

IN THE HIGH COURT OF MALAWI

LILONGWE REGISTRY

Miscellaneous Civil CASE NUMBER 46 OF 2012

BETWEEN:

The state

AND

The speaker of the national Assembly

respondent

Ex parte> chikumbutso john hiwa

CORAM: THE HONORABLE MR. JUSTICE L P CHIKOPA
Likhwa Mussa Mr. of Counsel for the Applicant
Njala, Court Clerk

Chikopa, J

ORDER

We have heard this matter *ex parte*. We have however taken the unusual step of giving a written opinion due to the somewhat unusual circumstances surrounding the matter.

The applicant is a Members of Parliament. It has been alleged against him that he has in breach of section 65 of the Republican Constitution crossed the floor the effect of which is that he must be deemed to have by operation of law crossed the floor. The matter was brought to the attention of the Honorable Speaker of the National Assembly who effectively dismissed it for want of

evidence. It is alleged that there is now been provided to the Speaker new evidence. The said Speaker is now desirous of making a ruling on the matter today at around 0900 hours when the National Assembly reconvenes. The applicant does not think it right that the Speaker makes the ruling without first hearing him. He is convinced that that would be in breach of the rules of natural justice. He has approached this Court seeking an order restraining the Speaker from rendering his decision until he has heard the applicant. A straight forward enough story one would think. The problem as we were quick to point out to the applicant and his Counsel is that this Registry is that of the Commercial Division and the matter before us is one which should ordinarily have been brought in the General Division. Counsel has however informed that he has been to the General Division here in Lilongwe but found that there was no Judge who could deal with the matter. Considering the urgency of the matter - the Speaker will deliver a ruling at 0900 hours - Counsel says he felt obliged to approach this Court for assistance seeing especially as this is still a High Court and has unlimited jurisdiction. It was also said having the matter not heard at this point in time would cause irreparable damage to the applicant and his constituents.

This very court has dealt with the issue of jurisdiction of the Commercial Division versus that of the General Division of the High Court. See our interim decision in **Re The Liquidator of Finance Bank and 5 Others**. we were and still are of the view that the Commercial Division and the General Division are only

different sides of the one coin that is the High Court. They as such have unlimited jurisdiction to hear and determine any matter. The same view was espoused by the Supreme Court in **New Building Society v Aziz Issa**. We do not disagree with the Supreme Court. In point of fact we are bound by that decision. However in practice it seems to us that there is a lot of good sense in letting commercial matters go to the Commercial division and letting those matters that should be dealt by the General Division go to the General division. Unless of course the situation demands otherwise. The question before us being whether this is one such situation.

The applicant alleges that he was informed yesterday afternoon that the Speaker was in receipt of new evidence against him. He has not had sight of such evidence which is a departure from the norm in the sense that he was granted an opportunity to give his side of the story when the allegations were first made. See exhibit CH 2 and 3. The Speaker meanwhile will give his ruling this morning at 0900 hours without hearing him or allowing him to test such evidence unless we stop him. Has a case been made out why this case should hear this application and not for instance let him go to the general division? We feel obliged to answer in the positive. We have no reason to disbelieve Counsel when he says he has been to the General Division and found no Judge to deal with the matter. Secondly this matter in the present circumstances touches in our view on the right to access to justice/courts. If we decline to hear we might end up not fully according him his right to access the courts and justice on grounds that are purely administrative and not legal. He might then find

himself in a situation where he will be seeking to close the door after the horse has bolted. Such we believe is the urgency of the matter. The second question is whether we should grant the order sought. We think it is a matter of convenience really. As we understand it the applicant is not asking us to stop the Honorable Speaker from determining whether or not he has crossed the floor. Only that he be allowed to have his case made out against whatever new evidence against him is before the Honorable Speaker. If we do not grant this application the Honorable Speaker will go ahead and make the ruling. If it is in his favour well and good. If it is not he will lose his seat in the National Assembly which is not a right. His constituents will also lose representation in the House which is their right. If we grant the application and the matter goes to trial either the Court will order that the applicant be heard or that he not be heard. Thereafter the Honorable Speaker will still make the decision whether the applicant has crossed the floor or not. It is like we have said above a matter of convenience. If the Honorable Speaker makes his ruling and it is against the applicant and it later turns out that he ought not to have made it would the damage thereby caused be capable of compensation? The damage as we have said above is loss of the seat and representation. It can be argued that the applicant can be compensated. Can on the other hand the constituents be similarly compensated? We have grave doubts. On the other hand if we grant the order sought and it turns out it ought not to have been granted or the Honorable Speaker still finds against the applicant is the situation retrievable? We think yes. The applicant will be made to pay back whatever benefit

especially pecuniary he gained by virtue of being a Member of Parliament when he ought not to have been. We think the balance of justice favors us granting the applicant an audience and the order prayed for. Any damage attending to such course of action is in our humble view retrievable which would not be the case if we acted otherwise. An order is therefore hereby granted restraining the Honorable Speaker from making the ruling until the matter of whether or not the applicant should be heard before him has been answered [if need by the court] or until further order of the Court. Because this is amidst a parliamentary sitting the order will be served on the Attorney General as principal legal advisor to the Government of the Republic of Malawi. And also because there is urgency attending to this matter we provisionally set down the hearing of the substantive matter on Friday 29, 2012 at 1030hours. Evidence shall be by affidavits which should be filed and served on all concerned at least two clear days before the date of hearing. Parties are at liberty to on notice cross-examine deponents. Unless the parties so insist we think it best that this matter reverts to the General Division. For that purpose we transfer this matter to the Judge in Charge Lilongwe Registry of the High Court for further dealing.

Costs in the cause

Dated this June 22, 2012.

A handwritten signature in blue ink, appearing to read 'L P Chikopa', followed by a large, stylized flourish or initial 'A'.

L P Chikopa
JUDGE