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**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2021**

**BETWEEN**

**BON KALINDO .....1<sup>ST</sup> APPLICANT**

**LEVY LUWEMBA.....2<sup>ND</sup> APPLICANT**

**AND**

**THE CHIEF EXECUTIVE OFFICER OF**

**LILONGWE CITY COUNCIL.....DEFENDANT**

**CORAM: HON. JUSTICE W.Y. MSISKA**

Mr. Chiwaya/ Taulo, of Counsel for the Applicants

Mr. Maone of Counsel for the Defendant

Mr. Mpandaguta, Court Clerk

**ORDER**

**Introduction**

This is the order of the Court on an application by the Applicants to set aside the prohibition of peaceful demonstrations. The application was brought *ex parte* on 24<sup>th</sup> November, 2021. Considering the nature and import of the application, this

Court directed that the application be served on the Defendant with the hearing of the application to take place on 25<sup>th</sup> November, 2021. The Court heard the application as scheduled and proceeded to dismiss the application to set aside the prohibition and undertook to provide the reasons in a processed formal order.

The application was made under section 102 of the Police Act. In the application, the Applicants sought an order of the court to set aside the purported prohibition against the holding of peaceful demonstrations issued by the Chief Executive Officer of Lilongwe City Council.

### **Sworn Statements**

The facts as gathered from the sworn statement in support are that the Applicants are the conveners/organisers of peaceful demonstrations to take place in the cities of Blantyre, Lilongwe and Mzuzu. As for Blantyre, the demonstrations were conducted on 19<sup>th</sup> November, 2021 and those for Lilongwe and Mzuzu being scheduled for 26<sup>th</sup> November, 2021 and 3<sup>rd</sup> November, 2021, respectively. The demonstrations are being done in fulfilment of the right to peaceful demonstrations as provided for under the Constitution.

Pursuant to section 96 of the Police Act, on 11<sup>th</sup> November, 2021, the Applicants delivered to the Chief Executive Officer of Lilongwe City Council a notification of the planned demonstrations. Through a letter dated 23<sup>rd</sup> November, 2021, the Defendant notified the Applicants that it had withheld consent for the demonstrations on the ground that the Malawi Police Service will not have adequate capacity to provide security during the demonstration due to the engagement of the Malawi Police Service with Southern Africa Development

Community (SADC) meetings allegedly underway until 27<sup>th</sup> November, 2021. A copy of the letter was exhibited as BK1.

The Applicants viewed the purported withholding of consent to hold the demonstration as being unjustifiable, unreasonable, unlawful, procedurally improper and not necessary in a democratic society and not made in good faith. According to the Applicants, failure by the Defendant to forthwith act upon receipt of the notification on 11<sup>th</sup> November, 2021 and failure to initiate negotiations and consultations with the organisers/conveners within 48 hours from receipt of the notification was an indication that the applicants had the right to proceed with the demonstration in accordance with the provisions of section 98(4) of the Police Act. Consequently, the Applicants were of the view and belief that the purported withholding of consent was rendered to be of no effect at law noting that it was made outside the prescribed period of 48 hours.

The Applicants further stated that contrary to the provisions of section 98(4) of the Police Act, the Defendant through a WhatsApp message of 16<sup>th</sup> November, 2021 only invited the Applicants to a meeting to be held on 22<sup>nd</sup> November, 2021 which message was later followed by another one which advised that the meeting can only take place on 28<sup>th</sup> November, 2021 after the SADC meeting taking place at Bingu International Convention Centre. The screenshot of the communication was marked as exhibit BK2. It was only upon the Applicants raising issue with the way the Defendant was handling the matter that the Defendant served the Applicants with exhibit BK1.

