IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 133 OF 2001

HIGH COURT
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BETWEEN:

PETER CHUPA.....PLAINTIFF

-and-

THE MAYOR OF THE
BLANTYRE CITY ASSEMBLY (HIS WORSHIP MR CHIKAKWIYA).....1ST DEFENDANT

- and -

THE OFFICER-IN-CHARGE, BLANTYRE POLICE STATION
(MR. MPALUKO).....2ND DEFENDANT

- and -

OFFICER-IN-CHARGE, NDIRANDE POLICE STATION
(Ms KAJOMBO).....3RD DEFENDANT

- and -

THE COMMISSIONER OF POLICE
(MR CHIKWAMBA).....4TH DEFENDANT

CORAM: **TWEA , J**
Nyimba/Kasambara, of Counsel, for the Plaintiff

Chisanga, of Counsel, for the 1st Defendant
Kamwambe, of Counsel, for the 2nd, 3rd and 4th Defendants
Selemani, Official Interpreter/Recorder

JUDGMENT

This case was brought by the applicant Peter Chupa (Member of Parliament) against the Mayor of the City of Blantyre His Worship Mr. Chikakwiya, the Officer-In-Charge of Blantyre Police Station, Mr. Mpaluko, the Officer-In-Charge of Ndirande Police Station Ms Kajombo and the Commissioner of Police, Mr. Chikwamba. Mr. Chikwamba is in fact, the Commissioner of Police for the Southern Region. The applicant applied to this court for leave that the respondents be committed to prison for contempt of court. The court granted leave to proceed for committal proceedings, against the four respondents. The applicants had applied to include the Attorney General as a party, but this was not allowed. The case therefore proceeded with the four respondents.

The facts of this case are not disputed.

On the 15th January, 2001, the Malawi Broadcasting Corporation aired an announcement forbidding any political meetings not sanctioned by Police. The exact text of this message was not disclosed in this court. The respondents however did not dispute this. I must mention at the outset that when counsel for the Applicant was making a reply to the submissions by the respondents, Mr. Chisanga of Counsel for first

respondent, the Mayor of the City of Blantyre, sought to object to this. This objection was totally out of order and misplaced as this was not raised when he was making his submissions on behalf of the first respondent. Suffice to say, this objection was over-ruled. It remains a fact therefore, that such a message was aired on M.B.C. Radio 2 and that the message originated from the first respondent. Further, there is no controversy that the said message did not disclose any reasons as to why such meetings were forbidden.

It is on record that following the airing of the message, the applicant who is a former Member of the ruling party, the United Democratic Party, since expelled, for reasons not disclosed in any of the affidavits, applied to the High Court and was granted an injunction restraining the first respondent and any of his agents or servants from stopping the meeting. The order read as follows:-

"**ORDER**

UPON reading affidavits and hearing Counsel, an order of injunction is made that:

1. The Defendants namely the Mayor of the City of Blantyre Assembly and the UDF Regional Governor of the South, their servants, their agents, or whomsoever be restrained from disrupting, preventing, stopping or interferring with the Plaintiff from holding a public meeting at Ndirande Community Ground on Monday 15th January, 2001.

2. The Plaintiff should pay damages in case this order is erroneous.

Dated 15th day of January, 2001

Signed
REGISTRAR"

This order was copied to the first respondent, the Regional Governor for the UDF, South, and the Commissioner of Police, Box 24, Blantyre, the fourth respondent. The second and fourth respondents were not cited in the order. The order bore a penalty clause which read as follows:

PENAL NOTICE

"If you the said Mayor of the Blantyre City Assembly, the Regional Governor of United Democratic Front party South; your servants, agents (the Police) or whomsoever do deliberately not obey the said order of injunction restraining you from disrupting, stopping, preventing or interferring with the plaintiff's public meeting to be held at Ndirande Community Centre Grounds, then you will be guilty of contempt of court and be liable to imprisonment."

There is no dispute that this order was served on the office of second respondent and brought to his attention, further, there is no dispute that it was served on the third and fourth respondent and that they were aware of the said order.

