



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL REVIEW CAUSE NO. 13 OF 2021**

BETWEEN:

RESERVE BANK OF MALAWI CLAIMANT

-AND-

**REVIEW COMMITTEE OF THE PUBLIC
PROCUREMENT AND DISPOSAL OF
ASSETS AUTHORITY DEFENDANT**

SPARC SYSTEMS LIMITED 1ST INTERSTED PARTY

MITRA SYSTEMS 2ND INTERESTED PARTY

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Kumwenda and Mrs. Sentala, Counsel for the Claimant
Mr. Soko, Counsel for the 1st Interested Party
Ms. Mbvundula, Counsel for the 2nd Interested Party
Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on an application by the Claimant for an order of stay of execution of the decision by the Defendant dated 9th February, 2021 faulting the Claimant's procurement process regarding two ICT projects.

The application is supported by a sworn statement made by Mr. Wesley Njete. Mr. Njete is employed by the Claimant as the Manager responsible for procurement. His sworn statement is couched in the following terms:

“Factual background

4. *The Claimant invited bids from eligible bidders for the SUPPLY AND DELIVERY OF ATS EQUIPMENT and for the SUPPLY AND DELIVERY OF ICT HARDWARE FOR FLEXICUBE UPGRADE. These were two separate invitations to bid for two separate works issued on 2nd June, 2020 and 29th May, 2020 respectively. Newspaper adverts for the two separate invitations to bid are attached and exhibited hereto as “WN1”.*
5. *A number of bidders responded to the invitations to bid and after evaluation of the bids, the Claimant published an Intention to Award Contracts for the two proposed works to the successful bidder, Mitra Systems. I now attach and exhibit hereto copies of the published intention to award contracts marked “WN2”.*
6. *On 16th November, 2020, following the publication of the Intention to Award Contracts, one of the unsuccessful bidders, Sparc Systems Limited [the Defendant], wrote the Claimant requesting access to the entire record of the procurement proceeding pursuant to its rights under section 37 of the Constitution as well as section 34 of the Public Procurement and Disposal of Assets Act [the Act].*
7. *The Claimant rejected the request for access to the entire record of procurement proceeding. Nonetheless, the Claimant provided the Defendant grounds as to why its bid was unsuccessful, in line with the Act. I now attach and exhibit hereto a copy of a letter dated 18th November, 2020 from the Claimant responding to the request to access the record of procurement proceeding marked “WN3”.*
8. *The Defendant subsequently commenced administrative review proceedings before the Public Procurement and Disposal of Assets Authority [the Authority] challenging the Claimant’s decision to award procurement contracts to the successful bidder, Mitra Systems.*
9. *Amongst the grounds upon which the administrative review was sought were that*
—
 - 9.1 *it was untrue that material documentation [Manufacturers’ Letters of Authorisation] was omitted from the submitted bids. According to Sparc Systems Limited, it submitted the required Manufacturers’ Letters of Authorisation.*
 - 9.2 *the Claimant had ignored its own set Evaluation and Qualification criteria for the bidding process and thus had proceeded to award contracts to a bidder who did not have the requisite experience [5 years’ experience in supplying office machines]. I attach and exhibit hereto a copy of the application for administrative review by Sparc Systems Limited marked “WN5”.*
10. *The Authority subsequently convened a three-member ad hoc review committee [Review Committee] in line with the Act to hear the matter.*

11. *Before the hearing, the Claimant submitted on the Authority's request, all information that was requested. The information and/or documentation included the following –*
- (a) *the bid submitted by the Defendant;*
 - (b) *the bid of the bidder that was being considered for award;*
 - (c) *all qualification assessment and bid evaluation documents;*
 - (d) *the solicitation, including specifications;*
 - (e) *requests for information and response thereto.*
12. *At the actual hearing, the Claimant insisted that the only reason the Defendant failed in the procurement was because it had failed to provide material information [Manufacturer's Letter of Authorisation] as had been highlighted in its letter of 18th November, 2020 such that its bid was materially non-responsive. The original and copies of the bid response as submitted to it by the Defendant were produced before the Review Committee and the bid documents in the custody of the Claimant did not contain the relevant material information.*
13. *On the other hand, at the said hearing, the Defendant highlighted and produced the said relevant material information.*
14. *In the end, it was always the case of the Claimant not to allow the Defendant to introduce material information that it omitted in its submission of the tender response, to be introduced through the back door, thus, using the Review Committee.*
15. *Upon hearing both parties [the Claimant and Sparc Systems Limited], the Review Committee issued its decision faulting the Claimant's procurement process with regards to the two ICT projects and granted remedies to Sparc Systems Limited. I attach and exhibit hereto a copy of the determination marked "WN6".*
16. *The decision of the Review Committee whilst made on 9th February, 2021, was communicated to the Claimant on 12 March, 2021 (there is therefore, on the facts, no inordinate delay in bringing this application for stay of execution of decision).*

Determination by the Authority's constituted ad hoc Review Committee

17. *The Review Committee made three determinations as follows –*

17.1 *Submission of Manufacturer's Letters of Authorisation*

- 17.1.1 *if a requirement is not met by a bidder, there is no need to consider the bid further;*

17.1.2 *the facts of this case were that the Claimant failed the Defendant on the basis of non – submission of Manufacturer’s Letters of Authorisation. The Defendant on the other hand argued that it had submitted the material information;*

17.1.3 *the Review Committee doubted if the unsuccessful bidder really did not submit the Manufacturer’s Letters of Authorisation. The Review Committee **felt that with the type of binding used it was easy for someone to remove a paper from the bid.** [Our Emphasis]*

