



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CAUSE NO. 38 OF 2018**

BETWEEN

ZAMEER KARIM t/a PIONEER INVESTMENT..... APPLICANT

AND

FINANCIAL INTELLIGENCE AUTHORITY 1ST DEFENDANT

FIRST MERCHANT BANK PLC 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mrs. Doreen Nkangala, Court Clerk

ORDER

Kenyatta Nyirenda, J.

There is before the Court an ex-parte summons for permission to commence judicial review proceedings against the Defendants. The application is said to be brought under Order 19, r.20(3), of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The application is supported by affidavit which provides as follows:

- "3. On the 4th day of August 2015, the Applicant was awarded a contract for the supply of 500,000 units of ration packs to the Malawi police Services at the unit price of MK3,995.00 The total contract price was MK2,327,087,500.00. I exhibit hereto a copy of the said contract marked as "FFM 1"*
- 4. The said contract was for the duration of one year*
- 5. After entering into the said contract, it became clear to the Appellant that the Malawi kwacha exchange rate against the US Dollar and other major trading*

currencies, had depreciated, and that it would continue depreciation during the period of the said contract.

6. *Consequently, in order to cushion himself against the effect of the said depreciation, and in order not to keep coming back to the Malawi Police Service to keep asking for contract price adjustments during the dependency of the contract, by letter dated 10th August 2015, the Applicant asked the Malawi Police Service for a contract price adjustment of 20%. A copy of the said letter is exhibited hereto marked thereon **"FFM 2"***
7. *By letter dated 14th August 2015, the Malawi Police service stated to the Applicant that they would consider his request. A copy of the said letter is exhibited hereto marked thereon **"FFM 3"***
8. *Before the 17th day of November 2015, the Applicant had delivered all supplies under the above mentioned contract, but the contract price was not paid to him until much later. A copy of a letter from Malawi Police Service to the Secretary to the Treasury evidencing this exhibited hereto marked thereon **"FFM 4"***
9. *Before the Malawi police Service fully endorsed the request for the contract price adjustment, by letter dated 28th December 2015, H. Adam Wholesalers, the Applicant's suppliers of the corn beef that the Applicant sold to the Malawi police Service under the contract of 4th August 2015, wrote the Applicant adjusting the cost price for the corned beef by 52%. A copy of the said letter is exhibited hereto marked thereon **"FFM 5"***
10. *Also, by letter dated 12th January 2016, the Applicant's suppliers of tinned Pilchards that the Applicant sold to the Malawi Police Service under the said contract, wrote the Applicant advising that they had adjusted the cost price of the said tinned Pilchards from **MK995,00 to MK1,495** per tin. A copy of the said letter is exhibited hereto marked **"FFM 6"***
11. *Again by letter dated 7th January 2016, Dada Foods, the Applicant's suppliers of fruit juices that the Applicant sold to the Malawi Police Services, wrote the Applicant adjusting their prices by 60%. A copy of the said letter is exhibited hereto marked thereon **FFM7"***
12. *All these price adjustments were against the backdrop of the depreciation of the Malawi Kwacha in the light of the Applicant's delay to pay them, which delay was caused by the Malawi Police Service's delay in paying the Applicant the contract price.*
13. *Further, from the execution of the contract with the Malawi Police Services on 4th August 2015 to 12th April 2016 when payment of the contract price was effected by the Malawi Police service, the Malawi Kwacha had lost about 25% of its value against major currencies. Copies of National Bank of Malawi foreign exchange rates for 4th August 2015 and 19th April 2016 from which this percentage can be calculated are exhibited hereto marked thereon **"FFM 8(i) and (ii)"***

