IN THE HIGH COURT OF MALAWI
LILONGWE REGISTRY
MISCELLANEOUS CAUSE NO. 1119 OF 2000

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

IN THE MATTER OF JUDICIAL REVIEW

BETWEEN:

MALAWI HUMAN RIGHTS COMMISSION ..... APPLICANT

- AND –

THE ATTORNEY GENERAL ..... RESPONDENT

CORAM: HON. JUSTICE A.K.C. NYIRENDA

Matiya, Counsel for the Applicant
Dr Duston, Counsel for the Respondent
Ethel Matunga (Ndunya), Senior Personal Secretary.

J U D G M E N T

A.K.C. NYIRENDA, J

This case arises from a recent decision by the Malawi government introducing a new housing allowance scheme for civil servants. By his circular number HRMD/102/4/oc/iv/22 of the 18th September, 2000 the Secretary for Human Resources Management and Development released a housing allowance scheme for civil servants at different grades. The Human Rights Commission

of Malawi challenges the scheme contending in the main that the scheme is discriminatory and unfair in relation to some civil servants. The case for the Human Rights Commission is that the scheme is an infraction of the Constitution of Malawi for allowing for discrimination and unfair treatment of some civil servants.

The case is brought by way of judicial review. In the usual manner there is the question whether the case had been properly instituted. The Attorney General by Counsel Dr Stuart Duston, has taken issue with the application for a number of reasons but the main thrust of the Attorney Generals dissatisfaction with the case is that the Human Rights Commission lacks sufficient interest in the matter, lacks the standing, lacks the capacity to make the application and more worrying, to make the application in its own name.

Mr Matiya of Counsel on behalf of the Human Rights Commission, hereinafter referred to as the Commission, is not persuaded by any of the objections taken up by the Attorney General and sees the mandate of the Commission as conclusive.

Let me attempt a brief outline of the issues advanced by each party. Dr Duston begins from the premise that the Commission is a creature of statute, to wit, the Constitution read together with the Human Rights Commission Act, 1998, and therefore that its powers, mandate and functions are dictated sorely by those instruments. Dr Duston has analysed the relevant provisions of the Constitution. Section 15(2), 16(2), 129 and 130 and also the provisions of the Human Rights Commission Act sections 12, 13, 14, 15 and 22. He submits that the Commission, in the totality of these provisions, is empowered to, ***inter alia,*** act as a source of information, educate, make recommendations, prepare reports, examine legislation, comment publicly, promote ratification of human rights instruments and harmonization of Malawi law with those instruments. It is Counsel's submission that no mention is made of making applications to

court let alone to suggest that the Commission can take up a court action in its own right and in its own name.

Section 129 of the Constitution which establishes the Commission provides as follows:-

> ***"There shall be a Human Rights Commission the primary function of which shall be protection and investigation of violations of the rights accorded by this Constitution or any other law."***

Section 130 of the Constitution provides for the powers of the Commission in this way:

> ***The Human Rights Commission shall, with respect to the applications of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under this Constitution, but shall not exercise a judicial or legislative function and shall not be given powers so to do.***

It is argued by Dr Stuart that the manner in which the word *'protection'* is used in section 129 followed by the word *'investigation'* means that the protection envisaged falls far short of allowing the Commission to take up cases before court. I believe the argument is that if the expressions were in the reverse, that is, *'investigate'* then *'protection'* there might have been an argument for the Commission taking up court actions.

To turn to Section 130 Dr Duston has a very persuasive and formidable argument. He initially observes that the trend on the globe and to his knowledge, Human rights Commissions have not been empowered to take up actions in courts to enforce human right. The practice has been to entrust them with promotional and recommendatory powers

and functions. Counsel has invited the court to look at the powers of The United Nations Commission on Human Rights and more specifically to related national institutions like the Australian Human Rights and Equal Opportunity Commission and The Commission For Racial Equality created under the Race Relations Act of England. The position really is that the powers of these institutions are restricted to general interventions. The usual manner of intervention in cases which are before courts is by way of befriending the court and helping with information which would enable the court to arrive at an appropriate decision *(amicus curiae).*

