IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MISC. CIVIL CASE NO. 49 OF 2008

BETWEEN

THE STATE ……. APPLICANT

AND

THE ATTORNEY GENERAL (I.G. OF POLICE,
COMMISSIONER OF POLICE (CENTRAL) ……. RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

: F. Assani, Counsel for the Applicant
: Mrs Kanyuka, Counsel for the Respondent
: Mr. Kafotokoza, Court Interpreter

RULING

On 26th August, 2008 the applicants filed notice of application for leave for judicial review. Within the application for leave for judicial review, the applicant also applied for an order of interlocutory injunction restraining the respondents by themselves, their agents and/or servants and whosoever acting from enforcing the respondents' decision disapproving the holding of whistle stops. The matter was brought ex-parte but my sister Judge, Chombo, J., ordered that the matter be heard inter-parties. The order was made the same day, 26th August, 2008. Later in the day the matter was brought before me on the question of the leave for judicial review. Leave for judicial review was granted while the matter for

interlocutory injunction was set for inter parties hearing on 3rd September 2008, a date I was informed both the Attorney General and the applicant found most convenient. The inter-parties hearing of the interlocutory injunction was done before me on 3rd September, 2008.

The present matter emanates from the decision of the applicants' political party, the United Democratic Front (UDF), to hold whistle stop tours of some parts of Lilongwe and Salima Districts. The said party did on 20th August, 2008 notify the police that on Tuesday, 26th August, 2008 the National Chairman of the United Democratic Front (UDF) who is also former Head of State Dr Bakili Muluzi would conduct a whistle stop tour in Lilongwe and on 28th August, 2008 he would conduct a whistle stop tour in Salima. The notification was sent to the Officers in Charge of both Lilongwe Police and Salima Police respectively with copies to the Commissioner of Police, Central Region Police Headquarters in Lilongwe. The applicants got their reply from the Commissioner of Police which was in the following terms:

Dear Sir,

RE: UDF NATIONAL CHAIRMAN'S WHISTLE STOP TOUR

I write on the above captioned and also refer you to your letter dated 20th August, 2008. In your two letters you wrote the Officer-in-charge, Lilongwe and the Officer-in-charge Salima informing us of your intention to conduct Whistle stop tours in Lilongwe and Salima on 26th and 28th August, 2008 respectively.

I wish to inform you that your application has not been approved. Previous experience has shown that the stops are made at busy trading centers along main roads which cause great inconvenience to other road users, as it obstructs the free flow of traffic on the road.

We regret any inconvenience caused.

D.F. Kapanga DCP
FOR : THE COMMISSIONER OF POLICE
CENTRAL REGION POLICE HEADQUARTERS

It is on the basis of this response and on the basis of the decision of the Commissioner of Police not to approve the whistle stop tours that the applicant made the application for leave for judicial review and an interim injunction pending the outcome of the judicial review.

As indicated earlier the hearing on 3rd of September, 2008 was not on the judicial review, where leave was already granted, but on an application for an interlocutory injunction. In this ruling therefore I will focus on those matters that bear relevance to an application for an interlocutory injunction and will leave matters raised in argument but pertaining to judicial review to the future when the judicial review hearing is done. The application is supported by affidavit evidence and there is an affidavit in opposition sworn by the Deputy Commissioner of Police who signed the letter quoted above. In arguing the application counsel said that the decision of the Police impinges on the exercise of political rights under sections 35, 38 and 40. The Republican Constitution, which exercise is very fundamental to the upholding of Malawi's democracy. He stated that the affidavits in opposition and the skeletal arguments filed by the Attorney

General do confirm that there are indeed triable issues. These issues relate to the extent, limitation of rights as permissible under the constitution and whether the Police acted Ultra Vires when they made the decision to disapprove a notification.

Counsel argued as a second issue to be considered when deciding to grant or not to grant an interlocutory injunction, whether damages would be an adequate remedy. He argued that a denial to freely campaign even through whistle stops cannot be compensated by way of damages.

On the question of balance of convenience Counsel argued that it was beneficial to Malawi's democracy if the Status quo ante was maintained, with the police only there to regulate the conduct of the whistle stop tours rather than stopping them. Allowing the letter of the Commissioner of Police to stay for now before judicial review is made means that people will not freely canvas for the election through whistle stops. The prayer therefore was that an injunction be granted awaiting the determination of issues in the judicial review.

Mrs. Kanyuka for the Attorney General argued that under our Constitution the police is an independent organ of Government and in the exercise of their powers under the Constitution are entitled to maintain public order. It may use its powers limit or restrict the exercise of derogable Constitutional rights under the Constitution. It was argued that the conduct of whistle stop tours will inconvenience other road users such as ambulances. The non approval of whistle stop tours does not violate the substance of the rights the applicant could enjoy. Counsel further argued that it is the mode of exercise of the rights that was

disapproved. Indeed paragraph 11 of the affidavit of Doreen Kapanga, Deputy Commissioner of Police, states about whistle stop tours and what happens that:

> *"this is regrettable and can be effectively avoided in our view by discouraging having such meetings in such places but rather having them held a reasonable distance away from the roads such as stadiums or open/community grounds."*

Counsel argued that the Police use discretion in the exercise of their powers. She argue that in this application for an injunction, Counsel for the applicant has not raised arguable questions. She argues that counsel for the applicant has not established that damages would not adequately compensate the applicant and that the question of balance of convenience only arises where there is doubt as to the adequacy of damages to the applicant.

