



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO 3 OF 2021

BETWEEN

THE STATE (ON APPLICATION OF

JANE KENNEDY.....1ST CLAIMANT

WILLY KAMALA.....2ND CLAIMANT

WAKAWAKA NIGHT CLUB.....3RD CLAIMANT

CENTER POINT NIGHT CLUB.....4TH CLAIMANT

CULTURE CLUB.....5TH CLAIMANT

MOGASD & MWANJE NIGHT CLUB.....6TH CLAIMANT

AND

THE PRESIDENT OF MALAWI.....1ST RESPONDENT

MINISTER RESPONSIBLE FOR HEALTH.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

COMMANDER OF THE MALAWI DEFENCE FORCE.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

CORUM: JUSTICE R.M CHINANGWA

Taulo Counsel for the Claimants

Mwafulirwa Counsel for the Respondents

Chitao Court Clerk

RULING ON APPLICATION FOR JUDICIAL REVIEW AND AN ORDER OF INTERLOCUTORY INJUNCTION

1. Introduction

The claimants seek leave for judicial review and an interlocutory injunction. In the first application the applicants seek permission to apply for judicial review on the decision:

- a) To declare a partial lockdown without attendant declaration of state of emergency when the lockdown amounts to a substantial derogation from fundamental rights under the Constitution
- b) To restrict the time of operation of bars and night clubs without consultation from the owners of the bars and nights clubs is punitive and unfair.
- c) To restrict the time of operation of bars and night clubs and movement of people without providing bailout package to the bars and night clubs as well as social security interventions to marginalized groups in our society.
- d) To promulgate Public Health (Corona Virus and COVIS 19) Prevention, Containment and Management) Ammenment Rules, 2021 and to implement them without parliamentary oversight as required by section 58 of the Constitution
- e) To promulgate and implement the Public Health (Corona Virus and COVIS 19) Prevention, Containmentr and Management) Ammenment Rules, 2021 under section 31 as read with section 29 of the Public Health Act where the Rules expressly state that they authorize the taking measures which are outside the scope of the parent statutory provisions is ultra vires.

In summary it is argued that the defendants' decisions will greatly affect their businesses and livelihood as their right to economic activity, movement and development has been infringed on account that the business premises will be closed early and no bailout packages have not been made to the claimants.

Regarding the interlocutory injunction, the claimants made no separate application strictly speaking but have raised the matter within the application for judicial review.

The Defendants opposed both applications. In summary it is argued that the decisions made are informed by global public health knowledge on the pandemic; the rules are temporary and reviewed periodically to contain and manage the pandemic which was observed to have flared

during festive periods. It was observed that the claimants were allowed to sell alcohol to consumers within given hours for them to consume in their homes.

2. Issue for Determination

This court has to determine whether or not to grant

- a) leave for judicial review
- b) an interlocutory injunction.

These will be dealt with in turn.

3. Analysis of Law and Evidence

On judicial review the court is guided by, **Order 19 rule 20 of the Courts High Court Civil Procedure Rules 2017**. Under this rule the court has to consider the following:

- i. *There must be a law, an action or a decision of the Government or a public officer for conformity with the Constitution where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened, or*
- ii. *A decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened.*
- iii. *A person making an application for judicial review should have sufficient interest in the matter to which the application relates.*
- iv. *an application for judicial review should be filed promptly and shall be made not later than 3 months of the decision.*

In this case it is not in dispute that the respondents made decisions which affected the claimants who have sufficient interest in the matter. It is this courts view that that a decision having been made by a public authority regarding how night clubs are to operate, the same is subject to judicial review. It should be noted that judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words,

judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision. This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way' (source <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/>). This being the case, the decision having been made the same is amenable to judicial review because the court has to determine its lawfulness; its procedural fairness; its justification of the reasons provided. It is on this premise that leave for judicial review is granted.