17.1.4 *That, on the above basis, the Review Committee ordered that bids should be re-tendered apart from Lot 3 on the procurement of ICT Equipment for ATS where the unsuccessful bidder had accepted that it did not provide Manufacturer’s Letter of Authorisation.*

17.2 Eligibility

17.2.1 *the Claimant erred to award a contract to a firm/company that had two years’ experience when the Bidding Document specifically said the bidder must have five years’ experience;*

17.2.2 *the definition of bidder according to the Review Committee under the Act meant the firm and not the individual owners behind the firm;*

17.2.3 *on the above reasoning Mitra Systems should not have been awarded a contract*

17.3 Indigenous Malawian

17.3.1 *being an indigenous Malawian was not part of the evaluation criteria and therefore the Defendant’s claim on that basis failed.*

The Claimant’s position on the determination by the Review Committee

18. *As a tribunal, the Review Committee did not provide reasons for its determination that it doubted if the Defendant really did not submit the Manufacturer’s Letter of Authorisation. On examination, re-examination and further re-examination of the decision, the Claimant is unable to find evidence for the said determination.*

19. *The Review Committee’s determination was based on a **feeling**. The Review Committee stated that **‘it felt with the type of binding used it was easy for someone to remove a paper from the bid’**. Again, there was no evidence to support the tribunal’s **“feelings”** and **finding that the Claimant may have or indeed removed papers from the Defendant’s bid documents.** [My Emphasis]*

20. *The Review Committee suspected, without giving reasons for the suspicion that the Claimant, the Reserve Bank of Malawi, was tampering with submitted bids. The fact is obvious from an examination of the remedies granted by the Review Committee, thus, that the Reserve Bank of Malawi should be advised to engage independent evaluators for the procurement and future tender submissions should include electronic versions to avoid suspicions of tampering with bids.*
21. *The Review Committee failed to consider that the successful bidder, Mitra Systems, is not a body corporate but an unincorporated business organisation where the individual owners trade on a registered business name. As between the business organisation and the individual owners they are one and the same. This fact is obvious from the attached and exhibited copy of the certificate of registration marked “WN7”.*
22. *Further, the Review Committee’s determination that the successful bidder, Mitra Systems, was not eligible because of lack of the required 5 years’ experience, stands in conflict with its own determination that on the supply and delivery of ICT equipment for ATS Lot 3, the Reserve Bank of Malawi should proceed to recommend to award a contract to Mitra Systems.*

Composition of the ad hoc Review Committee and Declaration of Interest

23. *The Review Committee comprised of **Mr. Allan Muhome, Mr. F. Chiweza and Mr. B. Fudzulani**. The Claimant became aware of the composition of the Review Committee on the day of hearing and to be more particular, when the members of the Review Committee entered the room designated for hearing at the Authority.*
24. *The team that represented the Claimant, of which I was a part of, became aware subsequent to the hearing that **Mr. B. Fudzulani failed to declare that he is a key technical staff and/or the Chief Commercial Officer in Angle Dimension, a firm engaged by the Claimant in one of its ICT projects.** [My Emphasis]*
25. *Angle Dimension entered into an agreement with the Claimant for the Development and Implementation of Centralised National Pension Database System on 10 December, 2018. The agreement was to subsist for 4 months or for any other period as would be agreed between the parties. A copy of the agreement is exhibit hereto and marked “WN8”.*
26. *Between 10 December, 2018 and to date, the ICT project is yet to be implemented by Angle Dimension to the satisfaction of the Claimant and as such the Claimant has not yet accepted the system and has not fully paid Angle Dimension for the system per the agreement.*
27. *There have been several engagements between the two parties aimed at addressing the issues that have caused the project to stagnate. I attach and exhibit hereto minutes of one such engagement that took place in October, 2019 between the Claimant and Angle Dimension where **Mr. B. Fudzulani attended in his capacity as the Chief Commercial Officer for Angle Dimension** marked “WN9”.*

28. *The agreement between Angle Dimension and the Claimant has just been extended to run to October, 2021 and this means the firm that **Mr. B Fudzulani** represents as a key member has a running ICT project to be delivered with the Claimant. I attach and exhibit hereto a copy of an addendum extending the duration of the December, 2018 contract marked “WN10”.*
29. *Despite being key personnel of a firm that has a running ICT contract with the Claimant, which contract has been continually extended since 2018 and is yet to be delivered to the acceptance and/or satisfaction of the Claimant, **Mr. B. Fudzulani** failed to declare an interest in this matter involving the Claimant that he was required to hear.*
30. *The facts show that there was a real or seemingly incompatibility between **Mr. B Fudzulani**’s private interests and his public duty as a member of the ad hoc Review Committee as constituted by the Authority.*

Application for stay of execution and the High Court Review Proceedings

31. *There are good reasons for granting the application for stay of execution pending the hearing by this Court of the review proceedings.*
 - 31.1 *Firstly, the factual matrix contained from paragraphs 14 – 26 demonstrates that the Review Committee –*
 - 31.1.1 *failed to provide reasons for its decision when itself as an administrative tribunal ought to have done so.*
 - 31.1.2 *failed to consider the fact that the successful bidder was trading on a business name and thus the Claimant did no wrong in looking at the experience of the individual owners when examining the experience of the unincorporated firm or business organisation, Mitra Systems.*
 - 31.1.3 *failed to declare an interest in a matter that it was required to hear.*
 - 31.2 *The remedies granted by the Review Committee are such that if allowed to be satisfied, will leave an impression that indeed it is a matter of fact that the Claimant [Reserve Bank of Malawi] was tampering with bids by removing crucial bid documents and then failing bidders on a pretext of non-submission of material documentation. This will cause irreparable damage to the reputation of the Claimant as no reasons or evidence backing up that assertion or suspicion of tampering with bids have been given nor elaborated by the Review Committee.*
 - 31.3 *On the facts of this case, the risk of carrying out an injustice if it turns out that the decision to grant a stay was wrong, is lower if a stay is granted to the Claimant. On the other hand, rejection of the application for stay and*

proceeding with execution of the decision means retendering the bids on the basis that the Claimant most likely than not, removed crucial bid documents in order to fail a bidder and on the basis of a tribunal which on the face of it was conflicted and could not have been impartial.