The Applicants also stated that the alleged reason for withholding consent cannot be justified considering that at the SADC meeting the only high profile individual

attending the meeting apart from the President of the Republic of Malawi was the President of the Republic of Mozambique both of whom had already attended the event by gracing the official opening ceremony on 22<sup>nd</sup> November, 2021. According to the press release from Ministry of Foreign Affairs, the President of the Republic of Mozambique was expected to leave Malawi on 24<sup>th</sup> November, 2021. Exhibit BK 3 was confirmation of their assertion.

The Applicants further stated that allowing the Defendant to act in the way he did was a great threat to the rule of law and democracy and grave violation of the right to hold demonstrations as enshrined in the Constitution.

Finally, the Applicants were concerned that postponing the demonstrations will have adverse impact on all those involved noting that time and resources have already been invested and spent in preparation for the demonstration and even shifting the demonstration will have a ripple effect on the one planned for Mzuzu.

The application is opposed and the Defendant filed a sworn statement in opposition made by the Chief Administration Officer, Mr. Hudson Kuphanga. The Defendant, in addition, filed skeleton arguments.

In his sworn statement, Mr. Kuphanga confirms having received from the Applicants a notice of intent to hold a demonstration dated 11<sup>th</sup> November, 2021 but only received such notice on 12<sup>th</sup> November, 2021.

He averred that on 16<sup>th</sup> November, 2021 he invited the 1<sup>st</sup> Applicant to a meeting scheduled for 22<sup>nd</sup> November, 2021 with the aim of complying with the

requirements of the law to ensure that thorough consultations were done with the conveners of the demonstration, the Defendant and the Malawi Police Service.

That he then called the Commissioner of Police for Central Region to remind him of the consultative meeting scheduled to take place on 22<sup>nd</sup> November, 2021. In his response, the Commissioner of Police advised that it would be difficult for the Malawi Police Service to provide security on the date set for the demonstration as the Malawi Police Service was overcommitted due to SADC meeting which were ongoing until 27<sup>th</sup> November, 2021. The Commissioner of Police recommended that the conveners/organisers should be advised to consider shifting the holding of the demonstration to a date not later than 27<sup>th</sup> November, 2021 due to security concerns.

Based on the advice from the Malawi Police Service, the Defendant notified the Applicants of the impossibility to proceed with the scheduled meeting and accordingly communicated to the conveners/organisers the decision declining the authorisation for demonstrations to take place on 26<sup>th</sup> November, 2021. Both through the WhatsApp communication of 23<sup>rd</sup> November, 2021 and letter of the same date, the Defendant made it clear that the refusal to hold the demonstration was not an outright denial of the right to demonstrate but that the demonstration could be held only after 27<sup>th</sup> November, 2021.

It was further averred that though the issue of security weighed heavily on the decision to refuse the holding of the demonstrations, the Applicants did not comply with the requirement of the law in that the notice did not: identify the convener/deputy convener; mention the anticipated number of participants; mention the proposed number and, where possible, the names of the marshals who

were to be appointed by the convener and how the marshals would be distinguished from other participants; spell out the manner in which the participants will be transported to the place of the assembly and from the point of dispersal; and mention the number and types of vehicles, if any, which are to form part of the procession. It was therefore difficult for the Defendant to have any assurance on the security of the procession.

It was also averred that the Applicants have not shown why the demonstrations cannot be shifted to date after 27<sup>th</sup> November, 2021 and what sort of costs will be incurred or damage will be suffered by the shifting holding of the demonstration to another date.

### **Submissions By Parties**

In his submissions, Counsel Chiwaya emphasized that the basis for that application to set aside the prohibition arises from the fact that there were no consultations or negotiations between the parties as required by section 98 of the Police Act. According to him, the provision places responsibility on the Defendant to initiate the negotiations and it is clear that should be done within 48 hours. If the initiation of the negotiations is not done within 48 hours, section 98(4) provides that the conveners/organisers should proceed in holding the demonstration. It is clear from exhibit BK 2 that the negotiations were initiated outside the 48-hour period. Sadly, the negotiations were never held as they were cancelled by the Defendant. It was his belief that negotiations are provided in legislation for specific reasons noting that the exercise of powers by the Defendant to prohibit the demonstration can only be done after negotiations.

