



JUDICIARY
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 16 OF 2016

BETWEEN

THE STATE
AND

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT
EX PARTE: GIFT TRAPENCE.....1ST APPLICANT
TIMOTHY PAGONACHI MTAMBO.....2ND APPLICANT

CORAM: HON. JUSTICE RE KAPINDU

: Prof. Nkhata, Counsel for the Applicant

: Mrs. Ndanga, Official Interpreter

RULING

Kapindu, J

1. This is an ex-parte Application for leave to apply for judicial review, brought by Mr. Gift Trapence and Mr Timothy Pagonachi Mtambo. They are asking this Court to review the decision of the Director of Public Prosecutions (the DPP), who is the Respondent in the instant matter, to discontinue criminal proceedings against Mr. Kenneth Msonda in Criminal Case No. 16 of 2016 before the Senior Resident Magistrate Court sitting at Blantyre. They also seek a review of the decision of the said Respondent in omitting to give reasons for the exercise of her powers of discontinuance of criminal proceedings under Section 99(2) of the Constitution of Malawi in respect of the above-mentioned criminal proceedings.
2. Mr. Kenneth Msonda, who was the subject of the discontinued criminal proceedings herein, is a renowned politician in Malawi. He is a public figure and a leader in a political party that has significant national followership.

He is therefore an influential man in society. In January of this year, Mr. Msonda hit the headlines after allegedly uttering remarks against the gay and lesbian community in Malawi, and allegedly suggesting that the best way to deal with them is to “kill them”.

3. The Applicants herein, who are well-known human rights activists in Malawi, being shocked by the alleged utterances, and with a view to protecting the rights of members of the lesbian, gay, bisexual, transsexual, and inter-sexed (LGBTI) community in Malawi; decided to lay criminal charges against Mr. Msonda before the Senior Resident Magistrate Court sitting at Blantyre in terms of Section 83(1) of the Criminal Procedure and Evidence Code (CP & EC). The said complaint was laid on 8 January 2016 and the presiding Magistrate, after considering the issues, decided to issue a Summons against Mr. Msonda requiring him to come to the Magistrate Court to answer the criminal charges as laid against him by the Applicants herein. The Charge Sheet alleged that Mr. Msonda had committed the offence of inciting another to contravene the law, contrary to Section 124(1)(b) of the Penal Code (Cap 7:01 of the Laws of Malawi). The law against which others were allegedly being incited by Mr. Msonda to contravene, according to the particulars of the charges laid, was Section 209 of the Penal Code which creates the offence of murder. In the circumstances, incitement to kill, it was argued, constituted incitement to murder contrary to Section 209 of the Penal Code.
4. The Magistrate’s Summons initially required Mr. Msonda to appear before the Court on 21 January 2016 to answer to the charges laid.
5. Mr. Msonda allegedly stood by his remarks through an affidavit that he swore on 14 January 2014. He also invited the presiding Magistrate to refer the matter to the Chief Justice for Certification as a matter raising issues of constitutional application and/or interpretation which must be heard before a panel of three High Court Judges in terms of Section 9(2) of the Courts Act (Cap 3:02 of the Laws of Malawi).
6. An inter-partes Summons taken out by Mr. Msonda for the hearing of a Motion for Referral of the matter to the Chief Justice for certification under Section 9(3) of the Courts Act was issued by the Magistrate on 18 January 2016. This inter-partes hearing was assigned the 22nd day of January 2016 for hearing before the presiding Magistrate at 8:30 in the forenoon. This

Notice effectively superseded the Notice for Mr. Msonda to appear before the Court on 21 January 2016 since, according to the Inter-partes Notice, the application was that the matter of referral had to be determined before plea taking. Indeed, the prayer for referral of the matter to the Chief Justice for certification was coupled with an attendant prayer for stay of the instant criminal proceedings. Mr. Msonda, through his legal practitioners Messrs Khumbo Bonzoe Soko and Gift Nankhuni, attached a draft order to referral in the form of Form 3 under the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules.