- 32.2 *The Claimant has since filed an application for review of the decision of the Authority's constituted Review Committee and undertakes to prosecute the review expeditiously.*
- 33.3 *When the Court, in its discretion, undertakes a balancing act of all facts as expounded in this sworn statement, the balance of justice should tilt towards the granting of an order of stay of execution of decision of the Review Committee."*

The 1st Interested Party is opposed to the application and it relies on a statement, sworn by Mr. Wisely Phiri, the Managing Director for the 1st Interested Party, which states as follows:

- "3. *I have read what purports to be the sworn statement of WESLEY NJETE, 'the statement' and in opposition to the Application for stay and as a response to the aforementioned statement, I state as follows:*
- 3.1 *I concur in the factual background provided in paragraphs 4- 10 of the statement.*
- 3.2 *I refer to paragraphs 12 and 13 of the statement and state that consistent with the Defendant's position outlined in its application for review, I also produced an office copy of the bid document that the Defendant had submitted to the Claimant and that copy contained the Manufacturer's Letter of Authorization. This is the document which the Claimant had alleged was not included in the Defendant's bid document. There is now produced to me and exhibited hereto marked **C-WP 1A and CP-WP 1B** copies of the full bid documents for procurement reference numbers RBM/ICT/007/20 and RBM/ICT/008/20 as submitted by the Defendant to the Claimant.*
- 3.3 *I refer to paragraph 18 of the statement and the general accusation that The Committee did not provide reasons for its decision and state that this is not true. The reason for the Committee's decision is available on pages 11 and 12 of its Decision. The Committee was presented with 2 factual narratives that were irreconcilable to each other and the Committee could only accept and believe in one version. The Committee states on pages 11-12 of the Decision that it doubted the version of events offered by the Claimant on account of the manner in which the bid document had been bound. The binding, according to the Committee, made it easier for a malicious person to rip a key document from the bidding document.*

- 3.4 *I refer to paragraph 21 of the statement and state that the Committee was correct in holding that the bidder was the firm styled as 'Mitra Systems' and not Messrs. Robert Benimana and Martin Masawi. The justification that the Claimant offered for ignoring its own qualification criteria first appeared on page 6 of its Statement of Response in the proceedings before the Committee. There is now produced to me and exhibited hereto marked **C-WP 2** a copy of the Claimant's Response filed before the Committee. The justification was that despite Mitra Systems being only 2 years old, it could still be awarded a contract because its 'owners' were seasoned engineers who had been providing ICT works to the Claimant through their erstwhile employer, Southern Business Solutions Ltd.*
- 3.5 *The said justification is insincere and indefensible for the following reasons:*
- (a) *The experience was not stated to be in the performance of ICT works or indeed in engineering but rather in the supply of various office machines for at least 5 full years;*
- (b) *The 2 aforementioned gentlemen were to the best of my knowledge, information and belief, always employees of the company limited by shares known as **Southern Business Solutions Ltd**. They were not shareholders in the Company. There is now produced to me and exhibited hereto marked **C-WP 3 A** and **C-WP 3B** copies of the Certificate of Incorporation and extracts from the Memorandum and Articles of Association of the Company as retrieved by my agent from the Registrar General's Department. Since Southern Business Solutions Ltd is a separate legal entity, its experience cannot be said to be that of its employees.*
- 3.6 *I further draw the attention of the Court to the fact that it is a possibility for a firm's partner to transfer their stake to someone else or indeed for a new partner to join the firm after the fact of registration. This is why the experience of the firm is important in its own right. It is clear, therefore, that for a bidding firm to qualify, it needed to have been in existence for a period of not less than 5 years during which it should have been engaged in the business of supplying office machines.*
- 3.7 *I refer to paragraph 22 of the statement and state that having correctly found that Mitra Systems did not qualify as an eligible bidder, it was indeed erroneous for the Committee to hold that it be awarded any contract for any of the lots. At the review hearing, the Defendant will pray for a variation of this finding.*
- 3.8 *I refer to paragraphs 23-30 of the statement and state that these paragraphs do not disclose the pecuniary or indeed any other interest that Mr. Fudzulani had in the outcome of the review proceedings. Mr. Fudzulani is no shareholder in the Defendant and has got no association or links with the Defendant. Because he had no pecuniary or indeed any other interest in*

the outcome of the review proceedings, there was no ground for disqualification. There is now produced to me and exhibited hereto marked as C-WP 4 copies of the Defendant's Memorandum and Articles of Association showing the shareholders and directors of the Defendant.

