



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 68 OF 2021

BETWEEN:

THE STATE (On the application of ZUNETH SATTAR)

CLAIMANT

AND

THE DIRECTOR OF ANTI-CORRUPTION BUREAU

1st DEFENDANT

THE ATTORNEY GENERAL

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Gilbert Khonyongwa, Counsel for the Claimant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the claimant's application for permission to apply for judicial review made under Order 19 rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules 2017. By this application, the claimant seeks permission to apply for the judicial review of the decision of the 1st defendant to offer assistance to the United Kingdom Government in obtaining evidence or information in Malawi concerning alleged criminal acts committed by the claimant when the competent authority under Regulation 2 of the Mutual Assistance in Criminal Matters (Designation of Authority) Order and under section 122 (2) and 126 of the Financial Crimes Act to do so is the Attorney General and not the 1st defendant. The claimant also seeks permission to apply for a judicial review of the failure to act, by the 2nd defendant as the appropriate authority under the Mutual Assistance in Criminal Matters Act and the Financial Crimes Act, in circumstances where the 1st defendant acted *ultra vires* i.e. in excess of its powers.
2. If granted permission, the claimant seeks the following: a like order to certiorari, quashing the said decision of the 1st defendant. A declaration that the 1st defendant has acted *ultra*

vires and unreasonably in the *Wednesbury* sense. A declaration that all things done by the 1st defendant in purported mutual cooperation with the United Kingdom Government are illegal and invalid. And that the proceedings be expedited. Costs are also sought.

3. This is also this Court's order on the claimant's without notice application for an order of interlocutory injunction made under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017. By the instant application the claimant seeks an order of injunction granted without notice to the 1st defendant, restraining the 1st defendants from offering any sort of cooperation to the Government of the United Kingdom investigation agencies in relation to the investigation being undertaken by the 1st defendant as regards the claimant. The claimant also seeks to restrain the 1st defendant from sharing with the said United Kingdom Government investigative agencies or any of their agents or servants, any evidence that was obtained by the 1st defendant from the claimant during its search and seizure operation or any other time.
4. The application for permission to apply for judicial review as well as the application for injunction are supported by sworn statements of counsel Gilbert Khonyongwa respectively. This Court will deal with the two applications in turn, starting with the permission application.
5. As indicated, the claimant seeks permission to apply for the judicial review of the decision of the 1st defendant to offer assistance to the United Kingdom Government in obtaining evidence or information in Malawi concerning alleged criminal acts committed by the claimant when the competent authority under Regulation 2 of the Mutual Assistance in Criminal Matters (Designation of Authority) Order and under section 122 (2) and 126 of the Financial Crimes Act to do so is the Attorney General and not the 1st defendant. The claimant also seeks permission to apply for judicial review of the failure to act, by the 2nd defendant as the appropriate authority under the Mutual Assistance in Criminal Matters Act and the Financial Crimes Act, in circumstances where the 1st defendant acted *ultra vires* i.e. in excess of its powers.
6. The facts as gathered from the sworn statement of counsel for the claimant on this application show as follows: that the information stated in the supporting sworn statement is based on information supplied to Counsel Gilbert Khonyongwa by the claimant which counsel believes to be true to the best of his information, knowledge and belief.
7. The claimant herein is a British national resident in the United Kingdom but has got several business interests in Malawi.
8. On 5th October, 2021, the claimant was arrested in the United Kingdom on allegations of committing bribery in Malawi with unknown politically exposed persons in Malawi. The claimant's home and offices were searched on the same day and several documents and cell phones were taken from him.
9. Simultaneously, on the same date and around the same time, the 1st defendant's officers also searched and seized several documents and cell phones from the claimant's offices in Malawi at Ocean Industries Ltd. Counsel for the claimant asserted that the search in

Malawi, while being spearheaded by the 1st defendant, was carried out in the company of some officials from the United Kingdom Government, and the claimant later confirmed this to be true. The claimant understands that these United Kingdom Government officers are due to return to Malawi so that they can be shared with evidence that was obtained by the 1st defendant at his premises.

10. Counsel observed that the sharing of evidence or information pertaining to criminal legal matters is regulated by statute in Malawi, being the Mutual Assistance in Criminal Matters Act. He observed further, that under Regulation 2 of the Mutual Assistance in Criminal Matters (Designation of Authority) Order, it is only the office of the Attorney General that is authorized to offer assistance and share evidence or information obtained from investigations in criminal matters in Malawi with foreign Governments, including the United Kingdom. He also observed that the position is the same under the Financial Crimes Act.
11. On 1st November, 2021, the claimant's former lawyers Messrs. Kita & Co. wrote the Attorney General, Mr Thabo Chakaka Nyirenda, to find out if his office was involved in offering cooperation to the United Kingdom Government to obtain evidence from Malawi against the claimant for offences that have been proffered against the claimant in the United Kingdom. The letter is exhibited and it reads as follows:

RE: INVESTIGATION INVOLVING ZUNETH SATTAR IN UNITED KINGDOM

The above matter refers.