Counsel for the Attorney General also argued that the events for which the application for an injunction was made would have taken place on 26th August, 2008 and 28th August, 2008. This meant that the events have fallen away and that what is being pursued now is an open ended interim injunction as there was no other tour on the line. An open ended interim injunction would fail the interests of justice, so she argued. She submitted that the applicants need only wait for the outcome of the judicial review whose hearing may have to be expedited.

I must say that counsel on both sides went into considerable detail in their submissions. It is not possible to outline everything they said. As a matter of fact

some of the arguments raised by counsel on both sides were more relevant to a judicial review hearing than to the hearing for an interlocutory injunction. The outline has limited itself to matters relevant to an interlocutory injunction. I will take into account any other relevant matter argued but not included in the outline.

The first point that calls for consideration is whether the 26th August 2008 and 28th August, 2008 having passed the application for an interlocutory injunction would have lapsed. The 26th of August, 2008 were the dates the whistle stop tours which gave rise to this matter would have been undertaken. The two days passed without the tours being undertaken on account of the non-approval by the Commissioner of Police, Central Region. The purpose of an injunctive relief is to maintain status quo ante. Had it been that the phrasing of the letter from the Commissioner of Police had confined the non-approval to the two dates, perhaps the Attorney General's argument of the time lapsed would have held water. The letter appears not to have confined itself to the 26th and 28th of August, 2008. I take note that the Attorney General argued that there were no other tours proposed and therefore the application had lapsed. This argument may suggest that any other planned tour would have been considered on its own. But that is not the import of the letter of the Commissioner of Police. By referring to previous unhappy moments on whistle stop tours the Commissioner of Police appears to suggest that the proposed tours of 26th and 28th August, 2008 and any that may follow would not be permitted. In other words that suggestion is that it is in the nature of whistle stops that they are made at busy trading centers along main roads which cause great inconvenience to other road users as they obstruct

the free flow of traffic on the roads. It is therefore the phrasing of the letter suggestive of application to future whistle stops that renders this application competent and worthy of attention even at this point before judicial review. In that sense it would not be said that this is an application for an open ended injunction. It would be a contradiction in terms to call an interlocutory injunction open ended for it is supposed to last until the final determination of the matter, unless it is dissolved earlier. An interlocutory injunction is not the same as a permanent injunction. For all these reasons I hold that this application for an interlocutory injunction can be entertained at this point even after the dates of 26th and 28th August, 2008.

In considering this application, I have duly reminded myself that it is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. (See *American Cyanamid v Ethicon Ltd (1975) AC 396)*. As was stated in *Mkwamba v Indefund Ltd[1990] 13 MLR 244 at 248.*

> *"The American Cyanamid case does lay down important principles which should guide a court when considering an application for an interlocutory injunction. To begin with, the grant of an injunction is a remedy which is both temporary and discretionary. In considering whether or not to grant an injunction, the court must not embark on anything resembling a trial."*

As *Mkandawire J.* rightly put it in *Alvares v Mudaliar [1991] 14 MLR 7* at *page 17* the purpose of an injunction is to restore the parties to status quo pending the determination of their legal rights (See also *Somanje v Somanje 12 MLR 326).*

As to whether an injunction can be granted against the police I would do no better than adopt the approach taken by my brother judge, Potani, J. in *Kennedy Makwangwala and Hophmally Makande vs The State, Inspector General of Police and Commissioner of Police (South) Miscellaneous Civil Cause No. 63 of 2008* in *the Principal Registry.* In discussing the relevant law Potani, J. had this to say:

> *"It is settled law that in judicial review proceedings, the court can competently grant an order staying the proceedings or decision complained of and/or an injunction order against the respondent. This power is specifically provided for in Order 53 Rule 3 (10) of the Rules of The Supreme Court. The case of M.V. Home Office (1993) 3 WLR stands for the proposition that an interlocutory injunction can be granted even against crown servants, that is, Government servants like the respondents in this case. In considering whether or not to grant an injunction in judicial review proceedings the court has to be guided by the same principles that are applicable to an application for an injunction made under Order 29 of the Rules of the Supreme Court in an ordinary action. (See R.V. Kensington and Chelsea Royal London Borough Council ex-parte Hammell (1989) QB 518). The leading case authority on the principles governing the grant or refusal of an injunction is American Cyanamid Company v Ethicon Ltd*

(1975) AC 396 which has been applied religiously in a compendium of cases in the jurisdiction of this court one such case being Mobil Oil Malawi v Leonard Mutsinze, High Court Principal Registry, Civil Cause No. 1510 of 1992 in which Chatsika, J. expanded the applicable principles…"

Potani, J. then went on to quote in extent: the relevant part of the dictum of Chatsika, J. in the case just cited above.

