IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICAL REVIEW CASE NUMBER 6 OF 2023

BETWEEN:

THE STATE On the application of:

THE MALAWI LAW SOCIETY	**CLAIMANT**
AND	
PROSECUTOR LEVISON MANGANI, SACP	**1st DEFENDANT**
THE CHIEF RESIDENT MAGISTRATE (LILONGWE)	**2nd DEFENDANT**
THE SECRETARY TO THE PRESIDENT AND CABINET	**3rd DEFENDANT**

CORAM: JUSTICE M.A. TEMBO,

P. Mpaka and T. Mwabungulu, Counsel for the Claimant
C. Gondwe, Counsel for the Defendants
Makhambera, Court Clerk

ORDER

1. This is the order of this Court on the defendant's notice of preliminary point requiring dismissal of the claimant's notice of scheduling conference of the judicial review herein and dismissal of the whole matter for being academic and abuse of the court process, the subject matter of the judicial review having been withdrawn in its entirety. The claimant contested the preliminary point.
2. The background to the preliminary point against the scheduling conference taken out by the defendants herein is as follows. On 6th February, 2023, the claimant obtained permission to apply for a judicial review of some impugned

decisions of the 1st defendant, 2nd defendant and 3rd defendant, pertaining to the Director of the Anti-Corruption Bureau, Ms. Martha Chizuma. The impugned decisions are, namely, the decision of the 1st defendant on 25th January, 2023 to charge the Director of the Anti-Corruption Bureau before the 2nd defendant of criminal charges of making use of speech related to a certain now publicly well-known audio recording made in January, 2022 and the decision of the 3rd defendant Colleen Zamba on 31st January, 2023 to interdict the Director of the Anti-Corruption Bureau from exercising her functions and duties in view of the said criminal charges.

3. The claimant having obtained the permission to apply for judicial review, thereby commenced the judicial review *ex parte*, or without notice to the defendants, in terms of Order 19 Rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules. The claimant then served the application for judicial review on the defendants as required under Order 19 Rule 23 (3) (a) of the Courts (High Court) (Civil Procedure) Rules.
4. Subsequently, the defendants applied to this Court, without notice to the claimant, on 7th February, 2023 to stay the permission obtained by the claimant to apply for judicial review herein pending the defendants' application to discharge the permission. That application by the defendants was declined by this Court by Order dated 8th February, 2023.
5. Then, on 11th February, 2023 the 1st defendant entered a discontinuance in the criminal proceedings against the Director of the Anti-Corruption Bureau before the 2nd defendant. And on 13th February, 2023, the 3rd defendant cancelled the interdiction order against the Director of the Anti-Corruption Bureau citing the discontinuous of the criminal proceedings herein entered by the 1st defendant before the 2nd defendant.
6. Thereafter, on 24th February, 2023, the claimant filed the notice of scheduling conference that the defendants object to by their preliminary point herein. The notice of scheduling conference was filed by the claimant pursuant to Order 19 rule 25 of the Courts (High Court) (Civil Procedure) Rules which provides that the Court shall set down a date for a scheduling conference not later than twenty-eight days from the date of filing the defence and that Order 14 shall, with necessary adaptation, apply to the application for judicial review. By the trial check-list filed alongside the notice of scheduling conference, in line with Order 14 Rule 2 (3) of the Courts (High Court) (Civil Procedure) Rules, the claimant seeks that this Court determines the present judicial review application by a consideration of the documents on the record only and that

the facts as stated by the claimant be taken as undisputed since the defendants never filed a defence.

7. It is worth noting that Order 19 Rule 24 of the Courts (High Court) (Civil Procedure) Rules provides that the defendant, shall, within fourteen days of the service of the application for judicial review, file a defence supported by sworn statement. In the present case, the defendants never filed a defence to the claimant's application for judicial review. However, what the 1st and 3rd defendant did was to withdraw the impugned decisions which are the subject matter of the claimant's application for judicial review in this matter.
8. The scheduling conference was initially set for 17th March, 2023 but due to other circumstances beyond the control of this Court had to be rescheduled. In the meantime, the defendants filed the present notice of a preliminary point requiring dismissal of the notice of scheduling conference. The preliminary point is based on the ground that the subject matter of the judicial review was withdrawn in its entirety by reason of the discontinuance of the criminal proceedings and the cancellation of the interdiction against the Director of the Anti-Corruption Bureau alluded to herein. However, some other issues are also raised by the defendant alongside the main preliminary point as will be seen shortly from the defendant's sworn statement in support of the preliminary point.
9. The defendants filed a sworn statement in support of the preliminary point seeking dismissal of the scheduling conference. That sworn statement was made by Counsel Chancy Gondwe for the defendants in which he stated that the defendants were served with a notice of scheduling conference set down for 17th March, 2023. He then indicated that the defendants are surprised that the claimant has moved the Court to set the matter herein down for scheduling conference when the claimant has not served the defendants with an application for the substantive judicial review. He stated further that he personally went through the Court file and he noticed that the defendant has not filed any motion/application for judicial review. He then asserted that since the defendants have not been served with any originating process for substantive judicial review, and there is clearly no such process on the court record, it is clear that the notice of scheduling conference which among others seeks a default judgment against the defendants is irregular, premature and embarrassing.
10. Counsel Gondwe then asserted that it is also very clear that the claimant obtained the permission to apply for judicial review and injunction against the

decisions of the defendant in bad faith as the claimant neither filed nor served the substantive application for judicial review to support the permission and interlocutory injunction earlier obtained.

