

**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE NO. 32 OF 2008**

**BETWEEN:**  
**THE REPUBLIC.....APPELLANTS**

**AND**

**FRIDAY JUMBE.....RESPONDENT**

**PHILLIP BWANALI.....RESPONDENT**

**VINCENT MPALUKO.....RESPONDENT**

**CORAM: I. KAMANGA, JUDGE**

Chinoko, Counsel for the State

Kaphale, Counsel for the 1<sup>st</sup> Accused

Baziliyo, Court Interpreter

**RULING**

This is the State’s application seeking that the Order of the Chief Resident Magistrate dated 11<sup>th</sup> February 2008 ordering the State to produce documents to the 1<sup>st</sup> accused be reviewed and quashed. The application was made under Section 360 of the Criminal Procedure and Evidence Code. Section 360 of the Criminal Procedure and Evidence Code provides as follows:

**“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to**

**the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court”.**

The powers of the High Court as such review are provided in Section 362. In Section 362 (1) it is stated that:

**“In the case of a proceeding in a subordinate court the record of which has been called for, °°° the High Court, by way of review may exercises the same powers as are contended upon it on appear.”**

Under Section 353 of the Criminal Procedure and Evidence Code the High Court has powers to dismiss the application, if there appears to be no sufficient grounds for interfering; and where there is sufficient cause for interfering, the High Court may make any amendment or any consequential or incidental order that may appear just and proper. Lets make a statement on the manner that this court came to have knowledge of this matter so as to necessitate that it should come to court for review. Sometime in February, the Registrar was moved to issue an appeal allowing the state to be held as the State was aggrieved with the Order that had been made in the trial court. Upon going through the documents the Registrar considered the provisions of the Criminal Procedure & Evidence Code and opined that this was not a matter for appeal but that it could be moved under Section 360 of the Criminal Procedure & Evidence Code. Hence the Registrar called for the lower court proceedings under Section 360 of the Criminal Procedure & Evidence Code and forwarded the file to my chamber. Upon going through

the court record, I considered that I needed to hear from Counsel for both parties to assist me in coming up with an informed decision. Hence the hearing that leads to the decision hereunder. In supporting the application, Counsel for the State deponed that the 1<sup>st</sup> accused was charged together with some two other suspects in the Chief Resident Magistrate Court at Lilongwe with various offences under the Public Management Act and the Penal Code. The 1<sup>st</sup> accused was in particular, and for the purposes of this application charged with the following offences:

- Count 1 - Procuring improper payments of public money contrary to Section 88 (1)(g) of the Public Finance Management Act no 7 of 2003.
- Count 2 - Gross negligence by a Public Officer in presenting money contrary to Section 284 (1)(2) of the Penal Code.

The particulars of the offences indicate that the alleged incidents occurred on 5<sup>th</sup> May 2004. The court made a finding that the accused have a case to answer in respect of all counts proffered against them.

Counsel for the State deponed that on the appointed day for commencement of the accused person's defence, which was on 11<sup>th</sup> February 2008, the 1<sup>st</sup> accused in particular applied to court to have the State furnish him with documents contained in a Notice that in his view would help him in his defence, the document is as follows:

**REPUBLIC OF MALAWI  
IN THE CHIEF RESIDENT MAGISTRATE'S COURT  
AT LILONGWE DISTRICT REGISTRY  
CRIMINAL CASE NO. 14 OF 2004**

**REPUBLIC**

**And**

**FRIDAY JUMBE, PHILLIP BWANALI and VINCENT MPALUKO**

**NOTICE TO PRODUCE DOCUMENTS**

**TAKE NOTICE** that pursuant to section 245(2)(c) of the Criminal Procedure and Evidence Code as read with Rule 4 of the Criminal Procedure and Evidence (Documentary Evidence) Rules, the Prosecution is hereby required on behalf of the first accused person to produce and show to the court at the resumption of the trial of this case, the following documents which are deemed by the first accused to be in the possession of the Chief Secretary to the President and Cabinet in the Office of the President and Cabinet (in respect of Item number 3) and also in the possession of the Secretary to the Treasury and the Budget Director in Ministry of Finance (in respect of the rest of the Items) and which are relevant to the issues in this case:

1. The Year 2003/2004; 2004/2005; 2005/2006; and 2006/2007 Budgets and mid year expenditure returns in those years, showing budget and actual expenditure.
2. A narrative of all Votes that over expended during those years.
3. Cabinet Minutes approving every over-expenditure in those years.
4. Supplementary Appropriation Estimates and Supplementary Appropriate Bills during the periods mentioned in (1) above.
5. Letter from former Minister of Education Y. Mwawa to Minister of Finance G. Gondwe requesting extra budgetary funding for “special client” account with handwritten instructions from the Minister of Finance to the Secretary to the Treasury, including cabinet approval for the resultant funding.
6. At least any four letters from cabinet ministers to the first accused requesting extra budgetary funding.
7. Minutes indicating cabinet approval authorizing Minister of Finance to withdraw money from the unforeseen expenditure vote to cover

funeral expenses on the demise of the late First Lady of Malawi, Madam Ethel Mutharika.