Mr Zuneth Sattar is our client based in the United Kingdom with businesses in Malawi. Our client has informed us that he is being investigated in the UK in connection with alleged bribes he paid to politically exposed persons within Malawi Government in order for his companies to win contracts with the Malawi Police Service and the Malawi Defence Force.

Our client further understands that, recently investigators from the UK were in the country who in the company of ACB searched and seized several documents and cell phones, which have not yet been returned to our Client.

Our understanding of the law is that it is the office of the Attorney General that has, under Regulation 2 of the Mutual Assistance in Criminal Matters (Designation of Authority) Order, been designated as the appropriate authority for purposes of receiving requests from Commonwealth countries for purposes of investigations in Malawi. We thus take it that your office was fully involved in the search and seizure mentioned above.

It is against this background that our Client would like to be updated on the results of the search and seizure that was conducted at Ocean Industries Limited premises.

Yours Faithfully,

Wapona Kita
For Kita & Co.

12. Counsel for the claimant asserted that, by his letter dated 4th November, 2021, the Attorney General, Mr. Thabo Chakaka Nyirenda, denied to have been involved in the matter of offering assistance to the United Kingdom Government in respect of their investigation. The letter from the Attorney General is exhibited and reads as follows:

INVESTIGATION INVOLVING ZUNETH SATTAR IN UNITED KINGDOM

We refer to your letter Ref [...] dated 1st November, 2021 in respect of the above subject matter.

We would like to inform you that the said investigation and all issues incidental to the investigations are being handled by the Anti-Corruption Bureau (ACB) under the Corrupt Practices Act. The office of the Attorney General is not involved in the matter.

In view of the foregoing, all inquiries pertaining to the above investigation should be addressed to the Anti-Corruption Bureau.

Yours Sincerely,

Thabo Chakaka Nyirenda

13. The claimant's counsel asserted that the decision of the 1st defendant to cooperate with the United Kingdom in investigating in Malawi and sharing evidence with the United Kingdom was therefore done beyond the 1st defendant's powers. And that such a decision being *ultra vires* is amenable to be quashed by way of a like order to certiorari.
14. He asserted further that in acting without regard to the provisions of the Mutual Assistance in Criminal Matters Act, the Mutual Assistance in Criminal Matters (Designation of Authority) Order and the Financial Crimes Act, the 1st defendant's decision to do so is unreasonable in the *Wednesbury* sense in that she has thereby failed to take into account the relevant considerations stipulated in those statutes.
15. He then asserted that the 2nd defendant is amenable to judicial review for failure to act, as it was within his knowledge and power to make the decisions that were being made by the 1st defendant which can only be lawfully be made by him by statute.
16. It is the foregoing premises that the claimant seeks permission to apply for the judicial review of the 1st defendant's decision and the 2nd defendant's failure to act in this matter.
17. This Court observes that the law requires that an application for permission to apply for judicial review be made without notice to the intended defendant. See Order 19 rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules 2017. The purpose of a permission application like the instant one is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte*

Finance Bank of Malawi Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported); *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93.

18. Permission to apply for judicial review will be granted if the Court is satisfied that there is an arguable case for granting the relief claimed by the applicant. At this stage there is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an arguable case then permission should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review. See *Ombudsman v Malawi Broadcasting Corporation*.
19. In the present matter, this Court agrees with the claimant on the statement of the law. Whenever assistance of the Malawi Government is sought by Commonwealth countries in criminal matters by way of obtaining evidence or information from Malawi regarding criminal investigations for offences in those countries, the Attorney General is the appropriate authority to receive requests for such assistance and to deal accordingly as per the provisions of the Mutual Assistance in Criminal Matters Act. See Regulation 2 of the Mutual Assistance in Criminal Matters (Designation of Authority) Order.
20. The Attorney General is also the appropriate authority when it comes to similar requests under the Financial Crimes Act. See section 122 (2) and 126 of the Financial Crimes Act.
21. The matter that has exercised the mind of this Court however is whether the premise for the allegations against the defendants has been made out on the face of the papers filed by the claimant on this application. This Court observes that the claimant understands that after a search at his premises by the 1st defendant, whose officers were in the company of United Kingdom Government officers, those United Kingdom Government officers are due to return to Malawi so that they can be shared with evidence that was obtained by the 1st defendant at his premises. This looks much like a future event if it is granted that the claimant has evidence of this being true that at some future time the Anti-Corruption Bureau wants to share information herein. Significantly, however, there is no evidence to show or suggest that the 1st defendant has made any decision at all to share information from the search and seizure with the United Kingdom Government Officers at some future date as alleged by the claimant.
22. The presence of United Kingdom Government officers during the search and seizure herein is also not proved. There is no evidence to support that allegation. It is not clear how the claimant confirmed that fact in the absence of any evidence tending to show such confirmation.
23. Even if it were granted that United Kingdom Government officers accompanied the 1st defendant's officers at the time of the search and seizure that in itself does not show that the 1st defendant intends or has decided at a future date to share information or evidence gathered during the search and seizure with the United Kingdom Government officers.