11. He then asserted that, apart from the foregoing, the defendants have noted that the claimant is abusing the court process by pursuing this matter for academic purposes. And that the claimant is seeking a gratuitous opinion of this Court on a matter which is already settled. He pointed out that the two issues subject of the judicial review herein no longer exist given that the criminal proceeding against the Director of the Anti-Corruption Bureau instituted by the 1st defendant was discontinued before the 2nd defendant and the interdiction of the Director of the Anti-Corruption Bureau made by the 3rd defendant was cancelled by the said 3rd defendant. He added that when the defendants appeared before Honourable Justice of Appeal Katsala in the Supreme Court of Appeal on a fresh application for stay of permission to apply for judicial review herein on 13th February, 2023, the defendants applied for an adjournment of the matter and the Justice of Appeal did not allow the adjournment as he noticed that the further pursuit of the matter would be academic and a waste of resources since the basis of the criminal proceedings which formed the basis of the interdiction of the Director of the Anti-Corruption Bureau had been discontinued.
12. He then indicated that this Court will observe that even assuming that the claimant filed the substantive motion for judicial review, which the claimant has not done and will not do since the impugned decisions are no longer there, the defendants would still move this Court to dismiss with costs the notice of scheduling conference and the whole of the matter herein on the ground that the claimant is abusing the court process by pursuing a matter that has been rendered academic.
13. He then stated that, alternatively, a scheduling conference can only be held where a defence has been filed and served and that in the present matter the defendants could not file a defence where the claimant has not filed the substantive application for judicial review. He then asserted that in the absence of a defence, the claimant should have applied for exemption of the matter from a scheduling conference and proceeded with a notice of hearing if it is so minded to proceed with such an academic exercise at the expense of limited court resources. He therefore sought that the notice of scheduling conference and the entire matter be dismissed with costs.

14. In support of the above position the defendants alluded to a number of case authorities to the effect that courts will dismiss cases where academic questions are raised and there is no live dispute between the parties. see *The Registered Trustees of the Women and Law (Malawi) Research and Education Trust v The Attorney General and others* Constitutional case number 3 of 2009 (High Court), *The University of Swaziland v Duduzile Dlamini-Nhlengetwa* (74/2014) [2015] SZSZ 32 (29 July 2015), *ABSA Bank Limited v Van Resberg* (228/13) ZASCA 34 (28 March 2014), *Maziko Sauti-Phiri v Privatization Commission and The Attorney General* Constitutional Case number 13 of 2005 (High Court), *Ainsbury v Millington* (1987) WLR 379, *Railumu v Commander Republic of Fiji Military Forces* (2006) FSCA 7 abu 2004 (unreported) (24 March 2006) and *Ram Reddy & Others v The Indian Marga Ikya Sangam and Others* Civil Appeal No ABU 007 of 2012 (High Court civil action No. HBC 020 of 2003L). The defendants then insisted that there is no live dispute in the present case and that all that remains to be decided is academic and that the scheduling conference be dismissed along with the entire matter.
15. This Court also asked both parties to address this Court on the applicability of Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules, on ending proceedings early, which provides that the Court may enter judgement for the claimant without a hearing. The defendants contended that there is no room for a default judgment on judicial review proceedings. And that what a claimant can do in the case where there is no defence on a judicial review application is to apply for the matter to be exempted from scheduling conference and that the matter be heard, upon which the Court can then make its determination. The defendants also indicated that where there is no defence then this Court can proceed on its own motion under Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules to end the judicial proceedings early on documents only but not on an application by a claimant. It was not indicated however on what basis an exemption from scheduling conference can be had, in terms of the prevailing Rules.
16. On its part, the claimant filed a sworn statement in opposition to the defendants' notice of preliminary point. The sworn statement of the claimant as made by Counsel Chrispin Ngunde, its Chief Executive Officer. He stated that once the application for judicial review is commenced *ex parte*, the rules of procedure do not require the claimant to file a separate application for judicial review.

17. He then asserted that despite the discontinuance of the criminal proceedings against the Director of the Anti-Corruption Bureau and the cancellation of the interdiction of the said Director herein, some legal questions still remain unresolved on the judicial review application in terms of the reliefs sought by the claimant in paragraph 1 and 2 of the application for judicial review.
18. He then asserted that the Courts (High Court) (Civil Procedure) Rules do not provide guidance on how a claimant should proceed where the defendant does not file a defence. He added that, however, the Court may in that case give further directions on the conduct of the matter at a scheduling conference. He therefore sought dismissal of the preliminary point with costs.
19. In its arguments, the claimant essentially contended that indeed a case will be academic or moot where the subject matter no longer exists and that such a case must not be determined by the Court as submitted by the defendants. It however pointed out that although in the present matter the criminal proceedings and the interdiction against the Director of the Anti-Corruption Bureau were withdrawn and no longer exist, this Court should still make a determination of the matter given that this case falls within the exception to this general rule on moot and academic cases because the present case presents a scenario where the impugned conduct is 'capable of repetition yet evading review' by this Court. The claimant pointed out that the High Court took a similar view and was inspired by this exception to the general rule to determine a case even though the subject matter of the case was withdrawn and the case was otherwise rendered academic or moot. The claimant alluded to the case of *Kathumba and Others v President of Malawi and Others* Constitutional case number 1 of 2020 (High Court) (unreported) (The *Kathumba case*) in which the Court proceeded to determine the constitutionality of 'lockdown' Regulations during the covid-19 pandemic although by the time of the hearing of the case the said Regulations had been withdrawn which would ordinarily have rendered the proceedings academic but for the fact that the regulations fell in the category of such as were 'capable of repetition yet evading review' of the Court.
20. The claimant observed that in the *Kathumba case* the Court also adopted the view of the High Court in the matter of *The State, On the application of the Human Rights Defenders Coalition* Judicial Review case number 33 of 2020 (High Court) (unreported), (*The State, On the application of the Human Rights Defenders Coalition case*), where the Court went ahead to do a judicial review of a matter in which the impugned decision had since been withdrawn relating

to the forced leave of the Chief Justice and another Justice of Appeal by the President and the Secretary to Cabinet as the review was deemed to be on a matter of interest to the public and the withdrawal of the forced leave was not a withdrawal of the matter by the claimant under Order 12 Rule 42 of the Courts (High Court) (Civil Procedure) Rules.

