



GOLDEN & LAW
SERVICE ACCEPTED BY: *CAO*
DATE: *26.5.2021*
TIME: *12.11*

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL CASE NO. 8 OF 2020

THE REPUBLIC

AND



JEAN CHIFUNDO MATHANGA

JOHN KANDULU

FANUEL NKHONO

EMILIUS KANDAPO

Service Accepted By
Amara on behalf of
Maele Law Practice
on *26* day of *May*
20*21* at *11.57* O'clock
in the *fore* noon

CORAM: THE HON.JUSTICE MR S.A. KALEMBERA

Mr Chiwala, of Counsel for the State

Mr Harawa, of Co-Counsel for the State

Mr Nkutabasa, of Counsel for the 1st Accused

Mr Maele, of Co-Counsel for the 1st Accused

Mr Masanje, of Co-Counsel for the 1st Accused

Mr Kalua, of Counsel for the 2nd Accused

Mr Zambezi, of Counsel for the 3rd Accused

Mr Kamkwasi, of Counsel for the 4th Accused

Mr Ng'ambi, Court Clerk

Miss Mombera, Court Reporter

RULING

Kalembera J

Introduction

The Accused persons are facing multiple charges under the Penal Code and the Corrupt Practices Act respectively. Just after the Accused persons had taken plea, and before the State could parade it's witnesses preliminary objections were raised on behalf of the 2nd and 3rd Accused persons, in fact on behalf of all the accused persons. The preliminary objections are that the 1st Accused person is facing charges of neglect of official duty contrary to section 121 of the Penal Code and Public Officers performing functions contrary to section 25A (2) of the Corrupt Practices Act; and the 3rd Accused is facing charges of neglect of official duty contrary to section 121 of the Penal Code and abuse of public office contrary to section 25A (1) of the Corrupt Practices Act.

That the charges purport to show that these Accused persons are public officers by virtue of their employment by Electricity Supply Corporation of Malawi Limited (ESCOM), when the said ESCOM is a private company duly incorporated as such on 29th July, 1998 under the Companies Act. The preliminary objections are supported by affidavits sworn by Chimwemwe Mahekea Kalua and Frank Jones Zambezi, of counsel for **the 2nd and 3rd Accused persons respectively**. Their prayer is that the charges against the said accused persons be dismissed. The State has filed its own sworn statement by Victor Chiwala, of Counsel for the State, and skeletal arguments opposing the preliminary objection. It is the State's prayer that the preliminary objection be dismissed.

Though the preliminary objections were mainly raised by the 2nd and 3rd Accused persons, this determination will affect all the accused persons.

Case for the two Accused persons

It is the two Accused persons' case as deposed, that they have been charged in their capacities as public officers appointed in the public service as Chief Executive Officer and Director of Procurement at Electricity Supply Corporation of Malawi Limited respectively. It is contended that the said ESCOM Limited is not a public company but a private company incorporated under the Companies Act. That the two Accused persons are wrongly charged as public officers.

Case for the State

It is the State's case as deposed, that ESCOM Limited is a public body as it is fully owned by the Malawi Government with a shareholding of 100%. That is, 99% Malawi Government and 1% defunct Malawi Development Corporation, now owned by Public Private Partnership. It has further been deposed that ESCOM operates under the authority of the Public Procurement and Disposal of Assets Authority (PPDA) as a public body. Further that ESCOM employees submit their declaration forms under the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act. Thus, the State contends that ESCOM is a public body and its employees are public officers.

Issues for Determination

The main issues for the court's determination are:

1. Whether the two accused persons are public officers or not.
2. Whether ESCOM Limited is a private or public company.

Law and Analysis

I must from the outset thank counsel from both sides for their detailed submissions and the precedents therein.

It is not in dispute that ESCOM Limited was indeed incorporated under the Companies Act as a company limited by shares. What is in dispute is whether regardless of the said incorporation, ESCOM has remained, and is, a public body

or not. And whether employees of ESCOM are public officers or not. It has been strongly argued in support of the preliminary objection that the accused persons are not public officers as per the definition of public officer under the CPA, which defines a public officer in section 3 as follows:

“Public officer means any person who is a member of, or holds office in, or is employed in the service of, a public body, whether such membership, office, or employment is permanent or temporary, whole or part-time, paid or unpaid, and includes the President, a Vice President, a Minister and a member of Parliament.”

