



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CASE NUMBER 54 OF 2021**

**BETWEEN:**

**THE STATE**

**On the application of**

**THE MALAWI LAW SOCIETY**

**CLAIMANT**

**THE CHAIRPERSON OF THE LEGAL  
AFFAIRS COMMITTEE OF THE NATIONAL  
ASSEMBLY**

**1<sup>st</sup> DEFENDANT**

**THE LEGAL AFFAIRS COMMITTEE OF  
THE NATIONAL ASSEMBLY**

**2<sup>nd</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Mpaka and Ngunde, Counsel for the Claimant  
Chingeni, Chijere and Likomwa, Counsel for the Defendants  
Mankhambera, Court clerk

**ORDER**

1. This matter concerns the heated topical issue of proposed Legal Aid Bureau's legal assistants'/paralegals' right of audience before the lower tiers of the courts and access to justice by the vulnerable people accused of minor offences in those courts through such audience.

2. This is an order of this Court on the claimants' application, under Order 19 rule 20 (3) Courts (High Court) (Civil Procedure) Rules with notice to the defendants, for an order for permission to apply for judicial review of the putative defendants' decision or proceedings of the defendants contained or reflected in the Notice of the Legal Affairs Committee Meeting dated 26<sup>th</sup> August, 2021 and in the Letter of Invitation to the claimant dated 17<sup>th</sup> August, 2021 to institute and conduct public hearings across the country to solicit public views on a proposal by the Legal Aid Bureau to the defendant to amend section 14 of the Legal Aid Bureau Act with 'the ultimate goal...that the 2<sup>nd</sup> defendant comes up with a report which will contain recommendations [to the Ministry of Justice and Constitutional Affairs] which will assist vulnerable people with minor offences who lack legal representation who have stayed on remand for long periods of time access justice which will decongest the country's prisons'.
3. Both the claimant and the defendants were heard on the application as the rules of procedure allow.
4. The claimant contends that the decision by the putative defendants to solicit public views herein is null and void because it was unreasonable, procedurally unfair to the public and protection of the vulnerable public and was made without or in excess of the legal mandate of the Legal Affairs Committee contrary to the Constitution of Malawi and Standing Orders of the Parliament.
5. If granted is permission, the claimant will seek the following reliefs:
  - 1) A declaration that the defendants are bound to strictly follow the dictates as read together of the Constitution, the Law Commission Act, the Courts Act, the Legal Aid Act, the Legal Education and Legal Practitioners Act, the National Assembly (Powers and Privileges) Act and the Standing Orders of Parliament in seeking to exercise any jurisdiction on matters concerning the administration of law in Malawi.
  - 2) A declaration that on the true construction of sections 7, 8, 132 and 135 of the Constitution and section 6,7, and 8 of the Law Commission Act, the defendants have no jurisdiction or authority or power to initiate policies and legislation or to conduct review

or to receive submission on or to make recommendations relating to amendment of laws in Malawi.

- 3) A declaration that on the true construction of sections 7, 8, 132 and 135 of the Constitution as read with section 4 (j) of the Legal Aid Act and sections 6,7 and 8 of the Law Commission Act, the defendants have no jurisdiction, authority or power to initiate policies and legislation or to conduct review or to conduct public hearings or to receive submissions with a view to making any recommendations to the Ministry of Justice and Constitutional Affairs relating to amendment of any law generally or to amendment of the Legal Aid Act.
- 4) A declaration that on the true construction of section 4 (1) (j) of the Legal Aid Act and Standing Order 159 of Parliament Standing Orders as read with section 2 and 26 of the National Assembly (Powers and Privileges) Act, the defendants have no power or authority or jurisdiction to exercise oversight role over the Legal Aid Bureau or power to receive or investigate or make report on referrals from Legal Aid Bureau concerning the administration of the Legal Aid Act and that such powers vest in the Minister of Justice and Constitutional Affairs to whom the Bureau is obliged to prepare reports and make recommendations on such matters relating to the functions of the Bureau as the Bureau considers appropriate or as the Minister may reasonably request.
- 5) A declaration that on a true construction of sections 41(1), 42 (1)(c), 42 (2) (f)(v) and 20 of the Constitution as read with sections 5, 14, 16, 17, sections 29-34 and 38 of the Legal Aid Act and sections 2 and 31 of the Legal Education and Legal Practitioners Act and section 4 of the Courts Act the provision of legal aid to vulnerable people charged with any offences is required to be so provided by a legal practitioner by reason of which the proposed amendment to section 14 of the Legal Aid Act based on which the defendants made the decision complained of herein is unlawful, unconstitutional and discriminatory as it seeks to abrogate the entrenched right of the