21. The claimant then contended that the discontinuous of the criminal proceedings against the Director of the Anti-Corruption Bureau herein does not preclude the recommencement of the said proceedings. And that this is clear from the terms of the discontinuous itself. And that in the circumstances, the criminal proceeding against the Director of the Anti-Corruption Bureau, and the accompanying interdiction of the said Director, is capable of repetition yet it may evade review by this Court only by reason of the fact that the two impugned decisions were withdrawn by the defendants in short order herein.
22. The claimant then sought that it be granted the reliefs sought in the judicial review application on this Court's consideration of the documents on the record in circumstances where the defendants have not filed any defence and that this Court ends the proceedings early as provided in Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules which allows that this Court may enter judgment for a claimant without a hearing.
23. Upon hearing the parties and considering their respective arguments outlined above, this Court would like to agree with the claimant that a claimant shall seek to commence judicial review proceedings by filing the application for permission to apply for judicial review with the Court *ex parte*. Once that permission application is granted by the Court, the judicial review proceedings are commenced and there is no further requirement to file anything else other than to serve the defendant with the permission application which also constitutes the judicial review application. see Order 19 rule 20 (3) Courts (High Court) (Civil Procedure) Rules. This must be contrasted with the procedure that applied under the old Rules of procedure whereby an applicant had to initially get leave to apply for judicial review *ex parte* and once granted the applicant had to then make the judicial review application by originating motion. See Order 53 Rules 3 and 5 of the Rules of Supreme Court respectively. In the circumstances, the claimant had properly commenced judicial review proceedings before this Court to which the defendant was duty bound to file a defence upon being served, which they never filed. The defendants cannot therefore argue that there is no judicial review application before this Court.

24. This Court also agrees with both the claimant and the defendants that as far as a scheduling conference is concerned in judicial review proceedings, the procedure is that a notice of scheduling conference shall be filed by the claimant once a defendant files a defence within the time provided by the Rules for filing a defence. See Order 19 rule 25 of the Courts (High Court) (Civil Procedure) Rules.
25. However, as noted by the parties and this Court, the Courts (High Court) (Civil Procedure) Rules do not explicitly provide for how the Court is to proceed where no defence is filed by the defendant within the time allowed for filing a defence. This Court has to provide guidance on what should happen in that regard.
26. This Court is of the view that where no defence is filed within the time provided for filing the said defence under the Rules, after the application for judicial review is served on the defendant, it should be open to the claimant to either file a notice of scheduling conference as submitted by the claimant or, alternatively, to apply to this Court to end the proceedings early in terms of Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules. In either case, the Court shall have the power to actively manage the case and further the overriding objective of the Rules to deal with proceedings justly pursuant to Order 1 Rule 5 of the Courts (High Court) (Civil Procedure) Rules. In that case, the Court may either make further directions on the conduct of the matter, say as to filing of any further documents such as submissions by both parties or indeed ending the proceedings early by considering the application and determining the same on the papers only as already filed by the claimant, without a hearing of the parties.
27. In the present matter, this Court considered the application to commence judicial review proceedings filed by the claimant and granted the same. That application is the application for judicial review. As that application stands today, this Court sees no point in prolonging the proceedings where the defendants never filed a defence to the same. Prolonging these proceedings will not be just as it will result in unnecessary time and costs being expended on part of the claimant and this Court when the matter is undefended and uncontested. That would run counter to the overriding objectives of the Rules enshrined in Order 1 Rule 5 of Courts (High Court) (Civil Procedure) Rules which requires that matters be dealt with justly, including by ensuring that matters are dealt with expeditiously whilst saving time and costs, commensurate with the nature of the matter. This Court therefore agrees with

the claimant that this is an appropriate case in which it should end proceedings early and invoke Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules and consider whether it may enter judgment for the claimant herein without a hearing but only on consideration of the documents on the claimant's application.

28. On the question whether these proceedings are academic or moot, this Court agrees with the claimant that the present proceedings fall in the exception to the general rule that proceedings will be dismissed or discontinued where the subject matter of the proceedings or a dispute no longer exists. The exception in question relates to review of impugned governmental action or decisions that are 'capable of repetition yet evading review' as indicated in the *Kathumba case.* This Court is less persuaded by the reasoning in the case of *The State, On the application of Human Rights Defenders Coalition* as this Court is of the view that the more principled approach and the most persuasive one is as embodied in the exception to the general rule as expressed in the *Kathumba case* being the principle relating to review of governmental action or decisions that are 'capable of repetition yet evading review'.
29. The two impugned withdrawn decisions herein are clearly capable of repetition as the discontinuous entered by the 1st defendant before the 2nd defendant does not preclude recommencement of the criminal proceedings herein. And, once those criminal proceedings are recommenced, the interdiction may be repeated by the 3rd defendant. All the while, the defendants would have evaded review of their impugned decisions herein. This is why it is vital at this stage that this Court should proceed to determine the judicial review application herein so that the issues are well and truly resolved in the circumstances of this matter in terms of the position at law.
30. In that connection, this Court takes judicial notice of the fact pointed out by the claimant that the Director of the Anti-Corruption Bureau has been taken before so several criminal courts by all sorts of people ion the basis of the same leaked audio herein, culminating in the prosecution decision by the 1st defendant before the 2nd defendant herein. This shows clearly that this matter has been looming and still looms. The decision of this Court cannot therefore be moot or academic contrary to the submission by the defendants.
31. In the premises, the preliminary point raised by the defendants to dismiss the scheduling conference for being irregular and the entire judicial review application for being academic or moot is declined.

