



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 14 OF 2013

**IN THE MATTER OF SECTION 42(2)(1) OF THE REPUBLIC
OF MALAWI**

**GEOFFREY DOFF BOTTOMAN 1ST
APPLICANT**

and

**PETER PETROS TEMBO 2ND
APPLICANT**

- AND -

**THE REPUBLIC
RESPONDENT**

**INTER-PARTIES APPLICATION FOR CERTIFICATION AS A
CONSTITUTIONAL MATTER (Section 9 (3) of the Courts
(Amendments) Act 2004)**

**CORAM: HONOURABLE JUSTICE A. K. C. NYIRENDA, SC,
CJ**

Salimu, Counsel for the Applicant
Collin Chitsime, Counsel for the Respondent
Mthunzi (Mrs), Official Interpreter and Recording

Officer

Mwafulirwa (Mrs), Principal Personal Secretary

RULING

This matter was heard a few months back. I have taken much longer to invite the parties back before me than would ordinarily be the case with an urgent application as this one is. I realise that the delay in getting back to the parties is in itself a contradiction in terms in a matter where what is in issue is about delay in the prosecution of the Applicants.

What has caused me to take a while is the peculiar and unusual situation I find myself on account of the background of the case. I needed to reflect on the matter much more earnestly than ordinarily. The events leading to the arrest and the criminal charges against the Applicants are partly as a result of findings of a "Commission of Inquiry into the Death of the Late Robert Chasowa who was a student of the Malawi Polytechnic, a constituent College of the University of Malawi. The Commission of Inquiry was chaired by Yours Truly.

The case is before me, from the court below, seeking referral pursuant to Section 9(2) and (3) of the Courts Act. Section 9(2) provides that every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

More relevant to the application at hand is Section 9(3) which provides that a certificate by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence to that effect.

I have no doubt that this far we can already see the predicament in which I find myself. Having presided over the Commission of Inquiry I, am obviously not suited to preside over the present application. On the other hand, the law, clear as it says, vests the responsibility of certification of referral only in the Chief Justice.

Both counsels for the Applicants and the Respondent are of the view that I could proceed to hear the matter. They acknowledge the conflict of interest but they believe that I could rise above the background and approach the case with a closed mind and with an objective view. I believe that counsel are well meaning in their submission.

As observed by the Swaziland Court of Appeal in **Minister for Justice and Constitutional Affairs v Sapire (Civil Appeal No. 49/2001)**, the law will not suppose a possibility of bias in a judge who is sworn to administer justice without fear or favour and whose authority greatly depends upon that presumption and idea. That is the reason why the threshold for a successful allegation of perceived judicial bias is high.

Much as this is the threshold, the presumption can be displaced with cogent evidence that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See **R v S(RD) (1997) 118 cc (3)(d)**.

In **SARFU and Others v President of South Africa and Others 1999 (A) SA 147** it was stated:

“The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

I would agree that mere apprehensiveness on the part of a litigant that a judge will be biased, even a strongly and honestly felt anxiety, is not enough. The court must scrutinise the apprehension to determine whether it is to be regarded as reasonable, see **Matapo and Others v Bhila No. and Others 2010(1) ZLR32**.

As I disclose earlier, the background and my involvement with events leading to this case are common place. The recommendations that were made following the Commission of

Inquiry are still vivid in the public domain. While I could be convinced myself that I would live up to my oath of office to administer justice without fear, favour or prejudice, in accordance with the constitution and the law, it is less than likely that fair minded and informed observers, having the facts and the background of this matter, would conclude that I proceeded without a real possibility of bias. Even if I was as impartial as I could be, nevertheless if fair minded persons would think, in the circumstances, there was a real livelihood of bias, I should give way.

On account of my proximity and involvement with the events leading to this case, assessed against the oath of office that we take as Judges and in the desire to preserve public confidence in the independence, integrity and impartiality of our judicial system, it is overriding that my hands should be off this matter.

The conclusion I have reached obviously is serious cause for concern. It would result in the Applicants' case having no redress. The law is clear that for a referral to proceed, there shall be certification by the Chief Justice. The law does not designate any other person.

There are those that would say the duty of the courts is to interpret and give effect to legislation as given by the law giver. That courts should be concerned only with the law as it is and not as it ought to be. There are those who look beyond the confines of the law in order to give efficacy to the administration of justice in compelling situations. In **Re Residential Warranty Co. of Canada Inc [2006] AJ. No. 1304 (CA)** the court advocated inherent jurisdiction of courts co-existing with statutory jurisdiction and said:

“..... a judge is not precluded by codification of law from invoking his inherent jurisdiction where the benefits of granting a particular remedy outweigh the detriment caused by its application.”

In *G. McG v D.V. (No. 2) [2000] 4 I.R. 1* Murray C. J.'s views were that:

“The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possesses implicitly whether owing to the very nature of its function or its constitutional role in the administration of justice”

Of particular guidance is a statement on the principle of inherent jurisdiction of courts in **Golden Forest Holdings Limited v Bank of Nova Scotia (1991)** 98 N. S. R. 2ND 429 (1990, NSCA) where it is stated:

“The term inherent jurisdiction is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the court which is comprised within the term inherent is that which enables it to fulfil itself properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

We find ourselves in a situation where the law was short-sighted, much as it is appreciated that even the best of legislation could not prescribe for all events ahead of time. Yet it is cardinal that a litigant could never be left without a remedy in our legal system let alone in criminal justice. While the power for certification is confined to the Chief Justice, out of necessity and in the overriding interest of the administration of justice, it is more than compelling that I exercise the inherent powers of the court and cede my authority over these proceedings to the next most Senior Justice of Appeal. It must be emphasized again that the exercise of inherent powers is only for the ends of justice and must accordingly be absolutely confined.

PRONOUNCED this 29th day of October, 2015, at Blantyre.

A. K. C. Nyirenda, SC
CHIEF JUSTICE