MALAWI JUDICIARY

**INTHE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CAUSE NO. 4 OF 2018**

**BETWEEN:**

**THE STATE [ON THE APPLICATION OF RICHARD T. MAKONDI].....CLAIMANT**

**AND**

**THE DIRECTOR OF THE ANTI-CORRUPTION BUREAU .....DEFENDANT**

**CORAM: THE HON JUSTICE HEALEY POTANI**

**Mr. C. Gondwe, Counsel for the Claimant**

**Mr. K. Nyasulu, Counsel for the Defendant**

**Mr. Mathanda, Court Clerk**

## RULING

Pursuant to Order 19 rule 20 [3] of the Courts [High Court] [Civil Procedure] Rules, 2017, hereinafter referred to as HCPR, the claimant approached the court with an *ex parte* application seeking the permission of the court to commence judicial review proceedings against the defendant. The intended judicial review seeks to challenge the following:

1. *The prosecutorial decision made by the defendant to prosecute the Claimant as the former National Sales and Marketing Manager of Toyota Malawi when there is no evidence warranting the prosecution of the Claimant.*
2. *The conduct of the Defendant of failing to prosecute the claimant within reasonable time and expedition from the time he was arrested and cautioned by them.*
3. *The prosecutorial discretion made by the defendant of failing to properly understand Corporate Culpability in that they arrested a person who had no control over the contract between Toyota Malawi and the Malawi Defence Force.*

It was the considered view of the court that it would be desirable to hear the defendant on the application as such the court ordered an *inter partes* hearing. The court now proceeds with its determination thereon.

In support of the application, there is the sworn statement of the claimant himself in opposition to which there is the affidavit of Kondwani Zulu, Senior Investigations Officer for the Anti-Corruption Bureau [ACB].

The pertinent facts are that on June 23, 2013, Toyota Malawi Limited [TML] and the Malawi Defence Force [MDF] singed a contract under which TML was to supply 35 vehicles to the MDF. At that time, the clamant happened to have been the National Sales and Marketing Manager for TML. Somehow, the transactions under the contract attracted some investigations by the ACB which, among others, culminated into the preparation of a Prosecutor's Brief exhibited as ***RTM3*** to the sworn statement in support. Subsequently, a formal complainant was made pursuant to section 83 of the Criminal Procedure and Evidence Code [CP&EC] before the Chief Resident Magistrate at Blantyre under Criminal Case No 351 of 2016 against the Claimant and one Mohamed Abdul Gaffar Kassam bordering on suspected corrupt practices whereupon the court, on March 21, 2016, issued a warrant of arrest for the two suspects. The two suspects, then commenced Judicial

Review Case No. 45 of 2016 with a view to challenge the warrant of arrest. The judicial review proceedings were eventually withdrawn by a consent order of on or around June 20, 2016, which, among others, provided for the permanent stay of the warrant of arrest, that should the defendant herein wish to institute criminal proceedings against the suspects, it should be by way of summons under section 84 of the CP&EC and that the suspects should cooperate with the defendant in the discharge of its law enforcement mandate. Then on January 13, 2017, the Senior Investigations Officer at the ACB who is the deponent of the affidavit filed in opposition by the defendant recorded from the claimant an interview under caution. It is the assertion of the claimant that since the withdrawal of the Judicial Review Case No. 45 of 2016 in June, 2016, the defendant has failed to take any steps to take the case against him to court and speedily prosecute it which amounts to failure to uphold the constitutional dictate to accord him a fair trial and that this has materially prejudiced him and his business interests prompting him to seek permission to commence the intended/ present judicial review.

The parties through counsel have presented to the court oral submissions lasting about an hour in total, in addition to the detailed written submissions filed herein. Being mindful that this is a determination on application for permission to move for judicial review and not on a substantive judicial review, the court would at the very outset state that it will take a focused approach on what it has to consider at this stage. The court at this stage must desist from delving in the determination of matters or aspects that are best suited for determination at a substantive judicial review hearing. Having said, it must be stated and borne in mind that the purpose of the requirement for the permission of the court to commence judicial review proceedings is to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive judicial review hearing and to

ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full hearing.