In submitting on the provisions of the Human Rights Commission Act, State Counsel is of the clear view that the Act does not and can not empower the Commission any more than the Constitution itself does. Counsel observes that the provisions which establish the Commission under the Constitution do not leave room for further powers through an enabling legislation. Counsel points out that this is in sharp contrast with the provisions that establish other institutions for example the Ombudsman and the Law Commission. Section 132 of the Constitution establishing the Law Commission, for instance, provides that the Law Commission shall have such powers and functions as are conferred on it by this Constitution and any other Act of Parliament. It is argued on this basis that the ultimate powers of the Commission are those under Section 129 and 130 of the Constitution and nothing else can be done to expand on those powers; therefore that Section 10 to 15 and 22 of the Human Rights Commission Act cannot avail the Commission in the instant case when the Constitution does not.

State Counsel has advanced another very valid point. It is common practice in a number of common law jurisdiction that where an institution is created by statute the powers and functions of the institution are specifically spelt out by the statute itself. Counsel has referred the court to a number of statutes establishing some institutions in Malawi to show that this is indeed the practice followed in Malawi. This being the

practice, any capacity to sue and to take up any court suit will be provided for in the statute creating the institution. An example of this are the powers vested in the Office of the Ombudsman by Section 124 of the Constitution and in the Electoral Commission by Section 76 of the Constitution. A number of other Malawian Acts were referred to, to strength the argument. The point made is that the life line of statutory institutions is the statute itself and not what we might wish it to be.

Counsel Matiya in what is yet a rational and potent approach to the debate submits that the Commission has all the power it needs including the power to sue in its own right and name and to take up any legal action in human right related matters. The arguments taken up by Counsel can be summarised as follows:

Section 129 of the Constitution gives the Commission the mandate to protect human rights violations. As Counsel sees it, if after intervention and recommendation there is no solution to the problem, there is nothing in Section 129 and 130 of the Constitution to stop the Commission, as a legal entity, from seeking the assistance of the courts by court action. Since the Commission is entitled to intervene and investigate human rights violations on its own motion by virtue of Section 130, it should equally be able to institute or seek court redress on its own motion. In further support of his argument Counsel draws on Section 46(2)(b) of The Constitution. The Sections states as follows:-

> ***Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled,***
>
> ***(a) to make an application to a competent court to enforce or protect such a right or freedom; and***
>
> ***(b) to make application to the Ombudsman or the Human Rights Commission in order to***

secure such assistance or advice as he or she may reasonably require.

It is submitted in this regard that the Commission as a legal entity and therefore a person at law, qualifies under subparagraph (a) to make an application to court. It is also submitted that if the assistance which a person requires from the Commission is to file court action then the Commission should oblige in accordance with subparagraph (b) if that is the only reasonable way of dealing with the matter.

Mr Matiya's position is that courts should not be intransigent, rigorous or inflexible on issues of procedure in actions on human rights and prevent the consideration of the cases on merits. Counsel advocates a liberal and purposive approach on such matters including matters of capacity and standing.

According to Counsel, the provisions of the Constitution on human rights as a whole, read together with the provisions establishing the Commission and the Commission's enabling Act are so expansive on the powers of the Commission that the right to sue is implicit if not explicit. Counsel wishes to, in particular, draw the court's attention to Section 12 of the Human Rights Commission Act. This Section says:

> ***The Commission shall be competent in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of person or body.***

This is the point at which I should turn to consider what could be made out of this debate. I am most indebted to both Counsel for the assistance they have given to the court in thought, in reason and in material. I must also commend Counsel for their industry and conviction shown by the evident gusto with which they presented their addresses. I

might have overlooked some of the arguments advanced but I believe I have captured the salient points to enable me give some direction on the matter.

The provisions which are mainly in issue here are Section 15(2) 46(2), 129, 130 of the Malawi Constitution and Section 12, 13, 14, 15, 22 of the Human Rights Commission Act. The texts of some of these provisions are set out earlier in this judgment. I will cite others later.