I am in full agreement with the approach of my brother judge as stated above. An injunction can in a proper case be granted against the Police. Reverting to the evidence in the present matter, the question to be addressed first is whether there are triable issues raised on the facts. The present matter, just like the *Kennedy Makwangwala and Hophmally Makande* matter cited above, concerns the enjoyment of human rights as guaranteed by the Republic of Malawi Constitution. While the applicant says that the police have interfered with the enjoyment of the rights to freedom of association, expression, assembly and to participate in and campaign for a political party or cause, the respondents deny any such interference. The respondents however, argue that what they have done is in due execution of their Constitutional duties in which case they were entitled to restrict or limit the exercise of the rights claimed by the applicant.

To this the applicant responds by saying that police in acting in the manner they did, or in deciding in the manner they did, acted Ultra Vires their lawful authority. Clearly issues are joined here, very serious issues relating to the exercise of human rights guaranteed under our Constitution. Issues of human rights as raised by the applicant are so fundamental under our Constitution that they can not be

ignored or be treated as frivolous or vexatious without the matter going to full trial. Even the argument by the respondents that the rights claimed by the applicant are derogable and can be limited by virtue of section 44 of the Constitution can not serve to minimize the seriousness of the issues placed before the court without there being a full trial. On the issue of public security and safety to other road users and the duty of the police to maintain the same, I fully subscribe to the views of the South African *Chief Justice Pius Langa* as quoted with approval by Potani, J. in The *Kennedy* *Makwangwala and Hophmally Makande* case, that is to say.

> *"One of the functions of the courts in a democratic society is to uphold the rule of law, which includes ensuring that Constitutionally protected rights are upheld. Though the executive and the legislative are in the best position to determine policy with regard to national security, the courts have a crucial role to play in ensuring that security measures are done within the confines of the law and without unjustifiable limitation of human rights."*

Further our Constitution provides that any person who claims that his rights as guaranteed by the Constitution have been violated is entitled to approach the court for redress and is entitled to an effective remedy. Thus the applicant who claims that certain of his rights as guaranteed by the Constitution have been violated by the decision of the police is entitled to approach this court for redress and it is the duty of the court to provide effective remedy.

As to whether damages can be adequate remedy for the alleged violation of human rights, I hasten to say that damages may not be an adequate remedy. Enjoyment of human rights can not be quantified in monetary terms, and yet the enjoyment of those rights is a very fundamental aspect of our democracy. In addressing a similar question Potani, J. was able to say the following:

> *"Counsel for the applicants (I suppose the judge meant the respondents) has submitted that damages would sufficiently compensate the applicants if the injunction is refused and they happen to succeed in a substantive judicial review proceedings as they would be paid whatever sums have been spent in preparation for the intended rally. The court would hasten to state that such a view is a very simplistic and naïve one. The case at hand is not just about expenses attendant to the preparation for the rally. That is just a peripheral issue. The case is about interference with and violation of fundamental human rights. Damages, in the view of the court, in the circumstances, would not just be sufficient but also difficult if not impossible to assess and this tips the balance in favour of granting the interim reliefs being sought." (sse Kennedy Makwangwala and Hophmally Makande* cited above).

This in my view represents the correct position even in the case at hand. On the question of balance of convenience as a third principle on which an interlocutory injunction may be granted it seems to me that the affidavit of Doreen Kapanga, Deputy Commissioner of Police, makes life much easier for the court to determine

where the balance of convenience would tilt. I must say that the views and concerns as expressed in paragraphs eight to ten of the affidavit are genuine and understandable. The affidavit states as follows:

> *"8. THAT while recognizing and respecting the Applicant's rights, the Police is also aware of, and recognizes, the need to respect and protect the rights and freedoms of others such as other road users.*
>
> *9. THAT the road users have no alternative but the road to effectively and freely commute.*
>
> *10. THAT the essence of a whistle stop tour is the having of a short rally a few meters from the road or at trading centres and experience has shown that his results in congested roads and in some cases accidents involving pedestrians as they attempt to cross the road."*

These views and concerns on public safety and security would be balanced with the Police's own view expressed in Paragraph 11 of the affidavit which states thus:

> *"11. THAT this is regrettable and can be effectively avoided in our view by discouraging having such meetings in such places but rather having them held a reasonable distance from the roads such as Stadiums or open/community grounds."*

Clearly here the balance tilts in favour of having such meetings at places a reasonable distance from the roads, a view confirmed by the Police themselves. The short of this is that the balance of convenience in the application for interlocutory injunction tilts in favour of granting it and I so do. That injunction will last until the conclusion of the judicial review unless earlier dissolved by the court.

As for the judicial review it is ordered that the hearing of it be expedited.

MADE in Chambers this 16th day of September 2008 at Lilongwe.

R.R. Mzikamanda

J U D G E