



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CASE NUMBER 33 OF 2020

BETWEEN:

THE STATE (On the application of the HUMAN

RIGHTS DEFENDERS COALITION) -----1ST APPLICANT

ASSOCIATION OF MAGISTRATES IN MALAWI-----2ND APPLICANT

MALAWI LAW SOCIETY-----3RD APPLICANT

AND

THE PRESIDENT OF THE REPUBLIC OF

MALAWI-----1ST RESPONDENT

SECRETARY TO THE CABINET (Also styled as)

CHIEF SECRETARY TO THE GOVERNMENT-----2ND RESPONDENT

WOMEN LAWYERS ASSOCIATION----- AMICUS CURIAE

CORAM: THE HONOURABLE JUSTICE M.C.C. MKANDAWIRE

Soko, Counsel for the 1st and 2nd Applicants

Mwafulirwa, Counsel for the 3rd Applicant

Tembenu, Counsel for the Respondents

Mr. Kumwenda, Court Interpreter

RULING

INTRODUCTION

1. On the 27th of August 2020 I delivered a judgment in favour of the Applicants. I however deferred the issue of costs because the Applicants' counsel had prayed to the court that the Respondents should be personally liable for the costs of these proceedings. My order on this prayer was as follows:

"I therefore order that the issue of costs be deferred until the Respondents are heard. The court will within seven days from today inform the concerned parties the date and time when we should convene so that the court hears both parties."

APPLICANTS' CASE

2. On the 17th of July 2020, the Applicants' counsel Mr. Khumbo Soko filed submissions on why Honourable Justice Lloyd Muhara and former President Arthur Peter Mutharika should personally pay party and party costs. The Applicants' counsel made quite a lengthy submission which has been summarized below.

3. That costs are a matter of the court's discretion. In most cases however costs follow the event. It was however submitted that the court has the discretion to order non-parties to pay costs. The cases of **Lever Brothers (Malawi) Ltd –vs- Liabunya [1996] MLR 33** and **Nunes Panel Beating Services-vs- Trans Sopera [2004] MLR 248** were cited as examples. In the two cases the Supreme Court of Appeal made orders for counsel to pay costs for failure to file skeleton arguments on time and to attend a scheduled conference respectively.

4. In the present case which deals with public law cases, counsel said that the court has got discretion to award 'personal costs orders' against public officials who act

in a manner that is grossly negligent of public duty. Counsel cited the case of **Public Protector-vs- South African Reserve Bank CCT107/18[2019] Z ACC 29**. In that case the court said:

*“Personal court orders are constitutional and necessary in order to hold public officials to account when they fail, for example, to fulfil their constitutional obligations, The Public Protector argues for an exception in her case. There is no merit in the Public Protector’s contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of being mulcted with adverse personal costs orders. **On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and constitution”.***

Based on the same principle, a Minister was condemned to personally bear costs of a public interest case in **Black Sash Trust Minister of Social Development (Corruption Watch NPC) RF and South African Post Office SOC Limited Amicus Curiae [2018] Z ACC 36; 2018 JDR 1677(CC)**. In the English case of **Symphony Group PLC-vs- Hodgson [1994] QB 179**, the Court of Appeal in England, per Balcombe, LJ gave the following guidance where a non-party order is considered by the court: An order for the payment of costs by a non-party will always be exceptional: See the **Aidem Shipping Case [1986] 2 ALL ER 409 at 416**. The judge should treat any application with such an order with considerable caution.

5. The Applicants say that from the totality of the facts on record, it is very clear that the acts of the office bearers herein were not sanctioned by the office of their Legal Advisors (The Attorney General). The Applicants say that pursuant to section 98(1) of the Republic Constitution, the Attorney General is the Principal Government Legal Advisor. The Applicants conclude that the decision by the 1st and 2nd Respondents herein were made in bad faith:

i) The Chief Justice and Justice of Appeal Edward Twea were both part of the Supreme Court Panel that upheld the decision of the Constitutional Court to annul the May, 2019 presidential election.

ii) The 1st Respondent at divers times and places publicly admonished the Judiciary for what he termed ‘judicial coup’. The Chief Justice heads the Judiciary.

iii) As was mentioned by the Office of the Attorney General and this is on record, the Office of the Attorney General was bypassed or at least gave contrary legal opinion on the matter.

iv) Both the bearers of the 1st and 2nd Respondents at the time the decision was made were seasoned lawyers. The 1st Respondent being a constitutional law Professor emeritus and the holder of the office of the 2nd Respondent a Judge of the High Court. They therefore ought to have known better but disregarded simple and basic constitutional law principles.