- vulnerable people of Malawi to due recognition before the law to be represented by a legal practitioner at the expense of the State.
- 6) A declaration that on the true construction of sections 41(1), 42 (1)(c), 42 (2) (f)(v) and 20 of the Constitution as read with sections 2 and 31 of the Legal Education and Legal Practitioners Act and section 4 of the Courts Act as against section 41 (2) and 45 of the Constitution, the provision of legal aid by a legal practitioner at the expense of the State to vulnerable people of Malawi is non-derogable as contrasted with the limited right of access to justice set out in section 41 (1) of the Constitution by reason of which the proposed amendment of section 14 of the Legal Aid Act based on which the defendants made the decision complained of herein is unlawful, unconstitutional and discriminatory as it seeks to abrogate the entrenched right of the vulnerable people of Malawi to due recognition before the law and to be represented by a legal practitioner at the expense of the State.
  - 7) A declaration that on the true construction of sections 41(1), 42 (1)(c), 42 (2) (f)(v) and 20 of the Constitution as read with sections 2 and 31 of the Legal Education and Legal Practitioners Act and section 4 of the Courts Act as against section 41 (2) and 45 of the Constitution, if the right of the vulnerable to legal representation by a legal practitioner is limitable in the interests of justice, the proposal by the Legal Aid Bureau as advanced by the defendants in the decision or proceeding under review requires further refinement and definition of the scope, extent and strict regulation of the representation by Legal Assistants in order not to take away the essential content of the right conferred by the Constitution.
  - 8) A declaration that in the premises of the declarations under 1-7 hereof, the decision of the defendants to receive a submission by the Legal Aid Bureau and conduct any proceedings including the public hearings of 26<sup>th</sup> August to 11<sup>th</sup> September, 2021 or to develop any recommendations thereon with a view to cause an amendment of section 14 of the Legal Aid Act to allow Legal

Assistants in all subordinate courts in Malawi is made without jurisdiction and is *ultra vires* the respondent, null and void ab initio.

- 9) A declaration that in the circumstances, the defendants' actions/decision or proceedings including public hearings of 26<sup>th</sup> August, 2021 to 11<sup>th</sup> September, 2021 and any subsequent process based thereon are unconstitutional, unlawful, unreasonable in the *Wednesbury* sense, *ultra vires*, procedurally unfair and unjustifiable.
  - 10) An order akin to certiorari quashing the decision/actions of the defendants.
  - 11) A declaration that in the premises of the declarations and orders hereto above, the defendants are guilty of misfeasance and/or abuse of office.
  - 12) An account to the satisfaction of the Court of the public funds spent by the defendants in respect of all the proceedings conducted by the defendants herein and for a direction that the defendants personally refund the said funds to the public purse.
  - 13) An order for costs and that to vindicate the Constitution and encourage compliance with the Constitution that such costs be borne personally by the defendants.
6. This Court is aware that 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.
7. This Court is further aware that 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*.

8. This Court must therefore consider whether the facts as presented by the claimants show that there is an arguable case for further investigation at a full hearing. 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.
9. This Court observes that the claimant correctly submitted that in terms of section 56 (7) (c) of the Constitution, the defendants, as a Committee of the National Assembly, shall perform such functions as are conferred on them by the Constitution, by an Act of Parliament or resolution of Parliament or by the Standing Orders of Parliament.
10. In terms of Standing Order 159 of the Standing Orders of Parliament, a Legal Affairs Committee, the defendants herein, shall be appointed to, *inter alia*, perform the following functions:
  - a) Investigate and make report on such matters concerning the administration of the law as the Assembly may refer to the Committee;
  - b) Consider reports submitted to the National Assembly by constitutional bodies and report to the Assembly;
  - c) Exercise oversight over the office of the Director of Public Prosecutions, the Anti-Corruption Bureau, the Office of the Ombudsman, the Law Commission, the Human Rights Commission, the Inspectorate of Prisons, the Electoral Commission, the Office of the Administrator General, the Office of Registrar General, the Financial Intelligence Authority and the Judiciary.
  - d) ....

11. The claimant contended that according to Standing Order 159 of the Standing Orders of Parliament, the defendants' functions do not include the soliciting of views by public hearings that is sought to be impugned by the judicial review sought herein.
12. Contrary to the immediately foregoing contention by the claimant, this Court agrees with the argument by the defendants that, in fact, they have the function to look into the matter brought to their attention by the Legal Aid Bureau pertaining to congestion in prisons and the proposal to consider amending the Legal Aid Act to curb such congestion by possibly allowing audience to Legal Assistants within the Legal Aid Bureau, popularly known as paralegals, in relevant cases before subordinate courts given the inadequate numbers of legal practitioners within the Legal Aid Bureau.
13. Contrary to the contention by the claimant, a reading of Standing Order 159 of the Standing Orders of Parliament shows that it is not exhaustive in terms of the functions that the defendants shall perform. The functions specifically listed in that Standing Order are *inter alia*, or among others, that the defendants shall perform. This entails that, as contended by the defendants, they have room to determine the remit of their functions, or competent matters, as they are allowed by Standing Order 150 (2) of the Standing Orders of Parliament.
14. Standing Order 150 (2) of the Standing Orders of Parliament provides that a Committee may examine such matters within its remit (referred to as 'competent matters') as it may determine appropriate or as may be referred to it by the National Assembly and shall report to the National Assembly on any such matter.
15. Given that the issue of congestion in prisons is closely connected to the defendants' mandate to do with the function of oversight over the Inspectorate of Prisons, the Judiciary and others that deal with congestion in prisons, this Court is of the view that the defendants cannot be said to have acted in excess of their mandate under the Standing Order 159 of the Standing Orders of Parliament, by which the Constitution allows the defendants to draw their mandate.
16. Crucially, and as correctly submitted by the defendants herein and contrary to the claims by the claimants, there is no evidence that the defendants' final aim is to report to the Ministry of Justice. During oral argument, the claimant was

