



*Malawi Judiciary*

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MISCELLANEOUS CIVIL CAUSE NO. 16 OF 2016**

**BETWEEN:**

**THE STATE**

-and-

**DIRECTOR OF PUBLIC PROSECUTIONS**

**EX-PARTE:**

**GIFT TRAPENCE**

-and-

**TIMOTY PAGONACHI MTAMBO**

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

Dr. Nkhata, Counsel for the Applicant  
Soko, Counsel for the Applicant  
Apoche Itimu, Counsel for Respondent  
Mthunzi (Mrs.), Recording Officer  
Mwafulirwa (Mrs.), Principal Personal Secretary

## RULING

This matter is before me to determine certification as one that expressly and substantially relates to or concerns the interpretation or application of the provisions of the Constitution pursuant to section 9(2) and (3) of the Courts Act.

The impending action is meant to be by way of judicial review. As we are all aware such a matter originates with an application for leave to seek judicial review. This can only be leave of the court before which the application is commenced. It is also basic that it is leave that breathes life into the application. Strictly speaking, without leave it cannot be contended that there is a substantive action for judicial review.

On record at the moment is only an application for leave to file an application for judicial review.

Order 53 rule 3 of the Rules of the Supreme Court provides:

*“No application for judicial review shall be made unless the leave of the court has been obtained.”*

Rule 7 provides:

*“The court shall not grant leave unless it considers that the applicant has a sufficient interest in that matter to which the application relates.”*

Practice Note 53/1-14/2 in particular states in part:

*“The leave application will normally be dealt with initially by a single judge without a hearing and a copy of the order made by the single judge will be sent to the applicant ... If leave is granted, the applicant then institutes **a substantive judicial review application** by serving the prescribed form of originating process on all persons directly affected ...”*

Instituting the substantive judicial review application entails several steps upon obtaining leave, all of which must be undertaken within 14 days of the date of the grant of leave. Put simply, there is no substantive action before grant of leave, and even thereafter before instituting the substantive action.

The judge in the court below thought he did not have to grant leave but rather place the matter before me for certification. It is rather unclear to me to say the least, what I would be certifying when there is in fact and at law, no application for judicial review.

Section 9(2) and (3) requires me to certify a matter where:

*“a proceeding in the High Court and all business arising thereout, expressly or substantively relates to or concerns the interpretation or application of the provisions of the Constitution ...”*

The only proceeding yet, if it was argued, is the application for leave that was not crystallised into a substantive action. If I took charge of the matter at this stage, I will be required first to grant leave and allow for the judicial review application to be instituted within 14 days. Surely that cannot be my responsibility in the context of certification.

What is interesting is that the learned Judge made quite an exposition of what the matter entails already in a fairly detailed ruling. The only thing he does not do is grant or refuse to grant leave. At page 9 of the ruling is a statement where the learned Judge lost it as he says:

*“In the premises, it is my decision that the question of the reviewability by the courts of the exercise of constitutional prosecutorial discretion/powers by the DPP, in terms of the circumstances, scope and nature of such decisions, has to be determined in these proceedings before the court can rule on the issue of leave to apply for judicial review.”*

It is not clear from this statement who the learned Judge thought would “determine the reviewability” and which “court” would then “rule on the issue of leave to apply for judicial review.”

Be that as it may, the matter is not properly before me. The court below must deal with the question of leave to apply for judicial review. It was apparent to me when I raised the issue with the parties that they too saw the point, although attempts were made to explain the lower court’s position.

I would remit this matter back to the court below for further dealing as herein guided.

**MADE** in Chambers at Blantyre this 27<sup>th</sup> day of July, 2016.



Andrew K. C. Nyirenda, SC  
**CHIEF JUSTICE**