8. Budget item for floods including actual expenditure up to 31<sup>st</sup> January, 2008 and copy of cabinet minutes indicating cabinet approval.
9. During the last budget session the vote for MBC and TVM were reduced from MK360m to KM1m and that for Parliament was increased from MK2.9bn to MK3.2bn. Please furnish the first accused with relevant cabinet minutes authorizing the Minister of Finance to undertake the above named changes while in Parliament.
10. In the 2006/2007 budget, the Vote for unforeseen expenditure was MK100m. Indicate through cabinet minutes approvals from cabinet expenditures on this vote and match in with overall expenditure for that year.

Dated this .....day of .....2008.

**KALEKENI KAPHALE**  
**Of Counsel for the First Accused Person**

Counsel for the State deponed that the documents sought by the 1<sup>st</sup> accused have no relevance to the charges. He submitted that the offences were committed in May 2004 and that the 1<sup>st</sup> accused was charged in the same year, and looking at the notice to produce documents, it appears that the documents requested relate to events that occurred long after the 1<sup>st</sup> accused had committed the offence and after he had already been charged and are therefore not relevant in as far as defending the actus reus of the offence at the time the 1<sup>st</sup> accused committed the offence. He observed that consequently budgets and other financial documents after the

2003/2004 fiscal year requested in the Notice are not relevant to the issue and therefore the lower court ought not to have granted the request.

Counsel for the State also deponed that the documents sought by the 1<sup>st</sup> accused include Cabinet minutes and Cabinet documents on various transactions done long after the offence was committed. And that in as far as the same are not relevant to the facts in issue in the present matter, they are also privileged documents which are not subject to disclosure in terms of Section 221 of the Criminal Procedure and Evidence Code. He further deponed that nowhere in the world have Cabinet minutes and documents been subjected to public scrutiny and neither have they been admissible in a court of law except where the State voluntarily agrees to it. He noted that only the Chief Secretary of the State and Cabinet, who is the custodian of the requested privileged statement has a prerogative under S221 of the Criminal Procedure & Evidence Code to give or withhold permission to disclose such document and to that effect he has denied disclosing the information. That from common law principles as well as statutory provisions official communications and officers of the State, the Court ought not to have granted the request to furnish the 1<sup>st</sup> accused with the information contained in the Notice.

Hence the prayer that this court should review the Order to furnish the 1<sup>st</sup> accused with documents for purposes of checking its correctness, legality and propriety and having found it improper it should quash the Order.

Counsel for the State also prayed that in any case the 2003/2004 budget (which is the only document that might be relevant) is a public document and the 1<sup>st</sup> accused being then Minister of Finance and subsequently till now shadow Minister of Finance should be able on his own to obtain this information without the assistance of the State as he likely already has the documents or at least knows where to obtain them and how.

Counsel for the 1<sup>st</sup> accused filed affidavit in response. In referring to the findings of the court that 1<sup>st</sup> accused had a case to answer Counsel for 1<sup>st</sup> accused added that in respect of Count 1, the court ruled that the 1<sup>st</sup> accused had a case to answer, because, among other things, he may have failed to obtain Cabinet approval for the extra budgetary funding, before the money was disbursed. Hence in his possible defence, the 1<sup>st</sup> accused may have to concentrate on whether indeed a Cabinet approval is necessary before any extra budgetary funding is made or whether the same can be procured after funds are disbursed. That 1<sup>st</sup> accused may also wish to rely on the practice in government when he was Minister of Finance and now to see whether such approvals

were obtained or are obtained prior to every extra budgetary funding. And that since the State made a bare allegation of failure to obtain Cabinet approval without proffering evidence of the same, the 1<sup>st</sup> accused needs evidence to contradict the State on this point. Wherefore Cabinet approvals for extra budgetary funding are at the core of the case against the 1<sup>st</sup> accused on the first count.

Counsel also deponed that the 1<sup>st</sup> accused has a constitutional right to access information in possession of the State which he needs to advance his rights and interests. Hence to prepare his defence, and in pursuit of his right to a fair trial, the 1<sup>st</sup> accused issued to the State a Notice to produce that the State referred to. It was defence Counsel's submission that this Notice to produce centres around the issue of Cabinet approvals for extra budgetary funding which issue is at the root of the first count.