Further, in the absence of the negotiations to which the Malawi Police Service are a party it would be wrong for the Defendant to withhold consent to hold the demonstration based on the reasons which were within the remit of the Malawi Police Service. The reasons for the refusal could only come out through the process of negotiations involving all parties concerned.

It was also argued that by notifying the Defendant of the intended demonstration, the conveners do not seek consent from the relevant authorities. In support of this proposition, the case of *Attorney General v Gift Trapence and Another MSCA Civil Appeal No. 25 of 2019 (unreported)* was cited as authority. Similarly, the reason given for refusing the demonstration cannot be justified. The Defendants cannot refuse the holding of the demonstration on the ground that the police are overcommitted or indeed are overstretched, *see National Consultative Committee v Attorney General Civil Cause No. 958 of 1994; and Attorney General v Gift Trapence and Another (supra)*. In addition, no evidence has been provided by the Defendants to show that indeed the police are overwhelmed with the SADC meetings.

The Court was urged to take judicial notice that there have been times when personnel from the Defence Force of Malawi has been called in to provide security during demonstrations. With the option of bringing in Defence Force of Malawi as an alternative confirms the fears of the Applicants that the reason advanced was done improperly due to absence of negotiations. The decision should therefore be viewed as being unjustifiable and not made in good faith.

In response, Counsel Maoni submitted that much as the Applicants have the right to hold demonstrations, that right is not absolute. The exercise of that right is

limited by the Constitution under s.44 (1) and (2). More particularly, that the limitation is prescribed by the Police Act through the provisions under Part IX which deals with Regulation of Assemblies and Demonstrations. The power given to the District Commissioner or Chief Executive Officer under this Part includes making a decision to prohibit demonstrations. In support of this proposition, Counsel referred the Court to case of *Attorney General v Gift Trapence and Another (supra)* was cited as an authority. It was the submission by Counsel that the Supreme Court of Appeal in that case confirmed that apart from the consultations and other obligations, the Chief Executive Officer has the power to prohibit demonstrations for a good cause.

In addition, Counsel submitted that there are several grounds on which the prohibition may be made. Most of these grounds are provided for specifically under sections: (a) 97(3) where there is non-compliance; (b) 99(1) where a prohibition is allowed on reasonable grounds or on request of the officer-in-charge of police; and (c) 101(1) where it is to do with threat to security or disruption of traffic and many more instances. For that reason, the prohibition falls within the grounds set by the law. If anything, the Defendant provided the reason for the prohibition as required under section 98(4) of the Police Act. It is paradoxical for the Applicants to point fingers at the failure by the Defendant to initiate negotiations within 48 hours when the Applicants themselves did not comply with the prescriptions of section 96(7) which details what should be contained in the notice of intention to hold the demonstration. The Court was therefore urged to find that there was no notice at all to be considered by the Defendant. Consequently, on that reason alone, the prohibition should not be set aside.

The Defendant also argued that the Applicants have not shown with evidence any loss or damage whether financial or otherwise that will be occasioned if the demonstrations were to be shifted to a later date after 27<sup>th</sup> November, 2021.

On the use of the case authorities of *National Consultative Committee v Attorney General supra and State v The President of Malawi and Others ex parte Malawi Law Society and Another Miscellaneous Civil Cause No. 78 of 2002* by the Applicants in support of their cause, it was the view of the Defendant that the two decisions were rendered way before the enactment of the Police Act in 2010. For that reason, the Defendant called upon the Court not to place reliance on the two judgments as those judgments did not directly deal with provisions of the Police Act presently in issue in this proceeding.

On whether or not personnel from the Defence Force of Malawi should provide backup security in cases where the Malawi Police Service are overstretched, it was the argument of the Defendant that under the Police Act, it is only the Malawi Police Service that is conferred with the mandate to regulate assemblies and demonstrations. Nowhere in the Police Act is it stated that the Defence Force of Malawi shall provide backup in the regulation of assemblies and demonstrations.