There are two aspects that have featured in the parties' arguments and submissions which the court would wish to deal with first and foremost.

The first issue is one brought up by counsel for the claimant to the effect that the defendant has not complied with the rules of procedure, that is, the HCPR in two respects in that instead of filing a sworn statement in opposition, the defendant has filed an affidavit and secondly that the font type used by the defendant in its documents in not the one prescribed by the rules. The court would hastily observe that under the new civil procedure rules, the HCPR, what used to be known as an affidavit now bears a new nomenclature namely sworn statement and also under Order 24 of the HCPR court documents are supposed to be in Times New Roman font. Evidently, the documents filed by the defendant herein are not in line with the prescriptions of the new rules. This matter can easily be resolved by recourse to Order 2 of the HCPR which provides that the failure to comply with the rules of procedure shall be an irregularity which shall not render the proceeding, document or step taken in the proceedings a nullity. Order 2 rule 3 sets out a number of orders the court may make where there has been failure to comply with the rules and rule 3[f] gives the court some latitude to make any order as it deems fit. In the estimation of this court, what it important to consider is whether or not the failure to comply with the rule has cause irreparable prejudice or injustice to the other party. In the present case, the court is unable to fathom any such prejudice occasioned to the claimant and indeed the claimant has not demonstrated any. Therefore, much as procedural rules are supposed to be obeyed for purposes of achieving justice the court in this case would not make an order that would have the effect of expunging the defendant's offending documents as there has to no

prejudice occasioned to the claimant. It may have to be said in passing that the new rules still being in the infancy of their application and usage, there are bound to be some mistakes and lapses and depending on the prejudice the mistakes and lapses would cause on the other party, the proceeding, document or step need not necessarily be nullified or expunged. The only word of advice to all users of the new rules is that we should all endeavour to fully acquaint ourselves with them as time goes.

The second issue that has to be resolved at this early stage is that raised by counsel for the defendant that the proceedings have been brought against a wrong defendant. It has been argued by counsel that under sections 99 of the Constitution, it is the Director of Public Prosecutions [DPP] who exercises the public duty to prosecute or oversee prosecutions while under section 98 of the Constitution, it is the Attorney General [AG] whose is responsible for overseeing Governments' conformity with the law and such being the case, the matter should have been brought against these two public officers or they should have been added as defendants. To reinforce this argument, counsel has also relied on Order 19 rule 23 [2] HCPR which he has quoted in his written skeletal arguments as follows:

*...for a declaration in relation to an Act or subsidiary legislation, the Attorney General:*

*..for an order that a person shall not do something ; the person in question; and*

*..for an order about the decision, the person who made the decision or should have made the decision.* [Underlining Supplied]

To drive the point home, counsel for the defendant has argued that if the court were to grant relief that prohibits or prevents a prosecution, that would be an order against the DPP; and if it finds that there is or there was a decision to prosecute, that decision by law, in sections 99 and 42 of the Constitution and the Corrupt

Practices Act[CPA] respectively, should have been made by the DPP and therefore submits that the application herein should have been made against the AG or DPP and the holding by Tembo J in **State and another v Phiri** [2003] MWHC 25 has been relied on. The learned Judge is quoted as having held as follows:

*For a decision to be susceptible to judicial review the decision-maker must be empowered by public law to make the decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with the executive powers, which have one or other of the consequences mentioned in the preceding paragraph.*

In essence, the contention of counsel for the defendant is that since under section 99 of the Constitution it is the DPP who has the powers to conduct and oversee prosecutions, he or she is the right party to answer to any complaints regarding decisions to prosecute. Counsel for the claimant while admitting that the Constitution in section 99 gives the DPP the power to conduct and oversee prosecutions, contends that under of section 10[1][f] of the CPA the defendant herein has powers to prosecute and that by virtue of section 5A of the same CPA the defendant is the right party to these proceedings as he is the one who made the decision complained of herein to prosecute the claimant. Having considered the arguments and submissions made to the court and the relevant constitutional and statutory provisions, the court would tend to agree with counsel for the claimant that there is need to make a distinction between to make a decision to prosecute and having the authority to prosecute. From the reading of section 10[1][f] and 42[1] of the CPA, it is recognised that it is the defendant who first makes a decision to prosecute but once he makes that decision he has to seek the consent of the DPP before he can do the actual prosecution. Certainly the defendant cannot go and seek the consent of the DPP before he/she has made a decision to prosecute.