The premise at which to approach this matter is to be reminded that constitutional interpretation ought to be given all the diligence, thought and seriousness it deserves. One would not wish to take away from a constitution that which it gives to its subjects but at the same time it would be a betrayal of the wishes of the subjects to give that which it does not give.

In attempting to interpret a constitutional provision some suggestions have been made. In the Supreme Court of Appeal Case of **Fred Nseula vs Attorney General and Malawi Congress Party M.S.C.A. Civil Appeal No. 32 of 1997** the Court said this:-

> ***A Constitution is a special document which requires special rules of interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution.....***
> ***The starting point therefore is that a Malawi court must first recorgnise the character and nature of our Constitution before interpreting any of its provisions. The purpose of interpreting any legal document is to give full effect to what parliament intended and you cannot give full effect to that intention unless***

you first appreciate the character and nature of the document you are interpreting.

The Court went on to say:

> ***It is an elementary rule of Constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the greater purposes of the Constitution.***

Let me also refer to what other jurisdiction have said on the subject. Our neighbours in Tanzania have said *'a constitution is a living instrument which must be construed in the light of present day conditions;* The High Court of Tanzania in ***Muhozya vs The Attorney General, Civil Cause No. 206 of 1993.*** Up north, the Supreme Court of Ghana has said *'a broad and liberal spirit is required for constitutional interpretation. It does not admit of a narrow interpretation. We must take account of its principles and bring that consideration to bear in bringing it to conformity with the needs of the time;* ***Tuffuor vs Attorney General, [1980] GLR 637.*** In India it has been said *'the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense: a court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down,* ***Sakal Papers (P) Ltd vs Union of India and Others A.I.R. 1962 Sc 305***. In Canada it has been said *'the interpretation should be a generous rather than legalistic one, aimed at fulfilling the purpose and securing for individuals the full benefit,* ***R. vs Big M Drugmart Ltd [1985] 1SDLR 4th 32.*** The United States Supreme Court in the case of ***United States vs Classic, 313 US 299 [1941]*** has said *'we read the words not as we read legislative codes, but the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.'*

The authorities I have referred to might create the impression that in Constitutional interpretation we begin by ignoring or suspecting the words of the provision. That is not the position. The principle in these cases is that even a clear word could have a wider meaning especially in the context of a constitution which is a compilation of people's wishes. As pointed out by Justice Holmes elsewhere a word is not a crystal, transparent and unchanged, it is the skein of a living thought and may vary greatly in colour and context according to the circumstances and the time in which it is used. The principles urge us to give the words that wider meaning to provide for the wider demands of society and stop where the meaning might turn to absurdity. It is in this regard that Ag Judge Kenfridge in ***S vs Zuma and Others [1995](2)SA 642*** cautions that we must take heed Lord Wilberforce's reminder that even a Constitution is a legal instrument the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to values, the result is not interpretation but divination.

In the light of the above considerations what does one make of the Constitutional provisions which empower the Commission. In my judgment, while we can seek aid of Section 15(2) and Section 46(2) of the Constitution and time allowing one could discuss those provisions, this matter can be resolved by merely considering the specific provisions which establish and empower the Commission, Section 129 and 130 of the Constitution.

Section 129, at the expense of repeating says, *'there shall be a Human Rights Commission the primary functions of which shall be the protection and investigation of violation if rights.* I underline the words primary function. This to me clearly means that the functions of the Commission are not intended to be restricted to this provision in human rights matters. We must therefore look elsewhere for details of the Commission's powers.

Section 130, although entitled *'powers'* does not, in my view, serve the purpose of explaining the ultimate mandate of the Commission. What is important about section 130 is that it tell us that the Commission can intervene and look at a human rights situation on its own motion. Otherwise the section is simply cautioning the Commission not be capricious and vindictive in its investigative and recommendatory functions and to do only that which is reasonably necessary in performing those functions.

Section 130 however reveals something. It reveals that which the Commission cannot do after an investigation and by way of recommendation. The Commission can not exercise judicial or legislative functions, that is, it can not purport to make binding orders and purport to make or change laws. Lawyers will be familiar with the maxim ***expressio unius est exclusion alterius*** (to express one thing is to exclude another) an aspect of the ***expressio unius*** principle. By expressly excluding two possible mandates, the suggestion is that the other possible mandates are not excluded.