24. This Court is mindful of the provisions of section 5 (1) of the Mutual Assistance in Criminal Matters Act which provides that nothing in the said Act shall derogate from existing forms or prevent development of other forms of cooperation (whether formal or informal) in respect of criminal matters between Malawi and any Commonwealth country, or between Malawi, or any enforcement agencies or prosecuting authorities in Malawi, and the International Criminal Police Organization or any other such agencies or authorities outside Malawi.
25. By way of obiter, this Court wishes to state that on the face of it, section 5 (1) of the Mutual Assistance in Criminal Matters Act appears to allow other forms of cooperation and this may well allow the Anti-Corruption Bureau to legally cooperate with the United Kingdom Government officers with regard to sharing of evidence and other related matters. It is not a closed matter that only the Attorney General is to be involved in international cooperation in the fight against transnational crime through sharing of evidence and other cooperation. These are issues on which a decision would have to be made after hearing full arguments in a proper matter. That is not possible to determine definitively in this matter especially since the application herein is determined on the facts, namely, lack of evidence on assertions made by the claimant.
26. It could well be that the United Kingdom Government officers were on the ground on the search and seizure operation carried out by the 1st defendant herein due to some other form of cooperation and not necessarily with a view to be shared evidence or information at some future date, as alleged by the claimant, without recourse to the Mutual Assistance in Criminal Matters Act or the Financial Crimes Act.
27. The claimant appears to rely on the statement by the Attorney General in his letter dated 4th November, 2021 in response to the claimant's inquiry on the United Kingdom investigation. This Court finds that letter from the Attorney General not to be helpful to the claimant on the permission application. The letter from the Attorney General is ambiguous on such an important subject matter, to say the least. The Attorney General clearly says his office is not involved in the matter on which the claimant is making his vital inquiry. In the same letter, the Attorney General also says the matter of the United Kingdom investigation of the claimant and all incidental issues is being handled by the 1st defendant, the Anti-Corruption Bureau. How does the Attorney General who clearly says he is not involved in the matter, in his response to a specific and important inquiry as to his involvement concerning an alleged request or lack of request under the Mutual Assistance in Criminal Matters Act, say that the said matter and all incidental issues to the matter are being handled by the Anti-Corruption Bureau? This Court thinks it prudent not to attach any weight to this ambiguous letter given that there is no evidence of any decision taken by the 1st defendant to share information with United Kingdom Government officials. The claimant has clearly indicated that he understands the officers of the United Kingdom Government are yet to come back to Malawi to be shared such information. The source of the claimant's

understanding remains undisclosed. It may actually be speculation on the part of the claimant aimed at stifling the work to the Anti-Corruption Bureau.

28. In the foregoing premises, this Court finds that the claimant's case is not worth investigating at a full hearing. It appears to be significantly based on speculation. It is a case that must not be allowed to proceed beyond the permission stage. The application for permission to apply for judicial review is accordingly declined as against the alleged decision of the 1st defendant and the alleged failure to act by the 2nd defendant herein.
29. This Court turns to deal with the application of the claimant seeking an order of injunction granted without notice to the 1st defendant, restraining the 1st defendants from offering any sort of cooperation to the Government of the United Kingdom investigation agencies in relation to the investigation being undertaken by the 1st defendant as regards the claimant. And also seeking to restrain the 1st defendant from sharing with the said United Kingdom Government investigative agencies or any of their agents or servants, any evidence that was obtained by the 1st defendant from the claimant during its search and seizure operation or any other time.
30. Considering that the application for permission to apply for judicial review has been declined for being speculative, on the basis of which an injunction against the 1st defendant could have been made, this Court is of the view that the application for injunction must also fail as there is no decision of the 1st defendant to be restrained in the circumstances. There is no arguable case found which could form the basis for protecting the claimant by way of injunction.
31. In the foregoing circumstances, both applications made by the claimant are declined.

Made in chambers at Blantyre this 24th November, 2021.

M.A. Tembo
JUDGE