Counsel for 1<sup>st</sup> accused noted that according to the Criminal Procedure & Evidence Code (Documentary Evidence) Rules, the 1<sup>st</sup> accused did not need to apply to court to issue the Notice of Produce, neither did the State need to lodge a verbal objection against the filing and service of such notice to them. Hence the objection to the court made by Counsel for the State was misguided and unprocedural. He observed that after the unnecessary objection, the court proceeded to cause to be issued by the court, and filed and served witness



summons to two public officers requesting them to come to court to testify and produce the documents mentioned in the witness summons, which are the same as those that are in the Notice to Produce. And that with the issuance of the witness summons, the issue of the Notice to produce and ruling of the court on it were overtaken by events hence no need to review and quash an order that has since been overtaken by events.

Let me reproduce an extract of the court proceedings that are the origin of this application. After the court ruling and Defence Counsel's applications on the way forward on how the defence intended to proceed with the matter, upon appreciating that a case to answer had been made, State Counsel responded as follows:

**Chinoko:** We would like to object to the State producing the document as requested by Counsel for 1<sup>st</sup> accused. Primarily accused hasn't stated or shown the importance and the relevance of the documents being requested.

Secondly, the matter is now for defence and would be like asking the State to help the defence in coming up with their defence. The State has shown a prima facie case against them the onus is solely on the defence to discredit the evidence given by the State. If the State has to give the evidence sought it would be like the State helping the 1<sup>st</sup> accused make his defence. On those grounds we object to the request by 1<sup>st</sup> accused.

- (1) The State should comply with the Notice of the 1<sup>st</sup> defendant as enumerated within two weeks.

After hearing the defence response, the court made directions as follows:

**Directions:** The court has considered the request by both parties for the 3 suspects. For the 1<sup>st</sup> suspect there is a notice to request documents from the Chief Secretary to the President and Cabinet. The Secretary to the Treasury and the Budget Director in the Ministry of Finance. The court has been informed that the 1<sup>st</sup> suspect needs the listed document in order to help him exercise his right to defend himself in this trial; as such the request for the information is based on Section 37 of the Constitution which guarantees access to Information held by all State organs at whatever level. For purposes of this trial my court does not wish to comment on the legal extent of the Section 37 right, suffice it to say that the Criminal Procedure and Evidence Code (Documentary Evidence) Rules provide for access to such public documents which are defined under Rule 9 thereof. To that extent, therefore, the court fails to appreciate the contention of the State that they cannot furnish the documents because to do so would be aiding the defence in making out their case. As has been correctly pointed out by the defence lawyer the State are under a duty to help the suspects by furnishing them with such information as would enable them to exercise their right to a fair trial. In any event, the issue has been formulated by way of Notice not a summons. Thus State are expected to comply as requested. So in the light of these conclusions the court will give the following directions:

- (i) the State should comply with the Notice of the 1<sup>st</sup> defendant as enumerated within two weeks.

## **Finding**

Reading the trial court and listening to the arguments by both counsels, I see no basis for this court to interfere with the learned magistrates order. The following is the basis for my finding: The argument that was forwarded by the State as the basis for objection in the lower court is wanting. The basis for finding it wanting is the same that the learned magistrate advanced when he came up with his ruling.

Then the State Counsel has advanced in this court that the information sought is privileged information. Where liberty of an individual/the Right to a fair trial as well as the Right to access information is at stake; I wonder if the State can convince the court to make a wholesale order quashing the magistrate's order. Let me agree with Counsel for 1<sup>st</sup> accused that in as far as this matter is concerned, the learned magistrate has not yet made any finding on the Chief Secretary's statement that the information is privileged. This court has not seen the content of the Statement. It will therefore be premature for this court to make a pre-emptive order on matters that have not been heard.

I opinion that the learned Chief Resident Magistrate has an effective process that he can invoke when required to do so with regard to the management of this case. The State can therefore not come forward and deny the court opportunity to decide for itself whether indeed information on sought is relevant under the guise of privileged information. I am sure

the learned Magistrate has the capacity to decide upon being moved to decide which information he can allow and which he will not. And he also can decide how to conduct the trial to ensure that privileged information is not accessed by everyone.

Counsel for the State has referred to S221 of Criminal Procedure & Evidence Code that deals with privileged. I am sure that the Section referred has to be read in line with the Constitutional provisions. The Constitutional sitting can best digest the statutory and constitutional provisions.

It is on the above basis I am not interfering with the learned Chief Resident Magistrate's decision of 11<sup>th</sup> February 2008.

**Made** in Chamber this 30<sup>th</sup> day of May 2008.

I.C. Kamanga  
**JUDGE**