14. *Being thus under pressure due to these market forces, the Applicant was compelled to write the Malawi Police Service, by letter dated 20th January 2016, to pass on these exchange losses to them for delay in paying the contract price to the tune of **MK1,065,667,608.51**, but the said claim was never entertained by the Malawi Police Service. A copy of the Applicant's said letter is exhibited hereto marked thereon "FFM 9"*
15. *By the letter dated 22nd January 2016, the Malawi Police Service wrote the Ministry of finance, Economic Planning and Development presenting the Applicant's request for the contract price adjustment. A copy of the said letter is exhibited hereto marked thereon "FFM 10"*
16. *Before this, by letter dated 17th November 2016, already exhibited and marked "FFM 4" above, the Malawi Police Service had notified the Secretary to the Treasury its acceptance of the contract price adjustment.*
17. *By that time, the Malawi Police Service had already agreed to the contract price adjustment, obviously subject to approval by the Minister of finance. A copy of a letter from the Malawi police Service assuring of the Applicant of payment of the adjusted contract price of **MK2,793,087,500.00** is exhibited hereto marked thereon " FFM 11"*
18. *In these premises, I verily believe that it was only a matter of business prudence for the Applicant to pass on the losses dictated by market forces to the Malawi Police Services when his suppliers were passing on those losses to him owing to delays on part of the Malawi Police Service in paying the contract price, which was supposed to be paid upon presentation of a delivery note, an invoice and other relevant documentation as per "FFM 1". The Applicant is not a charitable organization that provides the Malawi Police Service which supplies as a subsidized price, but is a fully fledged businessman who trades for profits.*
19. *I verily believe that there was in these circumstances abundant justification to seek the adjustment in the contract price, and that in fact the adjustment granted **MK466,000,000.00** was not enough to cushion the Applicant from all the losses it suffered under the supply contract, which it ended up performing as a loss.*
20. *I verily believe that as far as the Applicant was concerned, he was entitled to presume that everything that needed to be done was done by the Malawi Government machinery which assented to his request for the justifiable, even though inadequate, price adjustment, and he was confirmed in his view when treasury, not just the Malawi Police Service, approved and processed his payment for foodstuff delivered.*
21. *I verily believe that the Malawi Police Service was, under the principle of freedom of contract, at liberty to accept the offer for the understandable price adjustment offer by the applicant, and that there was nothing wrong on criminal about the Malawi Police Service's acceptance the Applicant's said offer.*

22. *On the 12th day of April 2016, the Malawi Government paid the Applicant the adjusted contract price of **MK2,793,087,500.00***
23. *The following day, the Applicant, out of a sense of patriotism and benevolence, made out a cheque for **MK145,000,000.00** to National Bank of Malawi Plc, and instructed them to process a bank cheque for the amount in favour of the Democratic Progressive Party, he being at liberty to spend his own hard earned money according to his wishes*
24. *Subsequently, the Applicant learned through the media that the Anti-Corruption Bureau had investigated him for alleged corrupt practices in relation to the above mentioned contract with the Malawi Police Service, and that a leaked report of those investigations had implicated him in some way as regards the contract price adjustment.*
25. *I am informed that this shocked the Applicant as he had never been asked for his side of the story by the Anti-Corruption Bureau or any state authority, hence he has no opportunity of explaining with proofs, as shown in this sworn statement, the basis for his asking for the said price adjustment, and to show that even with the said price adjustment, he still performed the contract at a loss.*
26. *I am informed that the Applicant later learned, through the media as well, that Democratic Progressive Party would be returning to him the gift of **MK145,000,000** that he had benevolently given them*
27. *On or about the 8th day of August 2018, the Applicant duly received the said money through a cheque from the democratic Progressive party, and he proceeded to bank it with the 2nd Defendant Bank.*
28. *That when the said cheque was supposed to have been cleared by the 2nd defendant bank, on the 15th day of August 2018, the Applicant went to the said bank to access the said money, but he was shocked to be told by the bank that the same had been frozen through an administrative instruction from the 1st Defendant.*
29. *I am informed that the Applicant asked for a copy of the 1st Defendant's instruction from the 2nd defendant, or at least for a letter by the 2nd defendant explaining the said instruction to him, but the 2nd defendant flatly refused to oblige.*
30. *It was only after the said money was moved to suspense account by the 2nd defendant that it informed the Applicant in writing about the said instruction and about the reported investigation by the 1st defendant. A copy of the letter of notification is exhibited hereto marked thereon '**FFM 12**'*
31. *I am informed that at no time has the 1st defendant communicated with the Applicant, either before or after issuing the said instruction to the 2nd Defendant, and that to date the Applicant is not aware of the reasons for the said instruction.*