v) It is quite clear, therefore, that exceptional circumstances exist for the court to consider hammering Mr Muhara and former President Mutharika with costs order in this case.

vi) However to up to the cardinal rule that no person should be condemned unheard and in line with the guidance from **Symphony Group PLC** case it is proposed that the court issues an order to both Mr Muhara and President Mutharika to show cause why they should not be condemned to personally bear the costs of these proceedings. After their representations, the court can then proceed to make its order as it deems appropriate.

vii) We reiterate what we said during the appearance on 9th July 2020 that given the mischievous manner in which the decision to force out the Chief Justice and Justice Twea was made, it would really be sad if the tax payer was forced to bear the financial burden of the completely unjustifiable steps that these two took. Only they should carry that process.

RESPONDENTS' CASE

6. On 25th September 2020, the Respondents through their counsel filed submissions in opposition that Respondents must pay costs of proceedings.

7. The Respondents (in their personal capacity) emphatically oppose the application that they must personally bear the costs of the proceedings for the following reasons, in summary:

a) As a matter of constitutional principle, a former President of the Republic of Malawi cannot be held liable for acts done in an official capacity during his or her term,

b) The decisions complained of were made by the incumbent holders of the respective offices in their official capacity and not in their individual capacity.

c) It is not automatic that in public interest litigation cases, the acts condemned by the court will attract costs to be paid directly by persons holding public offices which made the decisions.

8. The Respondent relies on section 91 of the constitution which provides for immunity of the President. Of particular relevance to the case here are subsections (1) and (3) which provide as follows:

“(1) **No person** holding the office of President or performing the functions of President may be sued in any civil proceedings but the office of President shall not be immune to orders of the courts concerning rights and duties under the constitution.

(2) No person holding the office of President shall be charged with any criminal offence in any court during the term of office.

(3) After the person has vacated the office of President he or she shall not be personally liable for acts done in an official capacity during his or her term of office but shall not otherwise be immune.”

9. The Respondents submitted that Professor Arthur Peter Mutharika could not be sued in his personal capacity whilst holding the office of President but the actual office itself was (and still is) liable to court orders concerning rights and duties under the constitution. That the constitution has not created any exceptions and therefore the law of the land must be impartially interpreted as it is.

10. As regards the office of the Chief Secretary to Cabinet, it was submitted that this office was established pursuant to section 92(4) of the constitution of the Republic of Malawi. The duties and responsibilities of the office are as laid down in this section. That this office is a mouth piece of the Cabinet. From the evidence on record, it was submitted that there is nowhere on the record where it shows that the said decisions by Justice Lloyd Muhara were made in his personal capacity. That the second Respondent should not be made liable to pay cost for decisions of the cabinet which he conveyed. Reference was made to the case of Professor Arthur Peter Mutharika and the Electoral Commission-vs- Dr Saulosi Klaus Chirima and Dr Lazarus McCarthy Chakwera, Constitutional Appeal Case Number 1 of 2020(Unreported). In this case the court

found the conduct of the respective Commissioners for the second Appellant (the Electoral Commission) to be wanting and lacking in that it resulted in loss of colossal sums of money through litigation and caused injury to our democratic processes as well as general unquantifiable suffering of Malawians. If the Commissioners had acted prudently, as duty bearers and assisted the court early in litigation of the matter than take sides. The court only however issued a stern warning that any future wasteful and inappropriate conduct by the Commissioners will attract costs to be paid by the Commissioners personally. In this case the Electoral Commission was held liable to pay costs and not the Commissioners in their individual capacity. The Respondents cited this case to show how slow the courts are to personally hold public officers liable for party and party costs.

REPLY

11. The Applicants replied to the response by the Respondents. It is submitted that section 91 of the constitution deals with substantive civil liability. That the question for determination here does not deal with such liability, it having been established as against the Respondent offices as such. It has everything to do with a collateral liability that arises not exactly on the impugned acts, but the nature of the impugned executive overreaches and manner in which they were committed.

12. It is submitted that Justice Muhara cannot claim any semblance of immunity under section 91 of the constitution. Nowhere in the constitution does the holder of the position of Secretary to Cabinet enjoy any kind of immunity. That in the absence of such evidence, Mr Muhara cannot make such a claim.

13. Even if the liability for costs were treated as part and parcel of the civil liability from which the incumbent of the President is immune (which is hardly the case), such immunity only appertains to acts done in an official capacity "which by Respondents' own submissions are authorized acts." The Respondents cannot possibly suggest that they were at any time and indeed the offices they held **are authorized** to break fence with separation of powers and encroach on the independence of the judiciary as they calculatedly attempted to do.