32. This Court therefore shall next consider the judicial review application on the documents only in a bid to end these proceedings early, pursuant to Order 12 Rule 4 (1) of the Courts (High Court) (Civil Procedure) Rules, as requested by the claimant at the scheduling conference.
33. By the present judicial review application, the claimant seeks a review of the decision or proceedings of the defendants contained or reflected in the Summons and Charge Sheet under Criminal Case No. 236 of 2023 of 25th January 2023 and in the Interdiction Order of 31st January 2023 under Reference No. SPC/S/001 to respectively issue a Summons and Charge Sheet and an Interdiction Order against the current occupant of the office of Director of Anti-Corruption Bureau on account of a leaked audio recording without any allegation of bad faith in either the Summons, Charge Sheet or Interdiction Order.
34. The Claimant seeks the following reliefs on this judicial review application:

i. A declaration that the true construction of sections 12, 13, 30 and 98 of Constitution as read with sections 4(3), 5B, 22 and 51A of the Corrupt Practices Act, the occupant of the office of the Director of the Anti-Corruption Bureau in Malawi is immune from any civil or criminal proceedings in respect of any act or thing done or omitted to be done unless bad faith in respect of such act or thing is alleged.
ii. A declaration that on the true construction of sections 12, 13, 30 and 98 of Constitution as read with sections 4(3), 5B, 22 and 51A of the Corrupt Practices Act, the occupant of the office of the Director of the Anti-Corruption Bureau in Malawi is immune from any civil or criminal proceedings in respect of any act or thing done or omitted to be done unless bad faith in respect of such act or thing is alleged in order that to enhance the independence of the Anti-Corruption Bureau for purposes of protecting the public interest in the pursuit of the objects and exercise of powers of the Bureau set out in section 10 and 11 of the Corrupt Practices Act.

iii. A declaration that the decisions of the defendants made between 25th and 31st January 2023 to respectively issue a Summons and Charge Sheet and an Interdiction Order against the current occupant of the office of Director of Anti-Corruption Bureau, Ms. Martha Chizuma, on account of alleged criminal conduct based on a leaked audio recording without any allegation of bad faith in the recorded conversation is ultra vires the defendants, unconstitutional and amounts to impairment of the immunity clause and interference with the independence of the Bureau and is contrary to public interest for breach of the purpose and intent of sections 12, 13, 30 and 98 of Constitution as read with sections 4(3), 5B, 22 and 51A of the Corrupt Practices Act.

iv. A declaration that the decision of the 3rd defendant made on 31st January 2023 to issue an Interdiction Order against the current occupant of the office of Director of Anti-Corruption Bureau, Ms. Martha Chizuma, on account of alleged criminal conduct based on a leaked audio recording without any allegation of bad faith or without any express directive from the President of the Republic of Malawi for such suspension and without identifying any public interest served in the interdiction or suspension and at a time when the President of the Republic of Malawi has in the public interest expressly and publicly endorsed the current occupant of the office of the Director as the President's champion in the fight against corruption, is unconstitutional and amounts to impairment of the immunity clause, interference with the independence of the Bureau and is contrary to public interest for breach of the purpose and intent of sections 12, 13, 30, 88 and 98 of Constitution as read with sections 4(3), 5B, 22 and 51A of the Corrupt Practices Act.

v. A declaration that in the circumstances, the defendants' decisions or proceedings are unconstitutional, unlawful,

unreasonable in the *Wednesbury* sense, *ultra vires,* procedurally unfair and unjustifiable.

vi. An order akin to certiorari quashing the decisions of the defendants.

vii. A declaration that in the premises of the declarations and orders hereinabove, the defendants are guilty of misfeasance in and abuse of public office.

viii. An order for costs of these proceedings.

ix. And that all necessary and consequential directions be given and any further or other relief as the Court deems just and appropriate in the circumstances.

35. The claimant indicated that the issue arising on this judicial application is whether the defendants have correctly appreciated and discharged their duties under sections 12, 13, 30, 88 and 98 of the Constitution as read with sections 4(3), 5B, 10, 11, 22 and 51A of the Corrupt Practices Act to promote the freedom, independence and immunity of the occupant of the office of the Director of the Anti-Corruption Bureau in Malawi for purposes of protecting the public interest in the fight against corruption in Malawi.
36. This Court wishes to quickly point out that section 98 of the Constitution cannot have application in this matter as it establishes the office of Attorney General and makes provision relating for the same. The present matter has nothing to do with the said provision. Any declaration that may be made in this matter will therefore excluded any reference to section 98 of the Constitution.
37. It is convenient that this Court should reproduce some of the text of the sections referred to above. Section 6 of the Constitution provides that save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this Constitution in a manner prescribed by an Act of Parliament.
38. And then, section 10 (2) of the Constitution provides that, in the application of all laws and in the resolution of political disputes the provisions of this

Constitution shall be regarded as the supreme arbiter and ultimate source of authority.

39. And, section 12 of the Constitution provides on the founding principles of the Constitution as follows:

> (1) This Constitution is based on the following underlying principles-
>
> (a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
>
> (b) all persons responsible for the exercise of State power shall do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
>
> (c) …
>
> (2)…

40. Section 13 of the Constitution provides on principles of national policy, namely, that the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving goals in the various areas specified including administrative justice and public trust and governance.

41. It is worth noting that, in terms of section 14 of the Constitution, the principles of national policy are directory in nature but that courts shall be entitled to have regard to the same in interpreting or applying the Constitution or any law or in determining the validity of decisions of the executive.

42. In section 30 of the Constitution it is provided as follows:

> (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social and cultural and political development…
>
> (2) The State shall take all necessary measures for the realization of the right to development. Such measures…
>
> (3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
>
> (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

43. In section 88 of the Constitution provides that:

(1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall, as Head of State, defend and uphold the Constitution as the supreme law of the Republic.
(2) The President shall provide executive leadership in the interest of national unity in accordance with this Constitution and the laws of the Republic.

44. It is also convenient for this Court to set out some of the provisions in the sections of the Corrupt Practices Act that have been cited by the claimant. Section 4 (3) of the Corrupt Practices Act provides that the Bureau shall exercise its functions and powers independent of the direction or interference of any other person or authority.

45. In section 5B of the Corrupt Practices Act it is provided that:

(1) The Director may, apart from the Attorney General, instruct any legal practitioner-
(a) to provide legal representation to the Director in any civil proceedings before any court, including any proceeding concerning appeals against the decisions of the Director on any aspect of the exercise of the functions, duties and powers of the Bureau or the Director; or
(b) generally to provide legal advice or to act for or on behalf of the Director.