The same section 3 of the CPA defines a public body as follows:

“Public body means the government, a statutory body or any other body appointed by the government.”

Further, the said section 3 of the CPA defines a private body as follows:

“Private body means any person or organization not being a public body, and includes a voluntary organization, charitable institution, company, partnership and club.”

And section 3 of the Penal Code defines a ‘person employed in the public service’ as follows:

“Person employed in the public service means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely –

- (a) any civil office including the office of President, the power of appointing a person to which or of removing from which is vested in the President or in a Minister or in any public Commission or Board; or*
- (b) any office to which a person is appointed or nominated by an Act or by election; or*
- (c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either paragraph (a) or (b); or*

- (d) *any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act, and the said term further includes –*
- (i) *a member of a commission of inquiry appointed under or in pursuance of any Act;*
 - (ii) *any person employed to execute any process of court;*
 - (iii) *all persons employed in the Defence Force of Malawi or Police Service of the Republic;*
 - (iv) *all persons in the employment of any government department of the Republic;*
 - (v) *a person acting as a Minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnization of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;*
 - (vi) *a person employed in the service of any Local Authority or of any board, Council, society or other authority, whether incorporated or otherwise, established by or under any Act, other than the Companies Act;*
 - (vii) *a person employed in any class of employment which may be specified as public service by the Minister by notice published in the Gazette;*
 - (viii) *a member of Parliament;*
 - (ix) *any Chief.*

Relying on these provisions it has been argued and submitted that ESCOM Limited is not a public body and that its employees are not public officers. On the other hand, the State has maintained that ESCOM is a public body as it is wholly controlled by the government which has 100% shares. And that the President of Malawi as Head of the Executive appoints the Board of Directors of ESCOM.

The accused have further relied on the case of **Salomon v Salomon (1897) AC 22**, as to the effect of incorporation, where Lord MacNaughten had this to say:

“the company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the

same hands receive profits, the company is not in law the agent of the subscribers or a trustee of them.”

With this case in mind, I have nevertheless, looked at and considered, *inter alia*, section 26 of the Companies Act, and I have come to the conclusion that ESCOM Limited is not an ordinary private company. The said section provides as follows:

“s.26 –(1) A company shall be a State Owned Company if it is controlled within the meaning of this Act by the Government.

(2) The provisions in this Act pertaining to public companies shall apply to all State Owned Companies.

(3) The Minister may, where appropriate, and by notice published in the Gazette, exempt State Owned Companies from the provisions of this Act.”

It is clear from this provision that ESCOM Limited, despite its incorporation, is not an ordinary private limited company. It is fully owned and controlled by government. It therefore, as well, falls under the category of those companies which are State Owned, which in turn, and in my considered view, qualifies it to be a public company or public body, though like other public companies, not listed on the stock market. Section 24 of the Companies Act provides as follows:

“s.24 –(1) A company shall be a public limited liability company if –

- (a) its membership consists of a minimum of three members;*
- (b) its memorandum permits offering of its securities to the public;*
- (c) its memorandum permits the transferability of its securities.”*

Section 23 of the Act provides as follows:

“s.23 –(1) A company shall be a private limited liability company if –

- (a) its membership consists of a minimum of one person and a maximum of fifty persons;*
- (b) its memorandum prohibits it from offering any of its securities to the public;*
- (2) Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this section, be treated as a single member.*

(3)For the purposes of this section a single member company shall be taken to be a private company. ”

Furthermore senior officers of ESCOM Limited operate just like and take themselves as public officers or they consider themselves public officers. It is in evidence that they subject themselves to the Public Officers (Declaration of Assets, Liabilities and Business Interests) Act, which applies to public officers only.

Section 25 of the said Public Officers (Declaration of Assets, Liabilities and Business Interests) Act provides that *‘At the commencement of this Act, any person serving as a listed public officer shall be required to submit a declaration in the prescribed form within the time set by the Director.’* And it has named the public officers under:

PART B –SENIOR PUBLIC OFFICERS

34. Chairpersons, Board Members, Chief Executive and Deputy Chief Executive of a public body, parastatal, constitutional bodies, and all other statutory bodies set up by an Act of Parliament.

