicial review that the amendment is unreasonable and unnecessary breach of the Constitution as it does not achieve its objective of ensuring complete independence of the ACB since the Constitution gives the DPP powers to take over and discontinue cases commenced by the Director of ACB. The Claimants acknowledge that the Constitution gives power to the DPP to take over or discontinue cases commenced by the ACB and that even with the repeal of section 42 of the Corrupt Practices Act, the DPP still retains such a power. This, as already stated above means that the amendment has not in any way interfered with the DPP's powers in section 99 of the Constitution. If the effect of the argument is to mean that the ACB is still not independent despite the repeal of section 42 of the Corrupt Practices Act, does that mean then that the Constitution is breached? I think not. If anything, it cannot be a concern for the Claimants. It should be a concern for the ACB that they are still not independent despite the repeal of section 42 of the Corrupt Practices Act.
56. From the forgoing, the court is not satisfied that the Claimants have raised an arguable case requiring further examination at full judicial review hearing. I am not satisfied that there is sufficient basis for granting leave to commence judicial review proceedings. The application for permission to commence judicial review is therefore not granted.
57. The Claimants sought interim reliefs pending the hearing of judicial review. The interim reliefs were as follows;
- a) An order that the leave should operate as an injunctive relief staying the prosecution of the Claimants under Criminal Case No. 430 of 2023 in the Senior Resident Magistrate Court sitting at Lilongwe until the determination of the judicial review.
 - b) Alternatively, if the Court is of the view that the matter herein relates to the application and interpretation of the provisions of the Constitution, the matter

be referred to the Chief Justice for certification in accordance with Order 19 rule 7(1) of the CPR

- c) An order that the hearing and determination of the judicial review be expedited
- d) An order that the hearing and determination of the judicial review be before a single judge of the high court in open court.

58. The interim reliefs were to be granted in the event that leave for judicial review has been granted. Since leave has not been granted, there is no basis for granting the same.

59. All in all, the application is dismissed with costs.

Made in Chambers on ^{for} 24 day of **August, 2023** at Lilongwe.



V. Palikena-Chipao
JUDGE