



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.

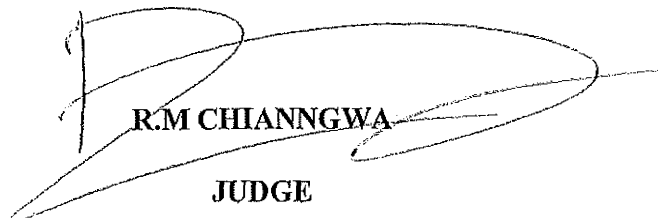
On the injunction

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 CHIANNNGWA
JUDGE