There is no dispute that notwithstanding the said court order, the first respondent's message kept being aired on MBC Radio 2. Further that at about 3:00 pm on the said day, the members of the Malawi Police Service under the direct command of the fourth, third and second respondents in that order of command, shot at and tear-gassed the gathering, purported gatherings and innocent parties in Ndirande Township in the City of Blantyre. The action of the members of the Malawi Police Service effectively disrupted and stopped the meeting from proceding.

This application is brought on the ground that the respondents acted in disregard of the court order prohibiting them from disrupting or stopping the meeting called by the applicant. This being a disregard of the injunction granted the applicant prays that the respondents be

committed to prison for contempt of court.

The first respondent did not file any affidavit in opposition to the applicant's affidavits or supplimentary affidavits. Be this as it may the first respondent submitted that this case be thrown out for want of procedure.

It was contended on behalf of the first respondent that there was no personal service contrary to Order 52 and 4 of the Rules of the Supreme Court; that there was no penalty clause endorsed on the front of the order against the first respondent; in terms of Or. 45 or 7/6 of Rules of the Supreme Court. It was submitted and argued strongly that the default in procedure is not curable.

Further it was submitted for first respondent that the evidence herein is all hearsay and should not be admitted. It was further argued that the *mens rea* has not been proved. It was contended that the applicant has failed to prove that the first respondent knowingly carried out the act or was responsible for the conduct in question. The first respondent thus prayed that the case against him that he be committed to prison for contempt of court should be dismissed.

The second, third and fourth respondents case however dwelt on totally different premise. I must mention that when this case was called, in the absence of Counsel for first respondent, as the record will show, this court enquired as to the conduct of the defence. Counsel for the three last respondents, then present, in reply informed this court that each Counsel will ran a defence independent of the other. I therefore, recognise that notwithstanding what the last three respondents expressly admitted or acknowledged receipt of the court injunction restraining the Mayor of the City of Blantyre and his agents, including themselves, their defence is different from that of the first respondent.

The last three respondents defence, in the essence, is very simple.

They do not raise issue with personal service, notice of the penalty nor the action that the members of the Malawi Police Service took to disperse the gathering. The only issue raised is that they did not do so in disobedience to the court order. They contend that they acted independently in the circumstances there being a likelihood of disorder erupting and therefore, security risk to person and property. It must be mentioned that there is no dispute that the last three respondent did acknowledge deferrence to "superior order" before they could act. Suffice or to say that the "superior order" to be deferred to had not been specified; one would ask whether it was from the Inspector General, the Minister of Home Affairs or the Commander-In-Chief, who is also the President of this Country?

It was submitted for the last three respondents that their action should be looked at in the light of the situation on the ground and their duty to prevent loss of life and property. It was argued that they could not have adopted a wait and see attitude because there was no guarantee that the apparently peaceful atmosphere would prevail to the end of the meeting.

It should be stated, and I find this as a fact, that at the time members of the Malawi Police Service started dispersing the gathering there were no acts of lawlessness or violence. I say this in the light of the unequivocal submission on behalf the last three respondents that: "it did not matter that people were unarmed, that no fracas had commenced, what mattered was whether the situation was volatile or likely to erupt into violence?" Clearly there was no violence at this point in time. This in my view, is purely a question of fact which has been established on the evidence.

This then is the evidence and the argument against which I have to make a decision whether there was contempt of court or not and whether to grant the prayer for committal.

The parties were agreed that contempt consists of committing acts which tend to interfere with the administration of justice.[1] This includes contempt in the face of the court, such as insulting behaviour to the court or violence to judicial officers. This is what has been called "criminal" or "special" contempt.[2] But in respect of "civil" or "ordinary" contempt, it will be termed criminal if it involves misconduct or refusal to obey specific orders of the court. To this extent it will be criminal and will be treated and dealt with as such.[3] The parties in this case agreed that there was a valid court order and that this court order was not obeyed. They further agreed that to this extent the contempt in issue takes the proportions of criminal conduct and that the burden and standard of proof will be, to that extent, at criminal level.