32. *Further, the applicant is not aware for how long his said moneys, which he would have applied as business capital, will remain inaccessible by him, and so his business are suffering unwarrantably by being deprived of much needed capital which the Applicant worked and lawfully negotiated for with the Malawi Police Service, to the full knowledge and acceptance of the Secretary to the Treasury, the Inspector general of Police, the deputy Inspector general and the Ministry of Finance without any protest whatsoever.*
33. *I verily believe that there is literally no way the 1st Defendant can know, even if the contract price adjustment was held to be unlawful (which is disputed), whether the **MK145,000,000.00** was from the initial contract price or from the adjustment, hence there is no way of telling whether it represents proceeds of a crime (which there is not)*
34. *In the premises, I verily believe that the Applicant is being treated unfairly and irrationally, and that he is being condemned unheard, and that this is an unlawful interference with his rights to property and to freely engage in economic activity without being given any reason at all for such unconstitutional conduct on the part of the 1st defendant.*
35. *I verily believe that this is a proper case in which the Applicant should be granted leave to commence judicial review proceedings against the 1st defendant on the grounds of procedural unfairness, lack of reasons given in writing and bad faith. the 2nd defendant has been joined to these proceedings on the ground that since it is holding the Applicant's money in issue, any effective remedy given to the Applicant will necessarily involve making orders against the 2nd defendant*
36. *Further, I verily believe that in these circumstances, this is a proper case in which the said instruction from the 1st defendant to the 2nd defendant should be stayed so that the Applicant can assess his said money as there is no justifiable reason for withholding the same from him*

WHEREFORE, the Applicant prays for an order granting permission to commence judicial review proceedings herein, and that the 1st defendant's instruction to deny the Applicant access to his **MK145,000,000.00** be stayed pending the hearing and determination of the judicial review proceedings envisaged herein."

I have deliberately set out the sworn statement *in extensio* so as to see clearly the issues that are involved in this matter.

The first question that a court has to consider is whether or not the matter before it falls within its competence: see section 103(2) of the Constitution. In this regard, section 6A of the Courts Act, as read with section 2 thereof, are relevant.

Section 6A establishes specialized Divisions of the High Court and it is couched in the following terms:

"(1) The High Court shall have the following specialized Divisions-

- (a) the Civil Division which shall hear civil matters not provided for under another Division of the High Court;
 - (b) the Commercial Division which shall hear any commercial matter;
 - (c) the Criminal Division which shall hear any criminal matter;
 - (d) the Family and Probate Division which shall hear any family or probate matter; and
 - (e) the Revenue Division which shall hear any revenue matter.
- (2) *Where a person commences a matter or makes an application in a division other than the appropriate division in accordance with this section, the registrar shall, on his own volition or on application, immediately transfer the matter to the appropriate division.*
- (3) *The Courts may order that any costs arising from the process under subsection (2) shall be borne by the party who commenced the matter in an inappropriate division.*”
– Emphasis by underlining supplied

Section 2 of the Courts Act defines a “commercial matter” as follows:

“commercial matter” means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including—

- (a) *the formation or governance of a business or commercial organization;*
- (b) *the contractual relationship of a business or commercial organization;*
- (c) *liabilities arising from commercial or business transactions;*
- (d) *the restructuring or payment of commercial debts;*
- (e) *the winding up of companies or bankruptcy of persons;*
- (f) *the enforcement or review of commercial arbitration award;*
- (g) *the enforcement of foreign judgments of commercial matters subject to the provisions of the law;*
- (h) *the supply or exchange of goods and services;*
- (i) *banking, negotiable instruments, international credit and similar financial services;*
- (j) *insurance services; or*
- (k) *the operation of stock and foreign exchange markets,*

in the event of doubt as to whether a matter is commercial or not, the judge at the outset or during the course of the action, shall have power to resolve the issue;” - Emphasis supplied

The present proceedings are premised on a contract dated 4th day of August 2015 between the Applicant and Malawi Police Service for the supply of 500,000 units of ration packs to the Malawi Police Service at the unit price of K3,995.00, with the total contract price being K2,327,087,500.00. The unit price was actually adjusted upwards later on. The transaction involved the supply of goods. On the basis of the foregoing, there is no doubt in my mind that what we have here is a civil matter of commercial significance arising out of or connected with a relationship of commercial or business nature.

When considering the definition of "commercial matter", it is important to bear in mind that paragraphs (a) to (k) inclusive merely set out a few examples of matters that fall within the phrase, which is in the chapeau of the definition, that is, *"a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not"*. As long as a civil case is of commercial significance and it arises out of or connected with any relationship of commercial or business nature, it qualifies as a commercial matter

Under the Courts Act, any question related to such a commercial transaction has to be dealt with by the Commercial Division. The fact that a party seeks to raise such a question by way of judicial review, petition, or any other means, is neither here nor there. Accordingly, it is my finding that the proceedings herein pertain to a commercial matter.

In terms of section 6A of the Courts Act, it is the Commercial Division, and not this Division (Civil Division), that is charged with hearing commercial matters. In the premises, this matter has to be transferred to the Commercial Division. I, accordingly, order the immediate transfer of these proceedings to the Commercial Division.

Pronounced in Chambers this 21st day of August 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda

JUDGE