46. In section 10 of the Corrupt Practices Act it is provided that:

(1) The functions of the Bureau shall be to-
(a) take necessary measures for the prevention of corruption in public bodies and private bodies, including, in particular, measures for-
(iii) disseminating information on the evil and dangerous effects of corrupt practices on society;

47. In section 11 of the Corrupt Practices Act it is provided that:

(1) For the performance of the functions of the Bureau under this Act, the Director may-

(e) do or perform such other acts or things as are reasonably necessary or required for the exercise of the functions of the Bureau and performance of her duties.

48. In section 22 of the Corrupt Practices Act it is provided that no action or other proceedings shall lie against the Director, the Deputy Director or other officer of the Bureau in respect of any act or thing done or omitted to be done in good faith in the exercise of her duties under this Act.
49. And in section 51A of the Corrupt Practices Act it is provided as follows:

> (1)Any person believing that the public interest overrides the interest of the institution, organization or office in or under which he serves or to which he is subject or overrides the interest of a particular community, association or society to which he belongs, and any other person whosoever, may inform the Bureau or the police of an alleged or suspected corrupt practice, or other offence connected therewith, which he knows or believes is being perpetrated by or in that institution, organization, office, community, association or society.
>
> (2)Except as provided in subsections (3) and (4), no information relating to a whistle-blower or to any other informer who has provided information to the Bureau or to the police pursuant to subsection (1) as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding, and no witness shall be obliged or permitted to disclose the name or address of such whistle-blower or other informer, or state any matter which might lead to his discovery.
>
> (3) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain any entry in which the whistle-blower or other informer is named or described or which might lead to his discovery, the court before which the proceeding is heard shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the whistle-blower or other informer from discovery, but no further.
>
> (4)If on a trial for any offence under this Act the court, after full inquiry into the case, is of the opinion that the whistle-blower or other informer wilfully provided information which he knew or believed to be false, or did not believe to be true, in material particular, or if in any other proceeding the court is of the opinion that justice cannot be fully done between the parties thereto without the discovery of the whistle-blower or other informer, the court may permit inquiry and require full disclosure concerning the whistle-blower or other informer, and, if the information was provided in writing, require the production of the original thereof.
>
> (5)Any person who, having knowledge that any person referred to in this section as a whistle-blower or an informer, has informed the Bureau or the police of an alleged or a suspected corrupt practice, or other offence connected therewith, takes, by

> himself or through another person, an action of any kind to punish or victimize such whistle-blower or informer in any way shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for two years.

50. The claimant's position is that, in the circumstances herein and on the true reading, purpose and intent of the several constitutional and statutory provisions referred to in the application herein, the defendants have completely and remarkably failed to appreciate and/or to discharge their duty and have proceeded without any jurisdiction to issue the Summons and Charge Sheet or the Interdiction Order against the current occupant of the office of the Director General of Anti-Corruption Bureau, Ms. Martha Chizuma.
51. In the premises of the immediately foregoing paragraph, the claimant states that the decisions or proceedings complained of herein are therefore *ultra vires*, and null and void under the law, for being made without or in excess of jurisdiction, and for being unreasonable in the *Wednesbury* sense and for being procedurally unfair to the public interest in the efforts to eradicate corrupt practices in the country.
52. The claimant then asserted that it has sufficient interest in this matter to pursue the present judicial review proceedings given that it has a statutory mandate under section 64 (d) of the Legal Education and Legal Practitioners Act to protect on matters of public interest touching, ancillary or incidental to law.
53. This Court agrees with the claimant's assertion. In fact, previously this Court dealt with this aspect in detail in its decision of 8th February, 2023 by which this Court made a finding that the claimant has sufficient interest, and therefore *locus standi* or the right to bring and pursue these judicial review proceedings. There is a matter of public interest at stake in this matter pertaining to how an occupant of the office of Director of the Anti-Corruption Bureau is to be dealt with under law in the circumstances obtaining in the present matter. The claimant has a statutory duty to protect on that matter of public interest touching on the relevant law by advancing proceedings such as the present ones where circumstances so require given the conduct of the defendants as it may affect that public interest.
54. The claimant then correctly indicated that the defendants are holders of public office. And that by virtue of sections 6, 10 (2), 12, 13 and 30 of the

Constitution each of the defendants is bound to have due regard to the principles and provisions of the Constitution in the exercise of all legal and political authority endowed upon them as holders of public office.

55. The claimant asserted that the defendants' aforesaid common obligation is for purposes of solely serving and protecting the collective interests, maintaining and promoting relations with the international community, and advancing the collective interest of the present and future generations of the Republic of Malawi and progressive development of such peoples of Malawi in terms of the preamble and sections 6, 10 (2), 12, 13 and 30 of the Constitution.
56. It added that, as a result of this obligation common to the defendants, by virtue of section 5 of the Constitution, any act or omission on the part of any of the defendants purporting to be done in exercise of the authority of the State is invalid, null and void to the extent of its inconsistency with the constitutional dictates.
57. The claimant then submitted that the defendants' decisions contained or reflected in the Summons and Charge Sheet under Criminal Case No. 236 of 2023 and in the Interdiction Order under Reference No. SPC/S/001 to respectively issue a Summons and Charge Sheet and an Interdiction Order against the current occupant of the office of Director General of Anti-Corruption Bureau, Ms. Martha Chizuma on account of a leaked audio recording without any allegation of bad faith in either the Summons, Charge Sheet or Interdiction Order is invalid and of no legal effect under the Constitution as read with the Corrupt Practices Act.
58. The claimant then submitted on the specialized legal regime for the anti-corruption bureau in aid of the fight against corruption. It correctly noted that it is a well settled principle of statutory interpretation that that general laws do not prevail over special laws or the general does not detract from the specific. The claimant also correctly submitted that because of the importance of the need to fight against corruption in the country, Parliament enacted a specific law, the Corrupt Practices Act, 2004, to regulate the fight against corruption in the country over and over above the general criminal law contained in the Penal Code. The claimant submitted that this special regime was created in the public interest seeing the need to eradicate corruption primarily among public officials who are trustees of public power for the general good.