- 3.9 *Mr. Fudzulani's association with the Claimant, arising from his firm's contract with the Claimant, was so removed from the review proceedings that no reasonable connection can be drawn between them.*
- 3.10 *In any event, even if the Court finds that Mr. Fudzulani should have declared some interest as the statement alleges in the aforementioned paragraphs, then I refer to paragraphs 23 and 24 of the statement and state that by electing to proceed with the hearing even after the Claimant's representatives had become aware of Mr. Fudzulani's participation, the Claimant waived any objection that it may have had to his involvement in the proceedings.*
- 3.11 *I repeat the foregoing paragraph and state that during the hearing of 17th February 2021, a short while after it had started, the hearing was adjourned for some time to allow for the retrieval of some documents. These documents had been furnished to the Committee's secretariat by both parties but had somehow not been brought into the room where the hearing was taking place. This recess allowed for consultation amongst the members of the teams of the contesting parties. There was thus an opportunity for the Claimant (who was also represented by Legal Counsel Mr. Zumbe Kumwenda), if indeed it was minded to do so, to protest the participation of Mr. Fudzulani in the proceedings and to apply for his recusal and disqualification. This was deliberately not done.*
- 3.12 *I further state that from the totality of the circumstances, no reasonable and well-informed observer would take the view that there was an apprehension of bias or impartiality on the part of Mr. Fudzulani. I further state that there was in fact no such bias. Given that it is being alleged that Mr. Fudzulani's firm had a contract with the Claimant, the alleged bias on the part of Mr. Fudzulani should have operated in favour of the Claimant and to the prejudice and detriment of the Defendant. This is because Mr. Fudzulani may not have wanted to run afoul of the Claimant. That he had the presence of mind to make adverse findings against the Claimant is a testament to his moral rectitude. Therefore, it cannot lie in the mouth of the Claimant – the potential beneficiary of any bias on the part of Mr. Fudzulani - to impeach his participation in the proceedings. I do not think that any reasonable and well informed by-stander would take the view that the failure to declare the interest in this case occasioned a failure of justice or indeed prejudiced the Claimant.*
- 3.13 *I refer to paragraphs 31-33 of the statement and state that there are no circumstances therein which would justify the granting of a stay order. The Claimant's chief concern – that of its purported reputational damage on*

account of the Committee's finding of a possibility that someone ripped out a document from the Defendant's bid – cannot be addressed by an order of stay. The only way of addressing such an adverse finding would be its reversal after the hearing of the review application. A Court cannot stay a finding. The alleged prejudice will not be addressed through this stay, therefore.

- 3.14 *The Claimant's legal duty is to engage the services of service providers in a manner which strictly complies with public procurement law. The remedial orders made by the Committee are required and necessary to ensure that the integrity, openness, fairness and accountability of the procurement proceeding is preserved. That this is being attacked by the Claimant is rather bewildering.*
- 3.15 *I further notice that the Certificate of Extreme Urgency filed by the Claimant suggests that it is critical that the implementation of the Claimant's ICT projects not be delayed. It is, therefore, surprising that the same Claimant wants to delay the procurement further by seeking and obtaining an order of stay.*
4. *I, therefore, pray that this Court be pleased to find the application for stay and for review to be without merit and to dismiss them both with costs on an indemnity scale.*
5. *The Court should further affirm all the Review Committee's findings and orders apart from the one which provided that Mitra Systems be awarded one of the lots that they did bid for in procurement reference number RBM/ICT/008/20.*
6. *I further pray that the Court be pleased to fix time within which the Claimant should comply with the remedial measures ordered by the Committee.*
7. *The Court should further limit the opportunity to bid only to those that submitted their bids during the annulled procurement proceedings as it is only the rights of these that would have been violated by the Claimant."*

The Claimant filed a statement, also sworn by Mr. Wesley Njete, in reply to the sworn statement in opposition. The sworn statement in reply will be quoted in full:

- "3. *The statement in opposition is a general attempt to show that the Claimant did not offer compellable reasons meriting the grant of an order of stay.*

Facts meriting the grant of an order of stay

4. *To begin with, the Claimant does not seek a stay of an adverse finding of fact as argued by the Defendant. The Claimant seeks a stay of the decision of the Review Committee. Page 12 of the Review Committee decision contains the relevant determination of the Review Committee that the Claimant wishes the Honourable*

Court to review. The Committee's determination was that since the Defendant accepted that for ATS on Lot 3 it did not submit the authorization letter then this lot should be considered to be in line with the Claimant's view that it should proceed to award lot 3 to Mitra Systems. But for the rest of the tenders, the Claimant should retender the procurement. A further determination was that Mitra Systems should not have been awarded a contract because they were ineligible in terms of the requirements in the Bidding Documents. The Review Committee then ordered a number of remedies.

5. *The Claimant does not agree that the rest of the tenders should be retendered nor that its assessment of Mitra Systems should have disqualified it from being awarded the contracts. The Claimant also seeks to challenge the consequential orders (remedies). To show that there are serious issues to be tried, the Claimant argues that that the Review Committee did not provide reasons for its decision especially if the reason is that what the Defendant claims it to be, thus, the Review Committee felt with the way the documents were bound it was easy for someone to remove a page from the document. This was an irregular finding of fact.*
6. *The Reserve Bank of Malawi Bidding Document for the Procurement of ATS Equipment by National Competitive Bidding (Procurement Reference Number RBM/ICT/008/20) as well as the Reserve Bank of Malawi Bidding Document for the Procurement of ICT Hardware for Flexicube Upgrade (Procurement Reference Number RBM/ICT/007/20) contained the relevant instructions that were supposed to be followed by bidders in the procurement for the two projects. Copies of the said RBM Bidding Documents are exhibited hereto and marked "WNR 1 and WNR 2" respectively.*
7. *For purposes of submission and opening of bids, the said RBM Bidding Documents required that a bidder should enclose the original and each copy of its bid in separate envelopes duly marking the envelopes as "Original" and "Copy". For purposes of its tender response, the Defendant therefore submitted an Original as well as a Copy of its bid documents to the Claimant.*
8. *I refer to paragraph 3.2 of the statement in opposition and state that with the Review Committee's determination that the tenders should be retendered because it doubted whether the Defendant really did not submit the required letter of authorization, –*
 - 8.1 *during the hearing before the Review Committee, as evidence to substantiate its own case, the Claimant produced the Original tender response as well as the Copy of the tender response as had been submitted by the Defendant to it. The same did not contain the requisite letters of authorization.*
 - 8.2 *as rightly put in the statement in opposition, it was the Defendant's own office copy that somehow miraculously contained the said letter of authorization. I exhibit hereto the copies of the tender response as submitted by the Defendant to the Claimant marked "WNR 3 and WNR 4" respectively.*