7. However, events in the matter took a sudden turn when on 20 January 2016, the Director of Public Prosecutions (the DPP) issued a Notice of Take Over of Criminal Proceedings in the instant matter under Section 99 of the Constitution. Section 99(2)(b) of the Constitution provides that:

The Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable so to do, to **take over and continue** any criminal proceedings which have been instituted or undertaken by any other person or authority. (Emphasis added)

8. However, evidently, the learned DPP did not decide to take-over and continue the criminal proceedings. By contrast, it seems she took over in order to discontinue the same. This is because, according to the documents on the record, the DPP issued both the Notice of Take-over of proceedings and also the Notice of Discontinuance of the criminal proceedings herein on the same day, i.e 20 January 2016. According to the joint Affidavit of the Applicants herein, they were served with the Notice of Take-over of the proceedings and the Notice of Entry of Discontinuance which was issued by the presiding Magistrate (notifying them of the DPP's decision to discontinue the proceedings made under Section 77(2) of the CP & EC), as they were preparing to travel to Blantyre for the proceedings on 22 January 2016. I would have thought it was not really necessary for the DPP to first take over the proceedings in the circumstances of the instant case. It seems to me that all the DPP needed to do was to directly intervene by exercising her constitutional powers to discontinue the proceedings under Section 99(2)(c) of the Constitution because, to all intents and purposes, it seems this is what the intervention was about.

Section 99(2)(b) of the Constitution speaks of the power to “**take over and continue** proceedings” and it would appear that the exercise of the power to discontinue under Section 99(2)(c) is independent of the power to take over under Section 99(2)(b).

9. The Applicants state that they were perplexed by the Respondent’s decision to discontinue the criminal proceedings against Mr. Msonda and they instructed their Counsel to write the Respondent demanding that reasons be furnished for the discontinuance of the proceedings against Mr. Msonda. They state that the letter was sent to the DPP (the Respondent) on 2 February 2016 but that to date, they have not had a response to the same. They argue that in their belief, the decision not to provide an explanation for the discontinuance violates their constitutional right of access to information. They have raised further issues justifying the application for a review herein including an allegation that the impugned decisions of the DPP were and are unreasonable. They argue that by withdrawing the criminal proceedings against Mr. Msonda, the message that the DPP is sending to all and sundry is that she, and by extension the State of Malawi, approbates Mr. Msonda’s views and that it is accordingly, in their words “an open season for the killing of members of the LGBTI community in Malawi”, and that “this cannot be right.”
10. They state that they have sufficient interest in the matter as they were the ones that laid the complaint before the Magistrate’s Court in Blantyre.
11. According to Form 86A under Order 53 of the Rules of the Supreme Court (RSC) in whose form the application herein has been brought, the Applicants seek a number of reliefs through declarations and orders. These include a declaration that the Respondent’s decision to discontinue the proceedings was procedurally improper in that she failed to consult the Applicants before making the decision; a declaration whose purport is that the Respondent acted unconstitutionally and in a manner inconsistent with Section 12(1)(d) of the Constitution which sets fundamental principles of the Constitution; and a claim of violation of the right of access to information under Section 37 of the Constitution which I have already alluded to; the Applicants also claim that the Respondent’s decision failed to take account of the right of access to justice and access to the courts for the settlement of legal disputes under Section 41(2) of the Constitution.

12. I have carefully considered the issues raised here, and it seems to me that the Applicants' decision to challenge the decision of the Respondent herein raises various issues of a constitutional nature that ought to be heard before a panel of at least three High Court Judges in terms of Section 9(2) of the Courts Act. Firstly, there is the preliminary issue as to the limits on judicial review in respect of the exercise of constitutional prosecutorial powers by the DPP to either take-over criminal proceedings or to discontinue criminal proceedings under Section 99(2) of the Constitution. Comparative constitutional law suggests that there is a split between administrative action and executive action within the constitutional framework, which split may perhaps inform the approach to be adopted in determining this preliminary issue. In the South African case of *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others*, 2013 (7) BCLR 762 (CC), the Constitutional Court of South Africa made the following dispositive remarks, at paragraph 59:

A further issue relates to ARMSA's contention that neither it nor its members were consulted either by the Commission or the President. The applicant argues that the decision was procedurally unfair. The challenge is without merit. With regard to the decision of the President, a procedural fairness challenge is not competent because the decision he took did not amount to administrative action. As it was pronounced in *Masetlha*, executive action may be reviewed on narrow grounds which fall within the ambit of the principle of legality. These grounds include lawfulness and rationality. Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute.