59. The claimant then asserted that the key and relevant features of this specialised legal regime for purposes of the present application are the wide latitude and independence conferred upon the Bureau as follows:

(i) THAT the Anti-Corruption Bureau shall exercise its functions and powers independent of the direction or interference of any other person according to section 4(3) of the Act.

(ii) THAT to underscore its independence even at legal representation, although it is a Government entity and that although the Attorney General is the principal legal advisor to Government, the Bureau is at liberty to instruct any legal practitioner to provide legal representation and advice apart from the Attorney General according to section 5B of the Act.

(iii) THAT the Bureau is at liberty to take any necessary measures for the prevention of corruption in public bodies and private bodies including disseminating information on the evil of and dangers of corrupt practices on society and enlisting and fostering public support against corrupt practices according to section 10(a) of the Act.

(iv) THAT the Bureau is at liberty to do or perform such other acts or things as are reasonably necessary or required for the exercise of the functions of the Bureau and the performance of the duties of the Bureau according to section 11(e) of the Act.

(v) THAT no action or any proceeding shall lie against the Director, Deputy Director or other officer of the Anti-Corruption Bureau in respect of any act or thing done or omitted to be done by in good faith in the exercise of the duties of the under that Act according to section 22 of the Act.

(vi) THAT any information from whistle blower or informer of the Bureau's is not admissible in evidence in any civil or criminal

proceedings and no witness shall be obliged or permitted to disclose the name or address of such whistle blower or other informer or state any matter that might lead to the discovery of the informer or whistle blower and all informers of the Bureau are protected according to section 51A of the Act.

60. The claimant submitted that, in other words, to promote the independence of the Bureau for the sake of public interest in the fight against corruption, the Director, Deputy Director or official of the Bureau or their informer cannot be subject of any judicial proceedings unless bad faith is alleged in the proceedings according to a true and purposive reading of sections 4(3), 5B, 10(a), 22 and 51A of the Corrupt Practices Act.
61. The claimant asserted that, contrary to the foregoing basic legal framework, on or around 25th January 2023, the 1st and 2nd Defendant decided and caused to be issued proceedings contained or reflected in the Summons and Charge Sheet under Criminal Case No. 236 of 2023 and on or around 31st January 2023 the 3rd Respondent in reliance on such proceedings issued an Interdiction Order under Reference No. SPC/S/001 against the current occupant of the office of Director of Anti-Corruption Bureau, Ms. Martha Chizuma, on account of a leaked audio recording without any allegation of bad faith on the part of the Director of the Bureau in the conversation referred to in the Summons, Charge Sheet or Interdiction Order. The claimant exhibited hereto marked as MLS 1A and MLS 1B the Summons, Charge Sheet and Interdiction Order issued by the defendants.
62. The claimant invited this Court to observe that MLS 1A and MLS 1B are premised on the general law contained in the Penal Code and neither makes any reference or addresses the implication of the independence, immunity and freedom clauses in the specialised Corrupt Practices Act designed to protect the Bureau and its informers.
63. The claimant further invited this Court to observe that in MLS 1A, the 1st defendant intends to use information from an informer to try and prosecute the current occupant of the office the Director of Anti-Corruption which is clearly contrary to section 51A of the Corrupt Practices Act.
64. The claimant then submitted on the presidential policy and decrees on the culpability of the current occupant of the office director of anti-corruption

bureau. It observed that, in terms of section 88 of the Constitution, the ultimate authority for the observance of the provisions of the Constitution is in the President of the Republic of Malawi under whose authority the 1st and 3rd defendant fall, being officials under the executive branch of Government.

65. It then correctly noted that, in terms of section 6(3) of the Corrupt Act the authority to suspend the Director of the Anti-Corruption Bureau is placed upon the President of the Republic of Malawi. And that this suspension can only be done by the President "if he considers it desirable in the public interest so to do" according to section 6(3) of the Corrupt Practices Act. The claimant emphasized that public interest is therefore a fundamental issue in deciding on how to deal with the occupant of the independent and immune office of the Director of the Anti-Corruption Bureau.

66. The claimant then pointed out that ever since the audio referred to in the MLS 1A and MLS 1B went viral, the President of the Republic of Malawi has publicly disclosed the State policy on the position of the of the current occupant of the office of Director of the Anti-Corruption Bureau. And that in essence, the President has issued the following public policy statements:

(i) THAT notwithstanding the audio, the because the President took oath of allegiance to the Constitution and pledged to work only in the best interest of Malawians, he has chosen to put Malawi first and maintain the current occupant of the office of the Director of Anti-Corruption Bureau, Ms. Martha Chizuma as such. Exhibited hereto marked as MLS 2 is the President's speech made on 24th January 2022.

(ii) THAT notwithstanding the arrest of the Director of the Anti-Corruption Bureau on 6th December 2022 and the subsequent statutory inquiry into the matter, the current occupant of the office of the Director General of Anti-Corruption Bureau remains the Presidents *"champion against corruption"* and *"those who tried to intimidate her should know that they have failed. Those who tried to make her feel like she is alone should know that they have failed"* because *"this is fight for all of us*" and as a people *"we are ready to die"* in the fight against corruption with Martha Chizuma as

Director General of the Anti-Corruption Bureau in order *"to save Malawi's future"*. Exhibited and marked as "MLS 3" is the President's speech made on 9th December 2022.

(iii) THAT notwithstanding the findings of a Commission of Inquiry in respect of the audio, the President stands by his decision not to fire Ms. Martha Chizuma and of her choice as the President's champion against corruption. Exhibited and marked as "MLS 4" is the President's speech made on 18th January 2023.