at serious pains to point to a document that proves that the defendants intend to report to the Ministry of Justice upon finalization of public consultation on the issues at hand. The claimant was unable to prove that indeed the defendants plan to report to the Ministry of Justice on their findings from public hearings, although the claimants vehemently faulted that alleged reporting. In fact, the claimant intimated that it would later seek disclosure of some record of a public meeting at Blantyre to prove that the defendants intend to report to the Ministry of Justice and Constitutional Affairs.

17. The Standing Orders show that the defendants duty is to report to the National Assembly which then will consider the report of the defendants and the recommendations therein. The report may be accepted or be rejected by the National Assembly as provided by the Standing Orders of Parliament. The defendants also indicated that upon their consultation they intend to report to the National Assembly as per the Standing Orders.
18. It is only when the report is made to the National Assembly that the next steps will be realized in the matter at hand. All that is going on at the moment is that the defendants are, as per their mandate, doing public hearings on a matter they have determined correctly under the relevant Standing Order to be within their remit. The process of public hearings is a consultative process. That is allowed under Standing Order 170 (1) of the Standing Orders of Parliament.
19. This Court observed that the claimant itself, through its representations at a round table meeting with the defendants and other stakeholders that was held in April, 2021 actually indicated to the defendants that the matter in contention herein is one that calls for thorough and extensive consultation. It is therefore surprising, and may tend to show bad faith on the claimant's part as observed by the defendants, that now the claimant having seen that the defendants are seeking wider views now articulates that the consultation process that it championed is unlawful. In fact, it is not.
20. The concerns of the claimant that the public hearings will yield proposals that, if realized, may run counter to the constitutional and legal status quo on legal representation of people in criminal before the courts by legal assistants/paralegals are not a justification for granting the permission for judicial review sought in this matter. The proposals are not yet crystalized. We actually do not know what the terms of the final report and its proposals will be. We also do not know whether the National Assembly will accept the



proposals in the defendants' report. It is therefore premature for the claimant to start expressing serious misgivings against the public hearings on account of a report that is not even presented and acted upon by the National Assembly and to use that as the basis for seeking permission to have a judicial review.

21. The scenario we have here reminds this Court of the colonial days status quo in which the law severely limited black people's political participation in this country. There was also an era when the legal status quo was such that women were not allowed to hold property in what are now very civilized jurisdictions. It is consultation and deliberation that led to change of all those that are, with hindsight, now seen as oppressive and backward laws. It is therefore not prudent to stifle consultation and open dialogue on issues of the law in society. It may indeed be that according to the current constitutional and legal set up giving rights of audience to legal assistants/paralegals as is being canvassed by some is really unconstitutional or unlawful as asserted by the claimant. However, open dialogue and consultation on the matter may result in what the claimant itself alluded to regarding the definition of scope of the rights of audience and strict regulation that may make the role of legal assistants/paralegals constitutionally and legally tenable. The Constitutional provisions that the claimant alluded to in support of its contention against the legal assistants/paralegals were themselves a product of national dialogue.
22. This Court is therefore persuaded that, whilst it is now settled that this Court has power to review any law or decision of a public body for conformity with the Constitution on a judicial review application, see *State v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union (Judicial Review)* (Misc. Civil Cause No.1 of 2015) [2015] MWHC 494 (27 July 2015), the present application for permission to apply for judicial review does not disclose matters fit further investigation at a hearing. The application is premature. The claimant if minded, after the defendants have presented their report to the National Assembly, may at an appropriate time and for appropriate reasons take up its function of public interest litigation in this matter if at all steps will have been taken that are considered unlawful or unconstitutional. But to stop public hearings herein as sought by the claimant's intended application for judicial review is clearly premature and unjustifiable in the circumstances.

23. In the foregoing premises, the claimants' application for permission to apply for judicial review is accordingly declined. Costs are for the defendants and shall be assessed by the Registrar if not agreed within 14 days.

Made in chambers at Blantyre this 7<sup>th</sup> October 2021.

M.A. Tembo  
**JUDGE**