13. It would appear to me that the exercise of the prosecutorial decisions of the DPP is a species of executive action rather than administrative action. Guided by comparative case law such as *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others*, the amenability of such executive action to judicial review is more circumscribed and limited.

14. It is appropriate, in this regard, to look at several provisions that, among others, ought to be borne when examining the issues that this case presents to the Court for determination. The following are some of the important provisions:

- (a) Section 9 of the Constitution spells out the separate status, function and duty of the judiciary. It provides that:

The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.

- (b) Section 4 of the Constitution makes provision for the protection of the people of Malawi under the constitution. It provides that:

This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.

- (c) Section 5 of the Constitution lays bare the supremacy of the Constitution. It provides that:

Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

- (d) Section 12 of the Constitutional provides for the fundamental underlying principles of the Constitution. These are therefore overarching constitutional principles that lie at the very foundation of the whole constitutional edifice. Among these is the fundamental principle in Section 12(1)(d) of the Constitution which provides that:

the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.

- (e) Section 10 of the Constitution is very salient in constitutional adjudication as it makes provision for the principles to inform, direct and/or guide the application of the Constitution. Section 10(1) of the Constitution provides that:

In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.

- (f) Section 10(2) of the Constitution, in turn, provides that:

In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.

- (g) Section 11(2) of the Constitution of the Constitution is another key provision. It is the Constitution's interpretation clause. It provides that:

In interpreting the provisions of this Constitution a court of law shall—

(a) promote the values which underlie an open and democratic society;

(b) take full account of the provisions of Chapter III and Chapter IV; and

(c) where applicable, have regard to current norms of public international law and comparable foreign case law.

(3) Where a court of law declares an act of executive or a law to be invalid, that court may

apply such interpretation of that act or law as is consistent with this Constitution.

(4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.

15. A glimpse at this thread of constitutional provisions makes it clear that, among other things, the Constitution is supreme, it binds all organs of Government, it must be applied and interpreted in a manner that reflects its unique status, and that Courts have the ultimate responsibility to interpret, protect and enforce the Constitution. There is no doubt in my mind that the constitutional decisions that the Respondent herein, the DPP, makes should, at least in some respects, be judicially reviewable. In *Attorney General vs Fred Nseula & Another*, MSCA Civil Appeal No. 18 of 1996, the Malawi Supreme Court of Appeal made it very clear that “Courts have, therefore, **a Constitutional responsibility to review all constitutional decisions** because they are the protectors and guardians of the fundamental law of our Country.” (My emphasis)

16. Be that as it may, it would still appear to me that such reviewability comes in different shapes and sizes and does not apply without exception, as the same case of *Attorney General vs Fred Nseula & Another* above shows. In some cases, reviewability is tempered with privilege. In *Attorney General vs Fred Nseula & Another*, the Supreme Court of Appeal delineated certain matters that are regulated by the Standing Orders of Parliament as falling outside the purview of judicial review. In other cases, reviewability may have to be tempered by the fundamental principle of separation of powers which forms part of the constitutional basic structure. Thus the question is not whether constitutionally mandated prosecutorial decisions of the DPP are judicially reviewable at all. The general answer in that regard is in the affirmative. But there are more nuanced constitutional questions as to the circumstances and extent to which such decisions may be subjected to judicial review, and whether the instant case falls within the domain of such constitutional prosecutorial decisions as are amenable to judicial review.

17. The split between administrative action and executive action as spelt out in *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* above is one of the matters that ought to be addressed in the instant case. Considerations in this regard could

be guided by questions such as whether, as an example, the President's exercise of his/her powers to remove a Minister from the Cabinet can be challenged on the grounds that no reasons were furnished for the decision to remove the Minister from his/her ministerial position. Just like in the **Nseula case** above where the question essentially bordered on what were the constitutional limits of judicial review of legislative action or conduct; the key constitutional question in the instant case is what are the constitutional limits of judicial review of executive (prosecutorial) action?