67. The claimant then concluded that from the foregoing remarks, it is evident that the President has determined that it is in the public interest that the current occupant of the office of the Director General of the Bureau, Ms. Martha Chizuma, must remain in office and champion the fight against corruption notwithstanding the audio or the Commission of Inquiry Report on the same. The claimant noted that the President is an official elected by the public to serve the public interest in terms of sections 6 of the Constitution with ultimate authority to uphold the Constitution in the national interest under section 88 of the Constitution and therefore with power to suspend the Director of Bureau under the specialized regime of section 6(3) of the Corrupt Practices Act if the public interest so demands. The claimant asserted that the President has so far found no basis for exercising such power.
68. The claimant contended that, in the premises, by issuing an Interdiction Order against the current occupant of the occupant of the office of the Director of the Anti-Corruption Bureau, Ms. Martha Chizuma, the 3rd defendant is acting contrary to the Presidential Policy and express public directives of the ultimate constitutional and statutory authority for the suspension or removal of the Director of the Anti-Corruption Bureau. And that such conduct is clearly contrary to the constitutional and statutory authority of an elected official being the President of the Republic of Malawi under whom the 1st and 3rd defendant exercise authority of the State.
69. The claimant then submitted that it has no other viable alternative remedy against the decisions and actions of the defendants as they do not bother to respond to the input from the claimant. It added that all its efforts to offer

public guidance on the matter as reflected in the Public Statement of 24th January 2022 marked as exhibit MLS 5 have fallen on the defendants' deaf ears and they have proceeded to issue and execute the decisions complained of.

70. The claimant then submitted that it has no alternative remedy to the judicial review application herein. It noted that while some of the issues herein can possibly be raised in Criminal Case No. 236 of 2023, it is also worth noting that the 2nd and 3rd defendant are not parties to that case, that the 2nd defendant has very limited jurisdiction to resolve issues and that the claimant is not a party to that case but remains with a statutory duty to protect public interest on the issues raised and the issues raised are quite wide and touch on the Constitution.
71. The claimant then observed that, under sections 9, 103 and 108 of the Constitution, it is only the High Court that has original jurisdiction to review and offer binding and enforceable guidance on any law applicable to, and any action or decision of the defendants for conformity with the Constitution and other laws as drawn from the Corrupt Practices referred in this application now before the High Court.
72. The claimant contended that, therefore, unless this Court intervenes in exercise of its mandate, it has no alternative remedy with which to assist and protect the public on the matters of law concerning the decision or proceedings of the defendants contained or reflected in the Summons and Charge Sheet under Criminal Case No. 236 of 2023 and in the Interdiction Order under Reference No. SPC/S/001 to respectively issue a Summons and Charge Sheet and an Interdiction Order against the current occupant of the office of Director of Anti-Corruption Bureau on account of a leaked audio recording without any allegation of bad faith in either the Summons, Charge Sheet or Interdiction Order. This Court entirely agrees with this view taken by the claimant. This aspect was also dealt with in detail in this Court's Order of 8th February, 2023 declining the defendants' application to stay the permission granted to the claimant to commence the present judicial review application.
73. At this stage this Court will state the law on the nature and purpose of judicial review. Traditionally, it has widely been held that judicial review is concerned with the manner in which a decision was made, but not with its merits. For instance, it was held *In the Matter of the Constitution of the Republic of*

Malawi and in the Matter of the Removal of Mac William Lunguzi as Inspector General of Police and in the Matter of Judicial Review Misc. App. 55 of 1994, per Mkandawire J., that:

> Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power.

74. However, the introduction of human rights and the inclusion of other vital provisions in the Constitution of Malawi has changed this view. Judicial review, especially in Malawi today, goes beyond the review of the decision making process. It goes to the very substance of the decision. Now, judicial review has to be based on sound human rights and constitutional principles.
75. One of the most prominent proponents of this 'modern view' about the nature and purpose of judicial review in Malawi is Professor Danwood Chirwa. In his article titled 'Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles' *Journal of African Law* 55 (1) (2011) 105, he proposed that judicial review under the Constitution of the Republic of Malawi is different from, and is broader in scope than, the traditional common law one. For him, judicial review in Malawi falls into two categories: (i) judicial review concerning acts, decisions, and omissions of Government for their conformity with the Constitution of the Republic of Malawi; and (ii) judicial review simpliciter (of an administrative action), which involves the review of administrative actions, decisions, and omissions on more grounds than those which are available in common law judicial review.
76. It will be noted that this kind of categorization of judicial review in Malawi has received judicial endorsement in several recent cases including: *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union* (Judicial Review) (Misc. Civil Cause No.1 of 2015) [2015] MWHC 494 (27 July 2015) and *S v Judicial Service Commission and Another* (Judicial Review No. 22 of 2018) [2019] MWHC 34 (04 February 2019).

77. In the *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union case,* supra, the Court, with Justice Professor Kapindu presiding, had this to say:

> I should mention that I deliberately use the full term "judicial review of administrative action here" because in modern day Malawian constitutional law, which inextricably intersects with administrative law, there are two types of judicial review, viz: (a) judicial review of administrative action and (b) constitutional judicial review. The former is the review procedure by courts of conduct by public authorities or bodies that requires the procedure under Order 53 of the Rules of the Supreme Court, 1965 (or for those of another procedural school of thought, the procedure provided for under Order 54 of the Civil Procedure Rules, 1998). The latter review process (Constitutional judicial review) is premised on Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution, where the Courts review conduct by the Government or law for consistency with the Constitution. It need not be administrative action.

78. It must be pointed out that if any person harbored any doubt about this 'modern view' of judicial review in Malawi, Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 is now conclusive on this point. It provides for constitutional judicial review on one part, and judicial review simpliciter on the other part. It expressly provides that 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, 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; and
> (iv) Bad faith, if any,
>
> where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