9. *I refer to paragraph 3.3 of the statement in opposition and state that as far as I am aware, the fact or matter to do with binding of the bid documents and particularly as to the reason purportedly given by the Review Committee that, 'it felt with the way the document was bound it was easy for someone (the Claimant) to remove a page therefrom', the same was never in issue. No evidence was received by the Review Committee relating to binding of documents nor relating to a suspicion that the Claimant removed documents.*
10. *I tried to access the official recording or transcript of what transpired during the hearing from the Authority and I was advised by Mr. Neba, who was part of the Secretariat during the hearing, that the Review Committee decision was basically the entire transcript of what transpired during the hearing. Pages 3 – 11 of the decision therefore contain a detailed description of the matter that was in issue before the Review Committee and the evidence that was received by the Review Committee. To be more particular –*
 - 10.1 *the first part of the evidence from the Defendant was the testimony of Mr. Wisely Phiri who testified that the Defendant was experienced and had the know-how to obtain a letter of authorization. The second part of the evidence as the documentary evidence in terms of the Defendant's own office copy of the bid documents that showed the relevant letter of authorization was there.*
 - 10.2 *the Claimant in turn did not dispute whether the Defendant had the experience or know-how to obtain a letter of authorization. It was neither here nor there. The relevant fact in issue was, for this particular tender, the Claimant had the documents to show that the Defendant never submitted a letter of authorization.*
11. *In view of the above, the reason for the decision that the Review Committee gave was manufactured from its own feelings. It created a fact or matter in issue where the same was non-existent and somehow found evidence to substantiate this fact.*
12. *Tragically, the consequential remedies ordered, confirm that the Review Committee suspected the Claimant had tampered with the Defendant's bid to the extent that the Review Committee ordered that future tender submissions should include electronic copies because the Claimant, the Reserve Bank of Malawi, cannot be trusted.*
13. *The Claimant is the state's principal instrument for the control of money supply, currency and the institutions of finance. Its mission is to set monetary policy goals for the country. It seeks to achieve price stability and financial stability. Achievement of set policy goals or objectives per its mission depends on its credibility and reputation as a central bank. As an example, the Claimant is mandated by law to enter into financing transactions with foreign counterparties. Counterparties to such financing transactions want to deal with a credible and reputable central bank. Reputation damage affects its ability to access critical resources for the economy. No institution wants to give its millions of foreign*

currencies to a central bank which is deemed corrupt or suspicious in its dealings. I exhibit hereto a copy of a term sheet for Letters of Credit that the Claimant guarantees on behalf of local enterprises, as an example of such transactions, marked “WNR5”.

14. *The standing of the Claimant in the economy means that negative news attracts special attention. It is actually targeted by stakeholders whenever there is negative news. The least that should happen is that accusations must be true and borne out of provable facts and not based on unreasonable opinions of tribunals. I exhibit a news article which appeared on Nyasa Times on 13 November, 2020 titled **“HRDC exposes Reserve Bank of Malawi K1.8 procurement scandal: Flouts procedure in awarding contracts to Mitra”** marked “WNR6”. In essence, the Claimant was accused in the eyes of the public of fraud and acting in bad faith and subjected to investigations by the ACB. Now, if the Review Committee’s decision is executed before the Honourable Court has had a chance to review the case and it later turns out on review that the determination of the Review Committee was unfair on the Claimant, the damage suffered would be irreparable. The Review Committee has basically repeated the accusations of fraud and bad faith which first appeared in the media. It is thus important for the Honourable Court to first determine whether the decision to order retendering of tenders and the consequential remedial orders are founded on a regular finding of fact provable by evidence received by the Review Committee.*
15. *I refer to paragraphs 3.4 to 3.7 of the statement in opposition and state that it is accepted by both parties that there was a Bidding Document which guided the procurement. The Bidding Documents were duly placed before the Review Committee and the Review Committee was asked by the Defendant to review whether the Claimant had followed its own Bidding Document when it published an intention to award contract to Mitra. I maintain that the Claimant followed its own Bidding Document to decide on who was an eligible bidder as well as to evaluate the bidders.*
16. *In terms of the Procurement of ATS Equipment, the Review Committee noted that since the Defendant had accepted that it did not provide the relevant letter of authorization, Mitra Systems should be duly awarded Lot 3 in the procurement. If Mitra Systems was ineligible because of experience, it would never have been awarded this Lot 3 in the ATS tender.*
17. *It is also notable that the procurement proceedings used the legally accepted merit point system where point-scoring is the basis for determining the winner. It is also a fact; the Review Committee was legally required to consider all circumstances available in the procurement process when ordering remedies. Now, the Claimant duly submitted the technical evaluation scores per the request of the Review Committee and in the end, the Review Committee made the finding that Mitra Systems be awarded Lot 3. Whilst it is accepted by the Claimant that this finding seems to be in conflict with the Review Committee’s earlier finding of fact that the Mitra Systems was ineligible because of lack of experience, it remains the Claimant’s point that it is very important that these issues be looked at by the*

Honourable Court sitting in its appellate review jurisdiction. The Defendant has stopped short of agreeing with the Claimant and has made a submission that at the review hearing, it will pray for a variation of this finding.