It is in evidence, herein, that some senior officers of ESCOM Limited, in compliance with the said Act, submitted their declaration forms. If they are not, or did not consider themselves as public officers, why did they make such declarations? When the Act is clear that it is applicable to public officers from public institutions? This fortifies my considered view that ESCOM Limited employees are public officers and that ESCOM Limited is a public entity or body.

PUBLIC BODY

Section 3 of the CPA defines a public body as follows:

“..as the Government, a statutory body or any other body appointed by the Government. ”

ESCOM as a public body by virtue of its appointment by the Government

Furthermore, ESCOM was appointed by the Malawi Government by virtue of it being the sole owner of the company with 100% shares as evidenced in its Memorandum of Articles of Association filed with the Registrar of Companies..

Meaning that, and it is an undisputed fact, that it is the Malawi Government which solely appointed ESCOM and it is by virtue of this sole appointment that ESCOM is a public body as per the definition attached to it by section 3 of the CPA. It is only that government elected to use incorporation as a vehicle to create ESCOM as a private company, to effectively achieve its goals.

Furthermore, as already observed herein, ESCOM Ltd is a State Owned company, and therefore a public body. It suffices that by virtue of being a State Owned company alone, ESCOM Ltd is a public body. Furthermore, according to the CPA, ESCOM is a public body. And as I have already observed and found herein, ESCOM Ltd as a State Owned company, wholly owned by government, with 100% shareholding, is a public body. It therefore follows that anyone who works for a public body is a public officer. The CPA defines a Public Officer as any person who is a member of or holds office in the service of a public body, whether such membership, office or employment is permanent or temporary, whole or part-time, paid or unpaid. Employees of ESCOM Ltd are therefore public officers under the CPA.

Section 8 of the Public Procurement Act requires public bodies to establish internal procurement committees, which ESCOM has done, and it has been under the supervision of the Office of the Director of Public Procurement in matters of procurement. It is worth noting that the Public Procurement Act is only applicable to public bodies. No ordinary private company would be subjected to the PPA unless it operates as or is a public company. ESCOM Ltd is therefore no ordinary private company, if at all. It is the finding of this court that it is a State-owned company, therefore, a public company.

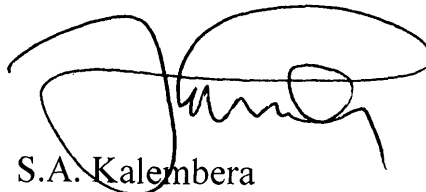
I further take judicial notice of the advertisement on ESCOM Limited Executive vacancies flighted in The Nation and The Daily Times of 8th March 2021, which required the interested applicants to direct their applications to the Comptroller of Statutory Corporations. This only augments the fact that despite the said ESCOM Ltd being incorporated under the Companies Act, as a private limited company, it has remained and still operates as a statutory corporation. It is a State-Owned company using public funds. It cannot therefore be heard that in one vein, it can use public funds as a public company, and when such funds are alleged to have been misappropriated, then it cannot be held to account as a public company or

public body, and that its officers cannot be held accountable as public officers for it is a private limited company. ESCOM Ltd, I conclude, is a public company or body as a State-owned company. I also take judicial notice that their vehicles use number plates for statutory corporations.

I have gone through the recent decision in **The Republic v Kandionamaso Padambo, Criminal Appeal No. 91 of 2009**, where my learned brother, Mbvundula J, found that ESCOM Ltd was not a public body in so far as the provisions of the Corrupt Practices Act were concerned. However, I beg to differ, and it is my finding, on the observations herein, that the CPA cannot be read in isolation in so far as public bodies are concerned. Section 26 of the Companies Act referred to herein clearly makes ESCOM Ltd a State-owned company, thereby a public company or body. It is therefore amenable to the CPA, so too its employees as public officers.

All in all, ESCOM Ltd is a State Owned company hence a public body. Being a public body, its employees are public officers in so far as the CPA and the Penal Code are concerned. So too members of its Board are public officers. The preliminary objections raised herein are therefore overruled and dismissed in their entirety. The trial of the accused persons shall proceed. The matter is therefore adjourned to the 9th – 12th June 2021 at 9:00 am for hearing.

PRONOUNCED this 25th day of May 2021, at the Principal Registry, Criminal Division, Blantyre.



S.A. Kalembera

JUDGE