He/she cannot go to seek consent to do something he has not yet decided to do. As rightly argued by counsel for the claimant, the defendant does not need the consent of the DPP for him to make the decision to prosecute. He first has to decide to prosecute and then seek the consent of the DPP to proceed with the prosecution. And whether or not a decision to prosecute was made is a question of fact to be decided by looking at all the facts of the case. In the present case, the defendant did not just conduct investigations but went further to have a Prosecutor's Brief which indicated that the case was ready for trial and surely having gone that far, the defendant made a decision to prosecute. It significant to note that the Prosecutor's Brief is dated March 9, 2016, and the warrant of arrest against the claimant was obtained by the defendant on March 21, 2016. This chain of events, in the estimation of the court, goes to show that the defendant had made the decision to prosecute. That decision was made by the defendant in course of exercising the powers conferred by section 10 of the CPA and by virtue of section 5A the defendant is a proper party to answer to any complaint emanating from that decision.

The all important question still remains whether the claimant should be given the permission to move for judicial review to challenge the defendant's decision to have him prosecuted. In Judicial Review Cause No. 3 of 2017 **The State and the Director of the Anti-Corruption Bureau *Ex Parte* Globe Electronics Limited and Mohamed Abdul GaffarKassa** [unreported] the Honourable Justice Kenyetta Nyirenda granted the applicants leave to move for judicial review to challenge the decision of the respondent to prosecute the 2nd applicant, in his capacity as managing director of the 1st applicant. The respondent applied to have the leave discharged but on an *inter partes* hearing, the court sustained the leave, proceeded with the substantive judicial review and granted the reliefs sought by the

applicants. As would be noted, the respondent in that case happened to be the same defendant in the present case. In fact there is every indication that the transaction/contract out of which the facts of that case arose is the same transaction/contract giving rise to the present case. The court in granting leave and subsequently the substantive reliefs sought by the applicants seems to have mostly been moved or persuaded by the fact that the facts in totality showed that there were no dealings between the applicants and MDF and that the applicants solely dealt with Toyata Malawi who had a contract with MDF. In the case at hand, the applicant contends that he was only a National Sales and Marketing Manager for TML and never signed any contract with the MDF on behalf of TML and that it was the Managing Director, Miss Rosemary Mkandawire, who so signed. He further contends that his role was peripheral as he was only taking instructions from his superiors. On these premises, the claimant submits that the decision to prosecute him is frivolous, vexatious and an abuse of the court process and also irrational, tainted with bad faith and unreasonable in the wednesbury sense hence amenable to judicial review.

This court would wish to state with a lot of emphasis that the authority to conduct investigations and make prosecutorial decisions lies in the discretion of those agencies or bodies entrusted by the law with such authority which in this case is the defendant as empowered by the CPA. Such being the case, the court should only stop the defendant in its tracks, by way of judicial review, if there is something latently and glaringly amiss with the processes undertaken and complained of herein. This was duly acknowledged by the court in the ***ex parte Globe Electronics Limited and Mohamed Abdul GaffarKassam*** case alluded to. The court had this to say in that regard:

*This case raises very novel issues. The said issues are not subject of daily or routine litigation in our courts. With the exception of the cases of The State v. Director of Anti-Corruption Bureau Ex parte Frank Farouk Mbeta wherein my sister Judge , Ntaba J., gave leave to move for judicial review of prosecutorial powers and* ***The State v. Director of Anti-Corruption Bureau ex parte Shiraz Fereirra****; Judicial Review Case No. 82 of 2015 and* ***The State v. Officer in Charge of Blantyre Police Station: exparte MabvutoKhoza*** *wherein my brother Judge, Tembo J., did likewise, litigation of his nature rarely comes before our Courts. I presume the reason is that a prosecutor of necessity must be left alone to flex his or her muscles against criminal activities and their perpetrators. Unless something very untoward happens in the way the prosecutor has conducted his duties, leaving him or her alone seems a sacrosanct ethos to be respected at all costs and in all weather by the Courts and the litigating public.*