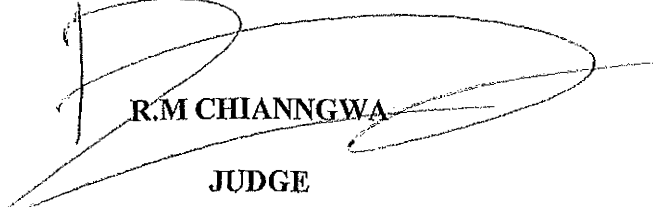
On the injunction

The claimants made an 'application' for an injunction against the decision made by the respondent. It should be noted that a separate application supported by an affidavit should have been filed. In this case it means procedurally there is no application for an injunction as such the court cannot make a decision where there is no application or dispute before it: **The State (On application of Francis Bisika) and the Malawi Communications Regulatory Authority** Judicial Review Case Number 71 of 2017.

4. Finding

The application for judicial review is granted against the respondent. The application for an interlocutory injunction is dismissed. The applicants are to serve the application on the defendant by 4th June 2021. The defendant to file defence with a sworn statement by 18th June 2021. A scheduling conference will be held on 25th June 2021 at 8am.

Pronounced this 25th May 2021 at LILONGWE


R.M CHIANNGWA
JUDGE

10. The decision to dismiss the appellant was made in the year 2017. The appellant lodged her appeal in the year 2020, clearly contrary to section 65 of the Police Act. In an application to appeal out of time, the court granted the same *ex parte* on considering that the reason for the delay was on account of the appellant negotiating her reinstatement through Malawi Human Rights Commission but the same proved futile.
11. Under section 22 of the Courts Act *"In a civil appeal the High Court shall have power— (a) to dismiss the appeal; (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits; (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds; (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence; (e) to make any amendment or any consequential or incidental order that may be just and proper; (f) to confirm, reverse or vary the judgment against which the appeal is made; (g) to order that a judgment shall be set aside and a new trial be had; (h) to make such order as to costs in the High Court and in the subordinate court as may be just"*.
12. Being a matter relating to administrative action this court will be guided by section 43 of the Constitution. It states that *"Every person shall have the right to— (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and (b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected"*.
13. From the foregoing section this court has to determine whether the appellant was discharged with justifiable reasons and whether the appellant was accorded a procedurally fair administrative action.
14. To begin with the reasons for the appellants discharge, the appellant was discharged from the Malawi Police Service on ground that she was unlikely to become efficient having been charged with conduct to the prejudice of good order and discipline under section 52 (1) as read with section 23 of the Code of Disciplinary Conduct for Police Officers. This was as a result of her nude photos found circulating on social media. It is recorded in evidence that the

appellant admitted that the nude pictures circulating on social media were her photos. It is also not in dispute that the appellants nude picture was taken voluntarily with her consent. It was disputed by the appellant that she did not take the photos nor did she circulate them but a friend did so.

15. The question that arises is whether the appellants action does amount to conduct to the prejudice of good order and discipline? The term 'conduct to the prejudice of good order and discipline' has not been defined in the Police Act. In **United States v Airman First Class Jon-Austin Ray** United States Air Force ACM S31431, 13th February 2009, United States Air Force Court of Criminal Appeals *'for an act to be prejudicial to good order and discipline it must have a 'direct and palpable' effect upon good order and discipline. Manual for Courts-Manual, United States, Part IV, 60.c(2)(a) (2005 ed). While the drafters do not define the terms direct, palpable and effect, the standard English definitions of these terms are proximate, obvious and result or outcome. Black's Law Dictionary 459, 1110, 514 (6th Ed. 1990). Colonel William Winthrop tells us that to be cognizable as an act prejudicial to good order and discipline, the act 'must have been committed under such circumstances as to directly offend against the government and discipline of the military state'. William Winthrop, Military Law and Precedents, 723-724 (2nd ed. 1920 reprint) source: [ray-s31431.u.pdf \(af.mil\)](#)*
16. The charge that was laid before the appellant reads as follows:

Charge:

Conduct to the prejudice of good order and discipline contrary to section 52(23) of the Police Act

Particulars of the Charge:

In that you No. 4026 Constable Chiunjiza of Chileka Police Station on 1st March 2017 committed the disciplinary offence of conduct to the prejudice of good order and discipline of being seen naked on nude pictures posted in various social media groups such as MPS attested members only and whatsapp groups contrary to section 52(23) of the Police Act.