14. In looking at section 91 of the constitution, it should be read with other sections of the constitution which delineate the ambit of authority vested in any state office and the purpose of the authority so vested. In terms of section 12(1)(a) of the constitution, any executive power or authority vested in the responsible offices is only allowed to be exercised "solely to serve and protect" the interests of the

people of Malawi. A deliberate departure from this limitation on the exercise and purpose of state power is typical abuse of such powers and outside the range of "authorized acts". Section 88(1) of the constitution provides that the President shall be responsible for the observance of the constitution by the executive and shall as Head of State, defend and uphold the constitution as the supreme law of the land. It was therefore submitted that the finding of this court are very clear that the President departed from that responsibility and can therefore not be protected by section 91(1) of the constitution. By virtue of section 91(3) of the constitution such immunity is removed.

ANALYSIS

15. Before I further delve into the matter, I would like to categorically state that the Respondents seem to have approached this matter in a very casual way. The court had directed that before an order for costs is made, let the Respondents be heard. The Applicants in their submission had cited so many acts which according to my view required personal responses from the Respondents. I expected that the Respondents should have filed sworn statements explaining in details as why they should not be personally liable to pay costs.

16. It is important to remember here that the substantive matter in this case commenced by way of Judicial Review pursuant to Order 19 rule 23 of the Civil Procedure Rules 2017. Judicial review should be distinguished from other suits in any civil proceedings. My understanding of section 91(1) of the constitution therefore is that the Respondents herein are not immune to judicial review proceedings. Much as I therefore enjoyed the submissions made by the Respondents, I however found that they were out of focus because what was before me was not a substantive case dealing with a suit against the Respondents. What was before me was whether the Respondents can personally be liable for costs.

17. In the most unlikely event that my understanding of section 91 of the constitution is wrong, I have further looked at the ambit of this section. I have addressed my mind to the fact that in interpreting the constitution, its provisions have to be read together and not in isolation. Section 12(b) of the constitution provides that all persons responsible for the exercise of powers of state do so on trust and shall only exercise such power to the extent of their lawful authority and

in accordance with their responsibilities to the people of Malawi. Section 88 of the constitution provides that the President shall be responsible for the observance of the provisions of the constitution by the executive and shall as Head of State defend and uphold the constitution as the supreme law of the land. In my judgment of 27th August 2020 from paragraphs 74-78 on pages 28-29, I made my finding very clear. For avoidance of any doubt there were two fundamental pronouncements that I made and they are as follows:

a) That the Respondents had no constitutional or legal basis upon which to compel the Chief Justice and Honourable Justice Edward Twea SC to go on leave pending retirement.

b) The Respondents breached the doctrine of separation of powers and that the said decision was unconstitutional and illegal.

18. The above finding manifests illegality and bad faith. I do not think that the immunity that is referred to in section 91 of the constitution covers such outrageous behavior. What the Respondents did is not authorized by the constitution therefore they cannot use the same constitution as a shield.

19. The conduct of the Respondents between May and June 2020 was very wanting. In a deliberate move to undermine the doctrine of separation of powers which is the bedrock of any democracy, the 1st Respondent addressed the entire Malawi Nation at Parliament through the State of the Nation Address where he said that Parliament was above the courts. What followed thereafter was the onslaught on the judiciary by the two Respondents.

20. I have gone through all the foreign case law that was submitted by both sides. I am aware that in applying and interpreting the provisions of our constitution section 11(2) of the constitution allows the court where applicable, to have regard to comparable foreign case law. Such foreign case law is not binding on me but is persuasive. These cases have indeed been of very great help to me.

21. The case of **Professor Arthur Peter Mutharika and Electoral Commission –vs- Dr Saulosi Klaus Chilima and Dr Lazarus McCarthy Chakwera** has given guidance to these courts on the issue of costs. Although the Commissioners in that case were not ordered to personally pay for the costs, but the case identifies circumstances which can lead a non-party to be personally liable for costs. In the present case

before me, the Respondents had acted defiantly, were unreasonable, were not prudent, acted outside their constitutional mandate and very wanting. As it was already submitted by the Applicants' counsel, the two Respondents are well seasoned lawyers. One a Professor of constitutional law. The other a Judge of High Court. They should have been very conversant with fundamentals of the constitution and in particular issues of separation of powers and Judicial Independence.

22. This is a proper case where Professor Arthur Peter Mutharika and Justice Lloyd Muhara should be personally liable to pay costs. I so order. The Registrar to assess the costs.

MADE THIS *20th* DAY OF NOVEMBER 2020 AT LILONGWE



M.C.C. MKANDAWIRE

JUDGE