In reply, Counsel Chiwaya maintained that negotiations under the Police Act are mandatory. As regards the limitation of rights, it was the view of the Applicants that the powers that the Defendant has under the Police Act as regards prohibition can only be exercised after consultations with the conveners and not prior to the consultations.

On whether or not the notice was defective for not complying with s.96(7), it was the submission of the Applicants that for all intents and purposes, it should be

noted that in the letter refusing consent, non-compliance with section 96(7) has not been cited as an issue for the refusal, rather, it has come as an afterthought on the part of the Defendant. In conclusion, the Applicants were emphatic that in the organization of demonstrations, resources are invariably involved. It would, therefore, be wrong to state that the Applicants may not suffer any loss in case the prohibition is not set aside.

Upon considering the sworn statements filed both in support and in opposition, the skeleton arguments and the oral submission by Counsel, this Court formed the opinion that a proper resolution of the matter would require the Court to consider the question whether or not it is on the office of District Commissioner or that of Chief Executive Officer where a notice of intention to hold demonstration should be served under the Police Act. The Court was compelled to adopt this approach to ensure completeness and clarity in the furtherance of the duty of the Court under section 9 of the Constitution. The Court was wary that proceeding to pronounce itself on the matter without resolving the issue of the correct appropriate office to be served with a notice of intention to hold demonstrations may be viewed to be unhelpful for the development of the jurisprudence in this area of law. This Court was conscious and alive to the fact that it is imperative that when interpreting the law, the Court aims at upholding the rule of law. The Court was also mindful that without resolving the issue of the correct or appropriate office to be served with a notice of intention to hold demonstrations may eventually render the decision to be *per incurium*.

It is for this reason, and in accord with the overriding objective through active case management that the Court invited Counsel to address it on the issue of the correct

or appropriate office on which the notice of intention to hold demonstrations should be served in accordance with the provisions of the Police Act.

In his address, Counsel for the Applicants submitted that all along the traditional understanding and practice has been that if demonstrations are to be held within the city, the then correct or appropriate office to be notified is that of the Chief Executive Officer of the city council concerned. Counsel went on to buttress his argument by referring the Court to section 6(1)(e) of the Local Government Act, Cap. 22:02 which gives a council the mandate to maintain peace and security in conjunction with the Malawi Police Service.

On the part of the Defendant, it was submitted that admittedly, the position under the Police Act is that the office of the District Commissioner features prominently as regards service of notice of intention to hold demonstrations. However, a parallel practice has emerged where the notice has always been given to the Chief Executive Officer of the city when the intended demonstrations are to be held within the jurisdiction of the city council. This, it was argued, emanates from the generous interpretation of the relevant provisions of the Police Act which interpretation in a way seeks to get rid of the absurdity.

It was the further submission of the Defendant that if the notice to hold demonstrations in the city was to be served on the District Commissioner it will tantamount to giving the District Commissioner power to make decisions within the boundaries of the city in which jurisdiction lies with another authority altogether according to Local Government Act. For that reason, the Court was urged not to apply the literal rule when considering the question of the correct office on which the notice of demonstrations should be served.

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## **Law and Analysis**

The starting point is Part IX of the Police Act which deals with the regulation of assemblies and demonstrations. It should be noted that the office of District Commissioner performs several functions with regard to the regulation of assemblies and demonstrations. The functions and duties of the office of the District Commissioner are virtually in every provision under Part IX. Suffice to state that for the purposes of this order, this Court will only highlight some of the functions and duties of the office of the District Commissioner with regard to regulation of assemblies and demonstrations.