79. Now coming to the substance of the present application for judicial review, this Court has no doubt in its mind and agrees with the claimant that the power to suspend or interdict the Director of the Anti-Corruption Bureau is vested in the President of the Republic of Malawi and is exercisable only in circumstances alluded to by the claimant herein, namely, in the public interest. See section 6(3) of the Corrupt Practices Act. It was therefore unlawful that the 3rd defendant, being a person other than the President, sought to suspend the Director of the Anti-Corruption Bureau from performing the functions of the office of Director of the Anti-Corruption Bureau. The decision of the 3rd defendant interdicting or suspending the Director of the Anti-Corruption Bureau from performing functions of the office of Director of Anti-Corruption Bureau is therefore null and void for illegality due to overstepping of authority since the 3rd defendant had no authority whatsoever to suspend the Director of the Anti-Corruption Bureau. The 3rd defendant usurped the powers of the President under the Corrupt Practices Act. This is not allowed and is to be checked by judicial review proceedings. See *Mhango and others v University Council of Malawi* [1993] 16(2) MLR 605 (HC).
80. As correctly submitted by the claimant, the 3rd defendant would have done well to heed the public pronouncements and stand of her principal, the President of the Republic, made in the public interest in relation to the handling of the leaked audio saga in view of the efforts of the Director of the Anti-Corruption Bureau as a champion of the fight against the vice of corruption as pointed out by the claimant.
81. The 3rd defendant therefore failed to appreciate that she could only exercise the authority of her office to the extent provided by the law as the Constitution prescribes. Further, the conduct of the 1st defendant impaired the independent work of the Director of the Anti-Corruption Bureau, as indicated by the claimant.
82. On the question of immunity of the Director of the Anti-Corruption Bureau from action and proceedings, this Court agrees with the claimant that in terms of section 22 of the Corrupt Practices Act, no action or proceeding will lie against the said Director for acts or omissions in the exercise of her functions unless there is an allegation of bad faith. No allegation of bad faith has been raised against the Director in relation to the criminal proceeding in the present matter. And, no prior application was made to remove the immunity of the

Director of the Anti-Corruption Bureau before the criminal proceeding was instituted against the Director herein. That rendered the criminal proceeding null and void. The case of *Ex Parte Aero Plastics Industries Ltd* MSCA Civil appeal number 18 of 2019 refers.

83. In connection to this question of immunity, in the case of *Ex Parte Aero Plastics Industries Ltd* MSCA Civil appeal number 18 of 2019, a seven-member panel of the Supreme Court of Appeal interpreted section 68 of the Environmental Management Act by which the Director under that Act had similar immunity from legal proceedings. Section 68 of the Environmental Management Act provides that no legal proceeding shall be brought against the Minister, Director, an inspector, an analyst or any other person duly authorized by the Minister, the Director, inspector or analyst to do anything authorized under this Act, in respect of anything done in good faith under the provisions of this Act. The seven-member panel unanimously held in the case of *Ex Parte Aero Plastics Industries Ltd* MSCA Civil appeal number 18 of 2019 at page 18 that:

> The immunity was total. No proceedings should have been brought. Proceedings, therefore, can only be commenced if a party establishes bad faith. The onus is on the one alleging to, before commencing those proceedings, establish bad faith. Proceedings commenced without a determination of bad faith are null and void.

84. The Court added at page 19 that:

> The law, therefore, in this matter, presumes that the Director acted in good faith. Anyone wanting to commence legal proceedings against the Director of Environmental Affairs must first demonstrate, by application, that the Director acted in bad faith. Counsel from both sides did not, as Counsel, advise the Court below of the Director's immunity from legal proceedings. The Court below never considered the precondition for instituting proceedings against the Director.

85. It is clear in the premises, that the criminal proceeding commenced by the 1st defendant before the 2nd defendant was similarly null and void for having been commenced without addressing the question of immunity of the Director of the Anti-Corruption Bureau in terms of her alleged action in relation to the leaked audio herein being in bad faith.
86. The 1st defendant therefore failed to appreciate that he could only exercise the authority of his office before the 2nd defendant to the extent provided by the law as the Constitution prescribes. The conduct of the 1st defendant impaired the independent work of the Director of the Anti-Corruption Bureau, as indicated by the claimant.
87. In terms of allegation that the 1st defendant intended to use the evidence of a whistle blower in the criminal proceedings against the Director of the Anti-Corruption Bureau before the 2nd defendant, in breach of section 51A of the Corrupt Practices Act, the impression of this Court from the evidence on the record is that there is no such indication of usage of evidence of a whistle blower as alleged. The only evidence available from the said criminal proceedings being a charge sheet and summons that do not show what sort of evidence was sought to be relied upon at trial.
88. In the circumstances, this Court is not persuaded that the 1st defendant intended to act in breach of section 51A of the Corrupt Practices Act on protection of whistle blowers. The final relief in terms of declarations will therefore exclude any reference to violation of the provisions in section 51A of the Corrupt Practices Act herein.
89. In the final analysis, this Court agrees with the claimant that it has made out its case warranting the granting of the declarations and reliefs sought herein on the basis of the true construction of the provisions of the Constitution cited by the claimant and a true construction of the provisions of the Corrupt Practices Act cited. The declarations are accordingly granted on those premises.
90. However, on the question of costs of the successful claimant in these proceedings, this Court observes that the present proceedings are undertaken for the claimant on *pro bono* basis as indicated by the claimant in its application herein. That entails that no costs are incurred by the claimant since the legal work is done for free by the lawyers for the claimant for the public good. Although this Court has discretion in terms of awarding costs for *pro*

bono court work in terms of Order 31 Rule 1 (3) of the Courts (High Court) (Civil Procedure) Rules, this Court is of the view that in principle it is not in order to award costs to the successful claimant in the circumstances of this case. The Rules of procedure ought to have been expanded in this regard, in terms of the exercise of the discretion of the Court and how the *pro bono* costs should be utilized. In England, *pro bono* costs are awarded by never go to the litigant receiving *pro bono* legal representation or the lawyer offering *pro bono* legal services. Such *pro bono* costs are by English statute, section 194A of the Legal Services Act 2007, paid to the prescribed charity, the Access to Justice Foundation which distributes the money to agencies and projects that give free legal help to those in need.

91. The view of the foregoing, this Court would suggest that the Rules of procedure or other pieces of legislation such as the Legal Aid Bureau Act or Legal Education and Legal Practitioners Act be considered for amendment by the relevant authorities to allow for *pro bono* costs to be deposited into and be managed under a Fund or other relevant mechanism aimed at assisting indigent litigants and the like.

Made in chambers at Blantyre this 5th of May 2023.

M.A Tembo
JUDGE