*It is from this view point that I have been very cautious in considering the issues in this case. The case pulls on two opposing ends of the criminal justice system vis-a- vis prosecutorial discretion.*

There is no dispute in the present case that the defendant has powers to investigate suspected corrupt dealings/practices. As the court has also found, the defendant has the power to decide to prosecute or initiate a prosecution. The claimant, however, contends that the defendant in this case has acted unreasonably and in bad faith in that on the facts in totality, there is no sufficient evidence or reasonable suspicion to warrant the decision to prosecute him. It is his contention that apart from the decision to prosecute him being unwarranted, he has not been prosecuted within reasonable time with the result that his personal life and business interests have been adversely affected.

The question the court considers critical in the determination of the matter is whether or not the defendant has acted unreasonably or in bad faith as justify the court's intervention through the judicial review machinery. That said, it should be said, at this juncture, that this court fully respects the decision of

Kenyatta Nyirenda J in the case of ***ex parte Globe Electronics Limited and Mohamed Abdul Gaffar Kassam*** but being a decision of a court of equal jurisdiction, it is not binding. It can only be persuasive. The court entirely agrees on the need for caution when faced with a case of this nature considering that the decision to investigate and prosecute those suspected to be involved in corrupt practices is the preserve of the defendant. It is the considered estimation of this court that it would be against public policy and indeed public interest to have those suspected to indulge in corrupt practices brought to book if the court unnecessarily intervenes in the investigative and prosecutorial decisions under the guise of judicial review. The court would also hasten to say that the law through the criminal justice system provides a forum at which the defendant's investigations and decision to prosecute would be tested and if found wanting, the applicant would be acquitted. In is noted that the defendant already initiated criminal proceedings against the claimant before the Chief Resident Magistrate at Blantyre under Criminal Case No 351 of 2016. In the criminal trial, the burden of proof, a heavy one for that matter, would lie on the defendant. The applicant will have the benefit of the presumption of innocence and the opportunity to put forward his defence, if need be. That process/forum is where the decision to prosecute would be tested if it was made without sufficient evidence or reasonable suspicion. In the end result, the court's position is that the defendant's decision to prosecute the claimant cannot be subjected to judicial review.

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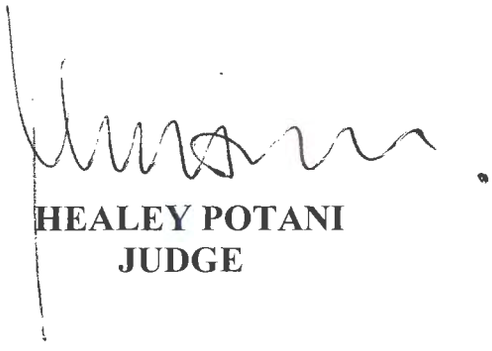
Then there is the complaint by the claimant on the delay in prosecuting him. As has been noted earlier, the defendant instituted criminal proceedings against the claimant before the Chief Resident Magistrate at Blantyre under Criminal Case No

351 of 2016. Those proceedings have not be stayed or discontinued. The consent order executed in Judicial Review Case No. 45 of 2016, in so far as the court can fathom, while staying the warrant of arrest did not necessarily discontinue the proceedings. That being the position, the court would tend to agree with counsel for the defendant that the claimant has an alternative remedy of applying in those proceedings to be discharged from the proceedings on the ground of failure to prosecute him with reasonable time. It is trite law that the remedy of judicial review will not be available to a party that has an alternative remedy available and has not pursued or exhausted the available remedy.

In the end result the court comes to the conclusion that the claimant has not made out a case that is sufficient enough to warrant to grant permission to the claimant to pursue the intended judicial review. The application by the claimant is accordingly dismissed with costs to the defendant.

**Made this day of May 10, 2018, at Blantyre in the Republic of Malawi.**



**HEALEY POTANI**
**JUDGE**