Among other functions, section 93 states that an organization which intends to hold an assembly or demonstration is required to forthwith notify the District Commissioner of the area, in writing, of the names and addresses of the persons appointed as convener and deputy convener. Section 95 provides that the District Commissioner or a person authorized by him in that behalf shall perform the functions, exercise the powers and discharge the duties assigned to that office with regard to an assembly or demonstration independent of the direction or interference of any person or authority and shall act with impartiality.

Under section 96, where it intended to hold an assembly or demonstration, the convener is required to give notice in writing of not less than 48 hours and not more than 14 days to the District Commissioner concerned with a copy to the officer-in-charge of a police station concerned. Upon receipt of the notice in accordance with section 96 regarding a proposed assembly or demonstration, the District Commissioner is required under section 98 to consult with the officer-in-charge of police regarding the necessity of negotiations with all concerned parties to the intended assembly or demonstration.

Further, the District Commissioner has powers under section 101 to prevent or prohibit an assembly or demonstration. The District Commissioner can only do so upon receipt of credible information on oath that there is a threat that the proposed assembly or demonstration will result in serious disruption of traffic, or injury to participants in the assembly or demonstration or to other persons, or extensive damage to property and that the police may not be able to contain such threat. The decision to prevent or prohibit the assembly or demonstration can only be made after meeting or consulting all concerned parties. The decision of the District Commissioner to prevent or prohibit a proposed assembly or demonstration is reviewable by the High Court under section 102 with the possibility of appeal to the Supreme Court of Appeal.

Though the office of the District Commissioner features highly and performs various functions under Part IX of the Police Act, it is not defined. This Court, therefore, had recourse to the General Interpretation Act, Cap. 1:01 of the Laws of Malawi. The Court resorted to this Act noting that the General Interpretation Act serves to shorten and simplify written laws by enabling needless repetition to be avoided. Secondly, the General Interpretation Act promotes consistency of form and language in written laws by including standard definition of terms commonly used. Lastly, it clarifies the effect of laws by enacting rules of construction.

According to section 2(1) of the General Interpretation Act, the general rule is that in every written law enacted, made or issued before or after the coming into operation of the Act, the words and expressions under that section have the meanings respectively assigned to those words and expressions. The meanings assigned to the words or expressions shall not be applicable in a particular written law for two reasons. First, is if there is something in the subject or context of the

First Schedule, it is also clear that Malawi is divided into twenty-four districts instead of twenty-eight.

This Court wishes to register its dismay that up to this day, the First Schedule to the Regional and Districts Boundaries and Place Names Act has not been updated to include Balaka, Likoma, Neno and Phalombe districts. Such sloppiness on the part of those responsible for ensuring that the statute book is kept up to date cannot be tolerated.

That as it may, the Regions and Districts as provided for in the First Schedule are as follows: (a) Northern Region comprises Karonga District, Chitipa District, Mzimba District, Rumphi District and Nkhata Bay District; (b) Central Region is made up of Nkhotakota District, Ntchisi District, Kasungu District, Dowa District, Salima District, Lilongwe District, Mchinji District, Dedza District and Ntcheu District; and (c) Southern Region comprising Mangochi District, Zomba District, Machinga District, Blantyre District, Chiradzulu District, Thyolo District, Mulanje District, Chikwawa District, Nsanje District and Mwanza Districts. It should be noted from both the Regional and District Boundaries and Place Names Act and the General Interpretation Act, Lilongwe City Council is at law not a district.

It is for that reason that this Court proceeded to consider the Local Government Act, Cap. 22:01. However, for a better understanding of the import of the Local Government Act, it would therefore be appropriate to begin from the Constitution. The relevant provisions of the Constitution are sections 146 and 147 which are reproduced herein as follows—

*146 - (1) There shall be local government authorities which shall have such powers as are vested in them by this Constitution and an Act of*

particular written law that is inconsistent with such construction under the Act. Second, is if the particular written law provides a different meaning of the word or expression different to the one under the General Interpretation Act.