17. The question is did the appellants nude pictures have a direct effect on good order and discipline in the Police. The appellant admitted that the nude picture were hers as seen on social media. The appellant denied having circulated her nude pictures. It is this courts view that men and women in uniform have a call to a higher standard of conduct in the public domain. It is this courts view that though the appellant did not distribute her nude pictures, she availed

herself voluntarily to have her nude picture taken. By involving a fellow officer to take a picture of her naked the matter was no longer the appellants private matter and thus the right to privacy cannot be argued as she voluntarily brought herself into the public domain. Now posing naked in public for one employed in the police service is conduct prejudicing good order and discipline in the police service. Men and women in uniform are called to higher moral standard in the public domain and posing naked in public is unacceptable.

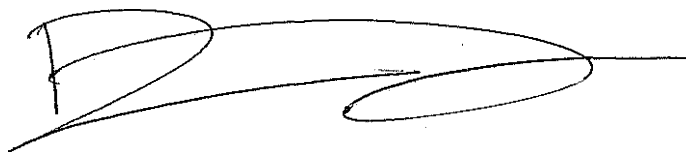
18. Regarding the procedural fairness, it has been emphasized by the court that any party subject to an administrative action should be subjected to procedural fairness. In this case it is noted that on 3rd March 2017 the appellant was called before the Station Disciplinary Panel which recommended that the appellant be discharged from Malawi Police Service for being unlikely to become efficient. Then the Regional Disciplinary Committee confirmed the recommendation. Later on, 6th March 2017, the National Disciplinary Committee *'quashed the finding of guilt and resultant sentence of Discharge on the basis of unlikely to become efficient on the basis that the defaulter could not be subjected to the Police Act for acts done before she became a member of the Malawi Police Force'*. On 8th March 2017, the Deputy Inspector General Administration, directed that the National Disciplinary Committee reconvene with utmost urgency to rectify the error of law in that the appellant could be charged under the Police Service Act by being a person employed in the Police Service under section 51 (1) of the Police Act. It does seem that the NDC reconvened and recommended a discharge as recorded in Police Service Commission Minute No. 7/2017. The Police Service Commission confirmed the decision of the NDC to discharge the appellant on ground that she was unlikely to become efficient.
19. The hearing process clearly has been flawed at four stages. These are inadequate notice; internal interference with disciplinary hearing process; disciplinary panel hearing the same matter twice which resulted in two different decisions being made and a higher disciplinary panel making a decision on a decision of a lower disciplinary panel which was functus officio. These will be explained below.
20. First, the appellant was given 24 hours' notice at the time she had appeared before the Station Disciplinary Hearing. The notice of hearing of less than 7 days was inadequate as it was contrary to regulation 49 of the Malawi Police Service Regulations.

21. Second, the Deputy Inspector General singularly interfered with the decision of the National Disciplinary Committee when his office singularly has no authority to do so. Owing to this interference, the NDC changed its earlier decision. If there was an error in the decision, the same was amenable for confirmation to the Police Service Commission. The matter should have simply been forwarded to the Police Service Commission.
22. Third, the NDC sat on the same matter twice. It is this courts view that once the NDC sat at the first instance, it became functus officio. The next step was for the NDC to forward the matter to the Police Service Commission. It is against the rules of natural justice for a disciplinary panel to hear the same matter twice.
23. Fourth, the decision made by the Police Service Commission became erroneous on account that the decision it was deliberating on was wrong in the first place, as the NDC became functus officio at it second sitting. If anything, the Police Service Commission could have been procedurally correct by deliberating and deciding on the first decision that the NDC made and not on the second decision which was made after the Deputy Inspector General had interfered.
24. It is paramount that rules of natural justice must be adhered to in full. In this matter the reason for the appellants discharge was valid but the hearing process was flawed. The law cannot be adhered to in part.

Finding

25. The appeal succeeds on ground of procedural unfairness.

Dated this 15th day of June 2021 at LILONGWE



R.M CHINANGWA

JUDGE