The first respondent raised the issue of lack of personal service - however this was dealt with in the interim ruling and I need not allude any more to this as it was put to rest. Be this as it may, the first respondent raised the issue of lack of notice of the penal clause. It was submitted for the first respondent that the penal notice was not prominently endorsed on the front of the order. Notwithstanding the view of the applicant, I would find no validity in this ground. I have examined the said notice clause which comes immediately after the order. The first respondent therefore, cannot be heard to say that there was no notice of the penalty, nor that it was not prominent. In any case, even if it were irregular, the first respondent would still have been obliged to obey it, as is clearly demonstrated by cases of **Isaacs vs Robertson [1985] A.C. 17**. It was open to the first respondent to challenge it but not to disobey it. The first respondents submission on this point, therefore, cannot be sustained.

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[1] See Halsburys Statutes of England 3rd Act Vol. 7, Page 1. Osman vs Reginam 1964-66 ALR(m) 595, Rooney vs Snaresbrook Crown Court, [1979] CAR Vol. 68, Page 72 at 82, A.G. vs Times Newspapers Ltd [1974] A.C. 273 AT 308

[2] Ibid page 2

[3] Ibid P. 1

The last limb of the first respondent case is that there is no *mens rea* proved, that the evidence herein is all hearsay. The evidence herein is all by way of affidavit. The first respondent did not file any affidavit evidence. It is alright for Counsel to suggest that the evidence was hearsay, but he did not offer any explanation otherwise. In the light of the Rules of the Supreme Court and the evidence; it is clear that the first respondent continued to air the notice of prohibition way after the court order. I would be in the view that in the confusion, there may have been lack of communication to MBC Radio 2 to stop airing the notice of prohibition hence the situation, but it is not for this court to find an excuse for the first respondent. Further, going by the evidence in exhibit PC3, the first respondent intimated that he had a defence for not having rescinded his order however, none has been proferred in this court. The only inference that this court can draw is that he had no defence and that he did so intentionally. I therefore find that there was *mens rea* on the part of the first respondent.

It is the finding of this court therefore that contempt of court has been proved against the first respondent and it is my judgment that the first respondent is guilty of contempt of court.

I now come to the last three respondents.

As I said earlier, the only issue before this court is that they had no *mens rea*, that they did what they did purely on the dictates of the situation independent of what the court order directed.

I must mention that these courts will always bear in mind the sanctity of lawful authority and power. The courts should be very slow to find use of authority and power unlawful. They will always have due regard to the circumstances as it will be of detrimental to any authority to wrongfully find that it misused, misapplied or used its power unlawfully. This would be detrimental to public order and public trust.

Be this as it may, I have carefully examined the affidavit evidence of the last three respondents. Clearly their evidence is not on all fours on matters of time, matters of what influenced the course of events and the conclusion on the necessity for the action taken.

In the ordinary course of things, the first person on the ground would be third respondent, then second respondent and lastly fourth respondent, in terms of command. From the affidavit of third respondent one would, with all humbleness, easily find that she lacked effective leadership on the issue of party functions. But, I would very much hesitate to say so in view of the command structure. Clearly, the notices of meetings were routed to her following her superior officers, one would have very serious doubt whether she had the last word on these matter. In paragraph 4 of her affidavit she averred that she was made aware of the MCP meeting in writing. Notably this notice had no date for the meeting. Subsequently she was verbally informed of a meeting by UDF party. Who gave the verbal notice or when, it is not clear. In paragraph 8 she avers that she was informed that there will be another meeting at the Ndirande Community Centre Ground by the second respondent. Clearly the notice from the applicant PC1 was addressed to her office and not second respondent. It makes no sense that the course of events should be in the reverse. Did second respondent intercept her mail and not tell her of the notice until the fateful day? This may be left to the most intelligent guess, but the truth of the matter is that the third respondent did not tell us the whole truth.

The confounded untruth in third respondent affidavit is confirmed by second respondent's affidavit; paragraph 4. He, the second respondent deponed that he had no knowledge of another meeting at Ndirande Community Centre Grounds. Well, if third respondent says she heard of this meeting from second respondent and second respondent says he knew nothing about it, then who, between these two senior officers of our Police Service, is telling the truth, or so to put it negatively, telling this court lies? The second respondent said he went

to Ndirande Community Centre Grounds by chance and found the third respondent in a state of confusion, really? Who called the officers and men on duty? Who ordered the issue of teargas canisters and rubber bullets or whatever was used there? Was it third respondent or second respondent?