With that in mind, it is worth to note that the expression "*District Commissioner*" is defined under the General Interpretation Act in the following terms: "District Commissioner" means the administrative officer in charge of a District, and "Assistant District Commissioner" shall be construed accordingly. Similarly, the word "*District*" is defined as follows:

*"District" means one of the districts into which Malawi is divided for purposes of administration in accordance with the Regional and Districts Boundaries and Place Names Act."*

The Regional and Districts Boundaries and Place Names Act, Cap. 18:04 provides for the division of Malawi into Regions and Districts. It is also a statute that is the basis for the any alterations or changes that may be effected to such divisions. Further, it is also the statute that provides for the conferring and altering of place names. Section 2 deals with the division of Malawi into Regions and Districts as follows—

- "(1) Malawi shall be divided into the Regions referred to in the First Schedule, each of which shall be comprised respectively of the Districts as set out in the First Schedule.*
- (2) Malawi shall be divided into Districts specified in the First Schedule the boundaries of which shall be the boundaries appropriate to such District as set out in the First Schedule."*

A consideration of the First Schedule reveals that Malawi is divided into three Regions, namely Northern Region, Central Region and Southern Region. From the

*Parliament.*

- (2) *Local government authorities shall be responsible for the representation of the people over whom they have jurisdiction, for their welfare and shall have the responsibility for—*
- (a) *The promotion of infrastructural and economic development, through the formulation and execution of local development plans and encouragement of business enterprise;*
  - (b) *the presentation to central government authorities of local development plans and the promotion of the awareness of local issues to national government;*
  - (c) *the consolidation and promotion of local democratic institutions and democratic participation; and*
  - (d) *Such other functions, including the registration of births and deaths and participation in the delivery of essential and local services, as may be prescribed by an Act of Parliament.*
- (3) *Parliament shall, where possible, provide that issues of local policy and administration be decided at local levels under the supervision of local government authorities.*
- (4) *Parliament shall ensure that the composition of local government authorities includes a prescribed number of persons serving as Chiefs in the area of jurisdiction of such authorities and affords equal representation in respect of each ward in its jurisdiction and that boundaries of each ward shall be designated by the Electoral Commission in accordance with section 148.*

147 – (1) *Local government authorities shall consist of local councilors who shall be elected by free, secret and equal suffrage by the registered*

*voters in the area over which that local government authority is to have jurisdiction.....*

*(2) The offices of local government shall include mayors in cities and municipalities and local councilors in all areas and they shall have such functions, powers and responsibilities as shall be laid down by an Act of Parliament.*

*(3) There shall be, in respect of each local government authority, such Administrative personnel, subordinate to local councilors, as shall be required to execute and administer the lawful resolutions and policies of those councilors.*

*(4) .....*

*(5) ..... ”*

It is worth noting that the scheme under the Constitution has been reflected in the Local Government Act. Under that Act, “**Council**” means a Council specified in the second column of the First Schedule. In the second column of the First Schedule, the councils specified are Blantyre City Council, Lilongwe City Council, Mzuzu City Council, Zomba City Council, Kasungu Municipal Council, Luchenza Municipal Council, Balaka District Council, Blantyre District Council, Chikhwawa District Council, Chiradulu District Council, Chitipa District Council, Dedza District Council, Karonga District Council, Kasungu District Council, Likoma District Council, Lilongwe District Council, Machinga District Council, Mangoche District Council, Mchinji District Council, Mulanje District Council, Mwanza District Council, M’mbelwa District Council, Neno District Council, Nkhata Bay District, Nkhotakota District Council, Nsanje District Council, Ntcheu District Council, Phalombe District Council, Rumphi District Council, Salima District Council, Thyolo District Council and Zomba District Council.

Further, a “*local government authority*” means a District Council, Town Council, Municipal Council or City Council constituted under the Act. In other words, each and every council is a local government authority.