My own view of sections 129 read together with section 130 is that, like the other provisions of the Constitution which establish Constitutional institutions, they have left the detailed account of the Commission's functions to be articulated in a separate Act of Parliament. That is exactly why sections 129 and 130 are loose lay. I have no doubt in my mind that this is what the framers of the Constitution intended and in pursuance of that intention Parliament came up with the Human Rights Commission Act, 1998. Counsel for the State had kindly assisted the court with a copy of he Hansard which introduced the second reading of he Bill on the Act. Part of the statement reads:

> ***..... this is a Bill for an Act of Parliament to make provision for the proper functioning of Human Rights Commission established under Chapter XI of the Constitution ..... as with all other institutions which the Constitution***

establishes, the Constitution does not lay down all the necessary provisions for the effective operation of the Human Rights Commission. It is essential therefore, that an Act of parliament be promulgated to make such provision and the Bill had that objective. ..... the bill makes provision as to the competency, powers, responsibilities, duties and functions of the Human Rights Commission.

The Human Rights Commission Act is said to have largely been drawn and adapted from the United Nation's Principles of National Institutions for the Promotion and Protection of Human Rights [commonly known as the Paris Principles] according to the Hansard.

I have had occasion to look at the Paris Principles and in the usual manner the United Nations desisted from drawing a bill board of powers and functions of national human rights institutions and largely left it to individual nations to draw on the Principles and draft specific legislation suitable to them. It is not just of interest but an important fact to note that other countries around us have given their human rights commissions' very wide and strong mandates. In the Republic of South Africa the Human Rights Commission can bring proceedings in a competent court or tribunal in its own name, or group of persons or class of persons. This is in Section 7(1)(e) of the Human Rights Commission Act of the The Republic of South Africa. In Tanzania under the Human Rights and Administrative Justice Act, 1999 the Commission for Human Rights and Administrative Justice can institute civil or criminal proceedings on behalf of a person, group of persons or on its own behalf before any court for the purpose of performing its functions. The same is true with Kenya where the Kenya National Commission on Human Rights can commence and prosecute proceedings in the High Court in its own name under section 21(b) of the Kenya National Commission on Human Rights Act. The Tanzanian situation is quite interesting in that the Human Rights Commission is

also empowered to make binding orders of a judicial nature. All this is to say the mandate of human rights institutions today is being more and more recognized and strengthened.

Let me briefly talk about the question of standing and interest in constitutional complaints and proceedings especially those that relate to the protection of fundamental rights. In the case of ***Rev. Longwe and Others vs The Attorney General, Misc Civil Appeal No. 11 of 1993*** Justice Tambala made the general observation that decisions on such applications must depend on the substance and merits of the application and not on a procedural technically. The High Court of Tanzania in the case of ***Mtikila vs Attorney General, Civil Cause No. 5 of 1993*** held as follows:

> ***..... the notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant acting in the public good, even where he has no personal interest in the matter ..... where the court can provide an effective remedy.***

Let me also refer to what the South African Constitutional Court said in the case of ***Ferreira vs Levin No. 1996(1) BCLR1 cc:***

> ***Whilst it is important that this court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent***

with the mandate given to this court to uphold the constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.

I think it is important to press home certain realities. In constitutional and human rights matters individual human beings may be claimants both in their own right and as representatives of groups. While individuals are of course always the ultimate deprivees, they do not necessarily become active, or effective claimants in seeking remedy against deprivation or nonfulfillment. In many communities many people who suffer deprivations or nonfulfillments are conditioned or forced to endure them is silence. They may be too intimidated, uninformed, powerless or resourceless to make claims. They become too used to being pushed around and accepting without questioning that which *"they"* in authority have decided or done. In these circumstances the relevance of public interest litigation cannot be over-emphasised. I entirely subscribe to the position taken by the court in the ***Mtikila*** case [above] that in such cases if there should spring up a public-spirited individual or body and seek the court's intervention against legislation, decisions or actions that pervert the constitution, the court, as guardian and trustee of the constitution and what is stands for is under an obligation to rise up to the occasion and grant him standing.