18. *I refer to paragraphs 3.9 to 3.13 of the statement in opposition and state that it is a mandatory requirement that a member of an ad-hoc review committee should declare an interest in a matter they are required to hear. Mr. Fudzulani is heavily involved in a project that his firm is undertaking on a contract with the Claimant and that project has persistently failed to deliver and in return the Claimant has refused to take delivery of the system and to pay his firm, Angle Dimensions. The Claimant has actually made a final extension to try to have Mr. Fudzulani's firm deliver the project. There is a real or at least a seemingly incompatibility between his private interests and his public duty. The conflict of interest could either be that he might wish to gain favour with the Claimant or indeed strengthen his resolve or zeal against the Claimant. After all, we have already shown that he was part of a committee that decided based on an unreasonable opinion not backed by any ounce of relevant evidence. It is important that the Claimant should not only perceive that justice was done but see that justice was done.*
19. *I maintain that we only got to learn of Mr. Fudzulani's conflicted standing after conclusion of hearing. The matter was adjourned once hearing had begun and in those 15 or so minutes when the hearing was adjourned, we never conferred about Mr. Fudzulani's standing. In any event, whether our Mrs. Katengeza should have known and we should have objected to the continuation of hearing is beside the point. Mr. Fudzulani himself has been required by law to declare an interest. This mandatory requirement cannot be waived. It is thus important for the Honourable Court to determine whether the Review Committee as a quasi-judicial body failed to meet the standards of procurement law. The Claimant's stand remains that for purposes of our procurement law, Mr. Fudzulani could never have been impartial. A stay is thus merited. What tragedy it would be, should a stay not be granted and later it turns out during the review proceedings that the Claimant was condemned by a tribunal which could never have been impartial!*
20. *The Claimant followed procurement regulations. The remedies ordered by the Review Committee are not in line with the procurement law. The Defendant should not be bewildered. Not at all.*
21. *I note that the Defendant wishes to make a case on the fact that the Claimant brought the application for stay on a certificate of extreme urgency alleging that the projects would suffer inordinate delay if a stay was not granted but now wishes to have an order of stay granted. I wish to highlight that the Claimant had to balance between protecting its reputation that it does not follow the law and deliberately tampers with bids to fail bidders as well as protecting its rights to be judged by a fair tribunal, on the one hand and the need not to delay its projects, on the other hand. Having been ordered by the Honourable Court to bring the matter inter – parties, the Claimant had to learn to live with smoke in a house that was on fire. The Defendant should not be surprised by the Claimant's desire to seek justice. The Claimant asserts that it is desirous of prosecuting the appellate review within*

the soonest possible time. In the meantime, it remains the Claimant's fear of what an execution of the decision of the Review Committee would entail.

22. *In the end, the Claimant asserts that there are compellable factors meriting the grant of an order of stay pending hearing. Its application should not be dismissed with costs as prayed for by the Defendant. It has not brought a hopeless case before this Court. There are good reasons for granting an order of stay. There is also no basis for the Defendant's prayer that this Honourable Court should fix time within which the orders of the Review Committee should be complied with.*
23. *The balance of convenience or the balance of risk favours the granting of stay in this case."*

In his submissions on behalf of the Claimant, Counsel Kumwenda contended that, on the totality of the facts of this matter, this is a proper case in which to grant an order of stay pending the hearing of the main case. It might not be out of place to quote in full the pertinent part of the Claimant's Skeleton Arguments:

"Serious question to be tried

- 4.2 *The facts and circumstances of the present case show that the Review Committee did not provide reasons for its decision or determination when itself as an administrative tribunal ought to have done so.*
- 4.3 *Where the tribunal attempted to provide reasons for its decision, the remedy it granted conflicted the determination it made. This was the case when the Review Committee determined that a successful bidder, Mitra Systems failed to meet the evaluation criteria as it did not have the requisite experience of 5 years and thereafter ordering or determining that that the same Mitra Systems should be given Lot 3 in the procurement of ICT equipment for the Claimant's ATS project.*
- 4.4 *The facts also demonstrate that a member of the tribunal failed to declare an interest in a manner that he was required to hear. Hearings of a tribunal must be characterised by impartiality.*
- 4.5 *Further, the facts show that the Review Committee failed to correctly interpret the meaning of bidder in the Act. Bidder is specifically stated to mean **any participant** who has expressed interest in procurement proceedings by submitting a bid. There is nothing in the definition that limits the word 'bidder' to a 'firm or a company' and/or further that should restrict a procuring entity, if the successful bidder is an unincorporated business organisation, nothing should prohibit it from looking at the experience of the individual owners when evaluating the experience of the unincorporated firm or business organisation.*
- 4.6 *The above therefore demonstrate that there is a serious issue that this court must determine on review.*

Irreparable damage

- 4.7 *When one considers the remedies granted by the ad hoc Review Committee, viz; that the bids should be retendered; the Claimant be advised that evaluation of the bids be done by an independent evaluator; and that bids should be submitted in electronic copy to avoid suspicion of tampering with bids, they are such that if allowed to be satisfied or executed, they will leave an impression that indeed it is a matter of fact that the Reserve Bank of Malawi was tampering with bids by removing crucial bid documents and then failing bidders on a pretext of non-submission of material documentation.*
- 4.8 *This will cause irreparable damage to the reputation of the Reserve Bank of Malawi especially as no facts or evidence or reasons backing up that assertion or suspicion of tampering with bids have been given or discussed by the Review Committee.*
- 4.9 *The remedies granted demonstrate that the Review Committee did not consider, when it should have, the impact of the remedies on the Claimant's mission as a central bank.*