18. 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.
19. There are also several constitutional questions raised by the Applicants, including whether the decision of the DPP (the Respondent) not to furnish to them reasons for the decision to discontinue the criminal proceedings violated a constitutional fundamental principle under Section 12(1)(d) of the Constitution, and also the right of access to information under Section 37 of the Constitution, among others.
20. In addition, perusing the documents filed by Mr. Msonda before the Magistrate's Court which documents have been exhibited to the Applicants' affidavit herein, one notices that the same also raised a number of other constitutional issues, including an argument that the charge and the particulars of the offence violated Mr. Msonda's rights to freedom of religion, thought, conscience, belief, expression, opinion, association and speech.
21. It is my considered view that all these are constitutional matters that ought to be dealt with swiftly and decisively by a panel of at least three High Court Judges within the meaning of Section 9(2) of the Courts Act, and this Court therefore refers this matter to the Honourable the Chief Justice to make a decision as to whether this matter is fit for certification to be dealt with as a constitutional cause under Section 9(2) as read with Section 9(3) of the Courts Act.

22. The Court will proceed to make a Notice of Referral in terms of Rule 8 under the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules.

23. I wish to pause here and observe in passing, that the parties in the Court below were geared to make an application and representations in respect thereof before the Senior Resident Magistrate Court for that Court to make a referral decision to the Chief Justice for certification of the matter as a constitutional cause. My reading of Section 9(2) of the Courts Act is that this seems untenable. Section 9(2) of the Courts Act is very clear. It provides that:

Every proceeding in **the High Court** and all business arising there out, 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.
(Emphasis added)

24. Section 9(2) of the Courts Act clearly confines itself to business arising out of the “High Court”. There is nothing in that Section that suggests that this should be understood as extending the scope of its application beyond the High Court to any other courts such as subordinate courts. The legislature confined itself to business “**in the High Court**”. I am not entirely sure why this provision was drafted in this way. But the result is that we were left with a clear text. It seems to me, without deciding, that in so far as Rule 8(1) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules extends its scope of application to a Magistrate or Chairperson of a Court (these being courts subordinate to the High Court); that would be ultra vires Section 9(2) of the Courts Act.

25. I am making these observations in passing (without deciding) as I am mindful that the instant application came as a simple ex-parte application for leave to apply for judicial review and the Attorney General did not have occasion to make any representations before this Court. Thus the question remains open for determinative judicial decision, and it remains possible that this Court or another competent Court may be persuaded otherwise.

26. I also wish to point out that I am keenly aware that Rule 8(5) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules provides that “The decision of the Court [sitting as a panel of not less than three Judges in terms of Section 9(2) of the Courts Act] shall be remitted to the original court which shall decide the proceedings before it in accordance with the decision of the Court.” I opine that this is another Rule that seems to be ultra vires the clear provisions of Section 9(2) of the Courts Act which is emphatic that the Court empaneled under Section 9(2) of the Act **shall hear and dispose of such proceeding**. It also seems logical that the decision of the Court under Section 9(2) of the Courts Act be finally dispositive of the matter because one would expect that the final result (determination/decision) of the Court in those proceedings should seamlessly flow and be infused by the Court’s interpretation and reasoning on such interpretation and/or application of the Constitution; and that this can, ideally, best be done by the same Court that decides on constitutional interpretation and application. Further, it seems to me that the framers of Section 9(2) of the Courts Act did not intend a back and forth process in the final disposition of the matter between different panels of the High Court.

27. In the final result, I stay these proceedings *sine die*, pending the decision of the Honourable the Chief Justice on certification of this matter as a constitutional cause in terms of Section 9(3) of the Courts Act. If the Honourable the Chief Justice so certifies, the matter herein shall be heard and disposed of by the High Court panel of Judges sitting pursuant to Section 9(2) of the Courts Act.

28. Costs are in the cause.

Made at Zomba in Chambers this 25th Day of April 2016

RE Kapindu, PhD
JUDGE