On the other hand, “*local government area*” is defined as an area under the jurisdiction of a District Council, Municipal Council or City Council. For better appreciation and understanding of this definition, a consideration of section 4, in particular subsection (1) is required. That subsection states as follows:

*“For the administration of local government, there shall be local government areas which shall comprise the areas respectively described in the first column of the First Schedule.”*

According to the first column of the First Schedule, the respective areas under the jurisdiction of a District Council, Municipal Council or City Council which areas are also known as a local government areas are Blantyre City, Lilongwe City, Mzuzu City, Zomba City, Kasungu Municipality, Luchenza Municipality, Balaka District, Blantyre District, Balaka District, Chikhwawa District, Chiradzulu District, Chitipa District, Dedza District, Dowa District, Karonga District, Likoma District, Lilongwe District, Machinga District, Mangochi District, Mchinji District, Mulanje District, Mwanza District, M’mbelwa District, Neno District, Nkhata Bay District, Nkhotakota District, Nsanje District, Ntcheu District, Ntchisi District, Phalombe District, Rumphi District, Salima District, Thyolo District and Zomba District.

Section 5 provides for the composition of the Council as follows—

*“(1) For every local government area, there shall be a Council consisting of-*

- (a) one member elected from each ward within the local government area;*
  - (b) Members of Parliament from the constituencies that fall within the local government area, as voting members, ex officio;*
  - (c) Traditional Authorities from the local government area, as non-voting members, ex officio; and*
  - (d) Five persons, as non-voting members, to be appointed by elected members to cater for the interests of such special interest groups as the Council may determine*
- (2) Each Council shall be a body corporate by the name "The District Council of . . ." or "The Town Council of . . ." or "The City Council of . . ." or "The Municipal Council of . . ." as the case may be, with the addition of the name of the particular district, town, municipality and city"*

What then are the functions of the Council or local government authority? The answer is in section 6 which reads—

- (1) The Council shall perform the following functions-*
- (a) to make policy and decisions on local governance and development for the local government area;*
  - (b) to consolidate and promote local democratic institutions and democratic participation;*
  - (c) to promote infrastructural and economic development through the formulation, approval and execution of district development plans within its jurisdiction;*
  - (d) to mobilize resources within the local government area for governance and development;*

- (e) to maintain peace and security in the local government area in conjunction with the Malawi Police Service;*
  - (f) to make by-laws for the good governance of the local government area;*
  - (g) to appoint, develop, promote and discipline staff;*
  - (h) to cooperate with other Councils in order to learn from their experiences and exchange ideas; and*
  - (i) to perform other functions including the registration of births and deaths and participate in the delivery of essential local services.*
- (2) .....
- (3) .....
- (4) ..... ”

From the above provisions which have deliberately been quoted extensively, what comes out is that a Council is a collective of various offices and individuals representing special interest groups. In addition, the Council is declared by law to be a body corporate. The conclusion to be drawn from the provisions is that a district as defined under the General Interpretation Act is not one and the same thing as a Council or local government authority under the Local Government Act. The two are different entities. It is therefore possible to have two distinct local government areas in one district. For example, Lilongwe as a District has two local government areas, namely, Lilongwe District and Lilongwe City.

Being a body corporate and policy body, at law, the decisions and policies of the Council are executed and implemented by a group of technocrats which form the Secretariat of the Council. Section 11 deals with the designation of the head of the Council in the following manner—

- (1) *There shall be in the Council an officer designated as Chief Executive Officer, in the case of a City, Municipal or Town Council and District Commissioner, in the case of a District Council who shall be the head of the Secretariat of the Council.*
- (2) .....
- (3) .....
- (4) .....
- (5) *The Chief Executive Officer or the District Commissioner of the Council, as the case may be, shall, subject to the general and special direction of the Council, be responsible for—*
- (a) implementing the resolutions of the Council;*
  - (b) day to day performance of the executive and administrative functions of the Council;*
  - (c) supervision of departments of the council; and*
  - (d) proper management and discipline of the staff of the Council.”*

In applying the law to facts in order to answer the question, “which is the correct or appropriate office on which a notice of intended assembly or demonstration should be served?” I have no doubt in my mind that it is the office of the District Commissioner as defined under the General Interpretation Act. If Parliament intended that the office of District Commissioner under the Police Act should include that office of a Chief Executive Officer (city, municipal or town council) it would have provided for that under the Police Act.

The District Commissioner envisaged under the Police Act is the administrative officer in charge of a district while under the Local Government Act, both the office of Chief Executive Officer, in case of a city, municipal and town council and

that of District Commissioner are described as merely a head of the Secretariat of the Council. It will be observed that this Court has already found that a district and a council are two different entities. Similarly, head of the Secretariat of the Council and administrative officer in charge of a district are distinct. It appears to this Court that the office of a District Commissioner at the same time performs functions of head of the Secretariat of the Council and also those of an administrative officer in charge of a district.

This Court is also fortified in its reasoning when one considers section 95 of the Police Act which states that the District Commissioner or persons authorized by him in that behalf, and within whose area an assembly or a demonstration shall take place, shall perform the functions, exercise the powers and discharge the duties assigned to that office. It is only through delegated authority under section 95 that a Chief Executive Officer of city, municipal and town council or any other person can exercise the powers or perform the duties of the District Commissioner with regard to assemblies and demonstrations.

It will be recalled that the Applicants in their submission urged the Court to hold that the office of District Commissioner under the Police Act includes that of the Chief Executive Officer of city, municipal or town council. In support of their position, it was argued that it has been the traditional understanding and practice that when a demonstration is to be held in the city, the notice has always been given to the Chief Executive Officer of the city council concerned. It was also argued by the Applicants that section 6(1)(e) of the Local Government Act in a way gives powers to the Chief Executive Officer to perform the duties of the District Commissioner under the Police Act. Section 6(1)(e) is to the effect that the

Council shall maintain peace and security in the local government area in conjunction with Malawi Police Service.

The first limb of the submission does not save the situation as it is trite that no matter how strong the practice may have developed; written law is always supreme. Practice shall in no way be held to be above the written law. The second limb of the argument also suffers the same fate of being of no assistance to the Applicants case. Admittedly, a Council and Chief Executive Officer are not one and the same thing under the Local Government Act. The Council or local government authority has its distinct functions provided for under section 146 of the Constitution and section 6 of the Local Government Act, respectively. Likewise, the office of Chief Executive Officer has its specific functions as head of the Secretariat provided for under section 11 of the Local Government Act. Nowhere in section 11 is the Chief Executive Officer given the power to receive notification of an intended assembly or demonstration.

Similarly, the argument by the Defendant that the Court should interpret the office of District Commissioner under the Police Act generously so as to include the office of Chief Executive Officer cannot stand. It is the view of this Court that there is no absurdity or indeed ambiguity that may require the Court to otherwise extend the meaning of the expression District Commissioner under the Police Act to include Chief Executive Officer.

### **Determination**

In view of all what has been discussed above, this Court holds that the notice of intended demonstration as required by section 96 of the Police Act was given to the wrong office which is that of the Chief Executive Officer of Lilongwe City

Council instead of the office of District Commissioner of Lilongwe District. Therefore, at law, no notice was given to the Chief Executive Officer of Lilongwe City Council. It follows that at law, there was no prohibition of holding the intended demonstration to warrant intervention by this Court under section 102 of the Police Act.

The end result is that the application by the Applicants to set aside the purported prohibition issued by the Chief Executive Officer of Lilongwe City Council against the holding of demonstration is hereby dismissed and consequently struck out of the list.

Since costs are in the discretion of the Court, I order that either party should bear its own costs.

Made in Chambers at Lilongwe this 1<sup>st</sup> day of December, 2021.

A handwritten signature in black ink, appearing to read 'W.Y. MSISKA', written over a horizontal line.

W.Y MSISKA

**JUDGE**