Balance of convenience

- 4.10 *On the facts of this case, the risk of carrying out an injustice if it turns out that the decision to grant a stay was wrong, is lower if a stay is granted to the Claimant. On the other hand, rejection of the application for stay and proceeding with execution of the decision means –*
- (a) *retendering the bids on the basis that the Claimant most likely than not, removed crucial bid documents in order to fail a bidder.*
- (b) *allowing a decision of a tribunal which was conflicted, and therefore could not have been impartial in its decision making, to prevail before the High Court has an opportunity to review whether indeed the tribunal was conflicted when it made the said decision. **On this basis alone, stay ought to be granted.***

Overriding consideration: justice and fairness

- 4.11 *In the end, the principles and guidelines for granting an order of stay state that even if an applicant satisfies the tests in paragraphs 4.1 to 4.9 above, the court would still be within its rights to refuse a stay if it otherwise felt that it would be utterly unjust to grant it.*
- 4.12 *In the present case, justice tilts in favour of granting the stay. It would therefore only be fair that the decision of the Review Committee be stayed pending the review of the decision herein.”*

To buttress his submission, Counsel Kumwenda cited the decisions by the Supreme Court of Appeal in **Mulli Brothers Ltd v. Malawi Savings Bank Limited, MSCA**

Civil Appeal No. 48 of 2014 and Mike Appel and Gatto v. Saulos Chilima, MSCA Civil Appeal No. 20 of 2013. Counsel Kumwenda submitted that these two decisions lay down key principles to guide the Court when considering an application for stay of execution. He highlighted the following principles:

- “3.3.1.1 Courts will grant a stay in a case when it is necessary to secure the rights of a party. The primary consideration in the court’s determination will be whether the applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay;*
- 3.3.1.2 An order for stay must be founded on the presence of three tests (similar to the test for interlocutory injunction), viz: a serious issue to be tried; irreparable harm; and a balance of convenience;*
- 3.3.1.3 Although the test for a stay may be equated to a test for an interlocutory injunction, there may be circumstances when the two may be said to be different. In those circumstances, the question, however, remains one of a balance of convenience;*
- 3.3.1.4 The court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong. Balance of convenience or balance of risk.*
- 3.3.1.5 When courts are exercising their discretion in applications of stay of execution of judgment, they should try to strike a balance between two considerations –*
- (i) firstly, the consideration that the court does not make a practice of depriving a successful litigant the fruits of his litigation; and*
 - (ii) secondly, the consideration that when a party has appealed, which is a right, the court should see to it that the appeal, if successful, is not rendered nugatory.”*

Counsel Kumwenda also drew the Court’s attention to other factors that in his view give weight to the Claimant’s application , namely, section 60 (3) of the Public Procurement and Disposal of Public Assets Act (which he said is the basis for the quasi-judicial functions of the Authority), regulation 196 of the Public Procurement Regulations, 2020 (which requires members of an ad hoc review committee to declare any interest in any matter that they are required to hear) and “Regulation 8 of the Sixth Schedule to the Procurement Regulations”.

Counsel Kumwenda added that when a tribunal is exercising its quasi-judicial functions, it has to follow the following principles:

- “3.8.1 it must make sure that hearings are made in accordance with the principles of natural justice. It must also make sure it correctly applies and interprets its law. [My Emphasis]*

- 3.8.2 *it must make sure that hearings are conducted in a manner that achieves openness, fairness and impartiality. According to O. Hood Philips, Constitutional and Administrative Law, at page 644:*

“(t)he process of hearing complaints before tribunals is supposed to be one that is subject to special procedures as outlined [in the law]. (T)he general characteristics that should mark these special procedures are “openness, fairness and impartiality.”

- 3.8.3 *a tribunal has a duty to furnish reasons for its decision. Section 43 of the Constitution.*

- 3.8.4 *The above principles on the duties of a tribunal, see generally the discussion by the High Court in Dr. Saulos Klaus Chilima and Dr. Lazarus McCarthy Chakwera - v- Professor Arthur Peter Mutharika and Electoral Commission, Constitutional Reference Number 1 of 2019 at pages 299 – 300.*

- 3.9 *Regulation 8 of the Sixth Schedule to the Procurement Regulations on remedies provides as follows –*

“In determining the appropriate remedies pursuant to section 60 (12) of the Act, the ad hoc Review Committee shall consider the all circumstances surrounding the procurement or disposal or proposed procurement, including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement of disposal, and the impact of the remedies on the procuring and disposing entity’s mission.”

The 1st Interested Party holds the view that the Claimant has failed to make out a cogent case meriting the granting of a stay. In the interest of parity of treatment, the relevant paragraphs of the skeleton arguments by the 1st Interested Party will also be set out in full:

- “7. *The law on stay applications is pretty much settled. It was recently restated by the Supreme Court of Appeal in Mike Appel and Gatto Ltd v Saulos K Chilima MSCA Civil Appeal Case No. 20 of 2013. In this decision, the court considered the relevant principles as had been religiously applied by Malawian courts following the English authority of Anot Lyle (1886) 11 PD 114 that courts should not make a practice of depriving a litigant of the fruits of his litigation. On the basis of this authority, courts had then required of the party applying for a stay to establish special circumstances meriting the grant of a stay. Per the decisions, one of the widely accepted grounds establishing special circumstance was the possibility of the appeal being rendered nugatory in the event of the appellant’s success. Where the case involved an award of damages, evidence that the receiving party would not be in a position to pay them back to the paying party in the event of the latter’s success on appeal was also accepted as a special circumstance meriting the stay of the decision appealed from. See The State v The Speaker of the National Assembly, Ex. Parte John Tembo (Civil Appeal No. 27 of 2010), The Minister of*

Finance and the Secretary to the Treasury ex parte Hon. Bazuka Mhango MP and others (MSCA Appeal Case No. 17 of 2009) and In the matter of Citizen Insurance Company Ltd and in the matter of the Registrar of Financial Services Act Ex Parte the Registrar of Financial Institutions, (MSCA Civil Appeal No. 06/2012).