Then one comes to the affidavit by fourth respondent the Commissioner of Police for Southern Region. I must mention that I have a lot of respect for what the Commissioner deponed to in his affidavit. His affidavit is clear that when the alleged rallies for MCP and UDF at Nyambadwe Primary School were cancelled on the morning of 15th January, 2001, the MCP group decided to join the NDA pressure group meeting. The UDF then re-grouped and decided to join the MCP/NDA meeting. Taking the words of counsel for the last three respondents, the Police have the prerogative of gathering information for the protection, internally, of the citizens, their property and their day to day dealings.

The fourth respondent, takes responsibility for cancelling the meeting as per his affidavit paragraph 11. I again salute fourth respondent. However, he did not isolate the UDF functionaries that were re-grouping to join the others. No reason was given for this default. This fact was also in the affidavits of third and second respondents: that UDF did not give any written notice of a meeting. They only gave notice verbally after alleging that their flags had been burnt on the night of 14th January, 2001 at Nyamba dwe Primary School ground. Why they planted their flags before giving notice of the meeting is not clear.

One thing comes out clearly from the affidavit evidence of the last three respondents; that in this case the Police pandered to the UDF - why and for what it is not clear. The Police disregarded the first come first serve principle, the principle that to be forewarned is to be forearmed? They knew that the UDF functionaries were re-grouping to join the NDA

meeting and did nothing to disband or isolate the possible disturbers. They served the interest of one party at the expense of the other party and the interest group. Why?

I have already found that there was no reason or cause by the first respondent for prohibiting the meeting at all unless cleared by Police that and the Police, as has been demonstrated, failed to orderly conduct their authority and inexplicably pandered to one party. They were aware of the court order but pandered to the UDF and the Mayor of the City of Blantyre, without any cause to show for it, in disobedience of the court order. There is therefore, the necessary nexus between and the announcement by the Mayor and the action of the Police.

I have carefully examined the circumstances of this case. The Police Service is a peoples service which, as has been admitted by the State, unfortunately still runs on the orders from above and not on the basis of the rule of law. The State has tried to impress on this court that the decision to find the Ndirande situation unstable was made within minutes after the court order, but this would make sense only to a man who thinks with his hind sight. To any reasonable court and any reasonable man with foresight, this could only have happened if it was well prepared for. The availability of men, equipment, supplies, transport and sundries is something that had to be prepared for. It is my view that the action of the Police was not accidental or unintended it was pre arranged - see Heatons Transport (St. Helens) Ltd vs Transport and General Wokers' Union [1973] A.C. 15 at 109.

I therefore find that contempt of court has been proved against the last three respondent and I find them guilty.

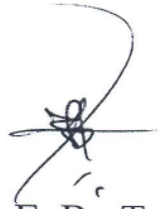
I have considered the punishment for the offence. I am most mindful of what Mr. Kasambara of counsel for the applicant said. This is a matter of the peoples constitutional rights: the right to associate and assemble and, most of all, the right to make political choices.

The first respondent was recently elected Mayor of the City of Blantyre on a party ticket. From his humble origin he may not appreciate that his office is above party politics and that he needs to guard and promote the political rights of the citizens of Blantyre notwithstanding his own political leanings: Put simply, he needs civic education on his role as Mayor.

For the Police Oficers, it is most regrettable that they should again be in the middle of repression after the nation disapproved their repressive conduct during the one party regime. Police, as a reform friendly and a prodemocratic police should refrain from pandering to the whims of any party. They should serve all parties and individuals equally.

I order that all the four respondents be committed to prison for 14 days. This order is suspended for 18 months on condition that they shall not in their personal or official capacity infringe any citizen's right to freedom of assembly and association in Malawi wheresoever they will serve as individuals or officials.

The respondents to bear the applicants costs for this action.
Pronounced in Open Court this 5th day of February, 2001 at Blantyre.



E. B. Twea
JUDGE

Chisanga: I seek leave to appeal

Court : Leave to appeal by 1st Respondent is granted.

E. B. Twea
JUDGE
5-02-01