Having said all this let me also state that it is important to bear in mind that the Malawi Constitution is a human rights dream. It has become an emblem and touchstone of national pride and extolled as a source of hope for preponderance of our citizenry.

Where does this plethora of thought place the Malawi Human Rights Commission? I have no difficulties myself in answering this question. I have earlier in this judgment discussed the question of the legitimacy and purpose of the Human Rights Commission Act 1998. In answering the

question of the Commission's capacity to take up constitutional and human rights matters ***suo moto*** (on its own motion) and its own name, one only has to turn to section 12 of the Act. The text of this section has be set out earlier in this judgment. This provision to me is in two parts. It is when one breaks the provision into the two parts that it becomes simpler to understand. The first part says:-

> ***The Commission shall be competent in every respect* to protect and promote human rights in Malawi in the broadest sense possible....**

Then there is the second part whish says:-

> ***..... and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.***

The first part of this sections says it all. The Commission's mandate is in the phrase which says *in every respect.* Quite honestly it would be tyrannical to undress the Commission of the power and capacity to take up court action in the light of such an open and permissive provision. The second part answers the question whether the Commission can act on its own. This question is also answered by the Constitution itself in Section 130. If it is accepted that the Commission can act on it own motion and having found that the Commission can institute proceedings in court, it only makes practical sense that the Commission should have the mandate to take up cases in its own name. If therefore in the circumstances of the particular case the Commission decides to investigate in its own right, it is my contention that the Commission should be able to take up a court action on its own and in its own name if it was found to be the most convenient manner of redressing the situation. Let me just add that it is now generally accepted that a public duty amounts to a sufficient interest to confer standing, see the case of ***Rep vs London Borough of***

Haringey exp Secretary of State for the Environment [1991] COD 135.

My answer therefore to the general questions whether the Commission has the capacity or standing or interest to take up court action in its own name and in its own right is all in the affirmative. It is therefore the finding of this court that the Commission has the mandate and the interest to take up human rights cases before our courts in its own right, in its own name or in a representative capacity.

It only remains for me to consider whether leave for judicial review should be granted in the present case. Paragraph 4(d) of Mr Matiya's affidavit in support of leave for judicial review states and I quote:

> ***That the Commission brings the application on its own volition based on its wide mandate under the Constitution and the Human Rights Commission Act as a watchdog over human rights issues. The application is not in any way brought on behalf of any person or class of persons or pursuant to any complaint lodged with the Commission.***

Let me emphasize the fact that human rights, by their very expression, are be stored in human beings. It is the human being who is the intended beneficiary of human rights. When human rights are threatened or violated it is human beings whose rights will have been threatened or violated. It is therefore a priority that where the individuals affected can be ascertained, they should be allowed the opportunity to vindicate their rights. As I discuss earlier in this judgment the justification for institutional suits is rooted in the lack of opportunity of the victims in approaching the threshold of courts for various reasons. It would be wrong, dangerous and unfair, if it became the practice of the Commission to snatch away cases from individuals who themselves are quite capable of complaining to the Commission or to bring up actions in

court. The idea is not to turn the Commission into a human rights bulldog. The danger is that the Commission itself might be taking away the individuals' right to sue, or in other instances, the Commission might force individual to sue when the individuals might have taken an informed choice not to take any action in the matter.

In cases where the Commission decides to spring and take up cases in its own name and in its own rights, I am of the view that a justification must be given to the court why the human being or human beings to whom the right relates cannot take up the case themselves. I have no doubt in my mind that the group of persons whom the Commission seeks to take away this case from would have something to say to the Commission if they were properly consulted, even if it meant authorizing the Commission to take up the case for them in a representative capacity. It is also important for the Commission to consider whether indeed the appropriate procedure in this matter is by way of judicial review although I would not be too astute about that point.

In my judgment therefore the Commission should go back to the drawing board and consider consultation with the interested persons. Leave for judicial review is therefore not granted.

PRONOUNCED in Open Court at Lilongwe this 9th day of February, 2001.

A.K.C. Nyirenda
JUDGE