8. *However, the Supreme Court approved the statement of the law set out in **Hammond Suddards Solicitors v. Agrichem International Holdings Ltd, [2001] EWCA Civ 2065, December 18, 2001, unrep. (referred to at para. 52.7.2 in the White Book).***
9. *In the **Hammond Suddards** case, pending the hearing of the substantive appeal by the Court, two judges sat to deal with (1) an application by the appellant for a stay of orders made by the judge for the payment of the judgment debt and costs, and (2) a cross-application by the respondents for an order for security for their costs of the appeal. In granting permission to appeal, a single lord justice refused a stay in relation to the order for costs. Before the Court, the appellant company renewed their application for a stay of the costs orders on the basis that, because it was in an extremely poor financial position, enforcement proceedings by the respondents could result in the appellant being unable to pursue its appeal.*
10. *The Court (Clarke L.J. and Wall J.) referred to r.52.7 and said as follows:-(para. 22) ““By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other and, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?” [Emphasis supplied.]*
11. *It is recognized that the duty is on the applicant to demonstrate that justice favours the granting of a stay. See **Mathanga v FDH Bank Ltd Civil Appeal No. 7 of 2 017 (u n unreported), See also Ex Parte HRDC et al, Judicial Review Case No. 33 of 2020, [R Ruling of 22nd March 2021.]***
12. *In this case, one struggles to identify any compelling reason why a stay should be granted. The one reason that keeps popping up in the arguments and evidence of the Claimant is that they have suffered reputational damage because of the finding of the Committee that someone could have removed a document [manufacturer’s authorization from Dell] from the Defendant’s bid document. It alleges, therefore, that if the bids are re-tendered, this ‘stain’ on its reputation will persist. However sympathetic one might be to the Claimant’s ‘plight’, it is difficult to imagine how a stay order would assuage the Claimant’s supposed reputational injury. The*

Committee made a finding that on account of the way in which the bid document of the Defendant was bound, it would have been easy for someone to remove a page from the document. A finding cannot be stayed. Consistent with the presumption of validity of official acts (omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium), the findings of the Committee will stand unless set aside by this Court. See Gibbins v Skinner [1951] 2 K.B. 379, [1951] 1 All E.R. 1049, [1951] 1 T.L.R. 1159, (1951) 115 J.P. 360, 49 L.G.R. 713; Campbell v Wallsend Shipway and Engineering Co Ltd [1977] Crim LR 351, DC; Dillon v R [1982] AC 484, [1982] 2 WLR 538, [1982] 1 All ER 1017, 74 Cr App R 274, [1982] Crim LR 438, PC; Gage v Jones [1983] RTR 508, DC; Kynaston v Director of Public Prosecutions, 87 Cr App R 200, DC.

13. *A stay order will not, therefore, heal any supposed injury to the reputation of the Claimant. Since it was sought primarily for this purpose, the application should promptly fail. Indeed, it is worth observing that the Claimant in its arguments alleges that the remedial measures of the Committee will impair the ‘mission of the Claimant as a central bank’. However, not a shred of evidence has been led to demonstrate the cogency of this belief. The Claimant is not special. It is a public body that is bound, like everyone else in this jurisdiction, to follow the law. It breaches the law at its own peril. Where people who have been affected by its wanton vandalism of the law avail themselves of statutory remedies, the Claimant cannot be heard to lay claim to some obscure special status which shields its actions from the harsh light of scrutiny. The Constitution has not created any islands to which public functionaries can retreat and seek refuge when accountability is demanded. Before the law, all are equal and must dutifully account for how they exercise powers granted to them under the law.”*

Having considered the evidence before the Court as gathered from the sworn statements and the submissions by both sides, it is clear that the Claimant is questioning the correctness, legality and propriety of the Defendant’s decision faulting the Claimant’s procurement process regarding two ICT projects. I am satisfied that the Claimant has raised an arguable case on the questions that it has.

Where such a situation obtains, the balance of justice tilts in favour of granting an order of stay unless there are sufficient reasons for not doing so: See **Attorney General v. Sunrise Pharmaceuticals and another [2013] MLR 1** wherein the Supreme Court of Appeal stated, at page 3, that:

“where legality, regularity and excess of a judgment are in issue they constitute sufficient reasons for granting a stay: National Bank of Malawi v Aziz Mahomed Issa and another, and Ismael Sabadia and Lennie Nkhonjera v Elizabeth Moto (supra).

Despite the spirited submissions by Counsel Soko, I am not persuaded that a case good enough has been advanced to warrant departure by this Court from the legal position set out by the Supreme Court of Appeal in the case of **Attorney General v.**

Sunrise Pharmaceuticals and another, supra. In short, this Court is bound by that decision in the circumstances of this case.

In light of the foregoing and by reason thereof, I am inclined to exercise my discretion in favour of granting the stay of execution of the decision by the Defendant dated 9th February, 2021. The order of stay is, accordingly, granted. The stay order will be valid until the main case is determined or until a further order of the Court. Costs will be in the cause.

On a related note, the hearing of the substantive judicial review case is scheduled for 18th day of June 2021 at 9 o'clock in the forenoon.

Pronounced in Court this 8th day of June 2021 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE