

21-01-22



Republic of Malawi
IN THE HIGHT COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW NO. 3 OF 2022

BETWEEN:

THE STATE

**(ON THE APPLICATION OF HON. EDWARD
SAWELENGELA AND 8 OTHERS)**

CLAIMANT

AND

**THE PRINCIPAL SECRETARY,
MINISTRY OF FOREIGN AFFAIRS**

DEFENDANT

Coram: Honourable Justice Simeon Mdeza

Khonyongwa, of Counsel, for the Claimant

Honourable Attorney General, Chakaka Nyirenda, Chaura, of
Counsel, for the Defendant

Mwangosi (Ms), Court Clerk

RULING

SERVICE ACKNOWLEDGMENT

L. Chakaka Nyirenda

ON BEHALF OF THE ATTORNEY GENERAL

ON THE 21st DAY OF Jan 2022 AT 3:00 HOURS

SIGNED

On the 7th day of January 2022, the claimant filed an application for permission to commence judicial review proceedings. The application was accompanied by an application for an order that all the decisions of the Respondent contained in his letter to the Applicants dated 15th December 2021 be stayed pending the hearing and determination of the herein matter. Upon considering the without notice application, under *Order 19 r. 20(3) of the Courts (High Court) (Civil Procedure Rules)* hereinafter for purposes of convenience referred to as ‘the Civil Procedure Rules’ or ‘the CPR, I directed that both applications be heard in the presence of both parties on 14th January 2022. On that day, after the inter-parties hearing, I gave an oral ruling granting the claimant an interim order of stay of the defendant’s decision pending the determination of the application for permission to commence judicial review proceedings. This is the Court’s ruling on the two applications.

APPLICATION FOR PERMISSION TO COMMENCE JUDICIAL REVIEW

The Claimants were sent on diplomatic duty by the Malawi Government to Washington DC and New York. The Respondent is the Principal Secretary for Foreign Affairs, and is tasked with the duty, *inter alia*, to oversee the affairs of Malawi’s Foreign Missions including those in Washington DC and in New York.

Beginning from 2020, the Malawi Government, through the Respondent, began the process of recalling the Claimants as their contracts began to come to an end. The Claimants argue that according to the terms of their contract, there is an obligation on the part of the Malawi Government to bear repatriation costs for recalled diplomats like the Claimants. Customarily, the logistics of moving the diplomats from their duty stations back to Malawi, involves proper co-ordination with shippers of the property of the diplomats so that their travel should properly coincide with the movement of their property. To that end, on recall, the personal effects of recalled diplomats is directly loaded in shipping containers and taken to booked vessels in readiness for shipment to Malawi.

Contrary to this established custom the Defendant, on different occasions, requested the Claimants to release their personal effects to a shipping company, Universal Freight Solutions, for storage in a warehouse as they arrange for the shipment of the same to Malawi. The Claimants are not comfortable with this arrangement. They fear that their personal effects may be destroyed or get lost.

The Claimants cited instances of similar occurrences in the case of people like Malawi’s former ambassador to Egypt Hon. Jafali Mussa and Ms. Jane Assani, a diplomat to New York, who lost all their property despite it being handed over to

shippers, because of improper handling. The said diplomats sued the Malawi Government for millions of Kwachas.

The Claimants and the Defendant do not seem to reach a compromise on this standoff. The Defendant wrote the Claimants stating to them in no uncertain terms that they were supposed to leave their duty stations by 31st December 2021, failing which they would not be provided any financial assistance at all by the Malawi Government including money for rent and Foreign Service Allowances. The Defendant has also indicated that if the Claimants do not leave by that date, then the Malawi Government would not be responsible for the payments for the renewal of their air tickets as well.

On the basis of these facts the Claimants prays for the court to grant them permission to commence a judicial review process of the Defendant's decision.

The Defendant contends that the Claimant's application is misconceived, frivolous, vexatious and a waste of court's time. He asserts that the Defendant's decision is not amenable or fit for judicial review as it is a pure labour matter for which the Claimants have alternative remedy before the Industrial Relations Court. The Defendant further asserts that the Claimants' application does not reveal a serious issue for further inquiry in a judicial review proceeding. According to the Defendant it is clear from paragraph 87 of the sworn statement in support of the Claimant's application that the Claimants' main argument is the safe shipping of their property from the United States to Malawi in light of the decision of the Defendant to implement their recall. According to the Defendant this is a matter where damages would be an adequate remedy as the property can be easily valued and that the Defendant would easily pay the said damages. It has further been argued that, the Claimants have not shown the court that they have the capacity to indemnify the Defendant should the main judicial review proceeding fail.

THE LAW

Order 19 rule 20 rule 1 of the CPR provides as follows:

'Judicial review shall cover the review of--

(a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or

(b) a decision, action or failure to act in relation to the exercise of a public function in order to determine--

- (i) its lawfulness;*
- (ii) its procedural fairness;*

- (iii) *its justification of the reasons provided, if any;*
or
(iv) *bad faith, if any,*

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.'

The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. See *Felix Mtwana Mchawi v The Minister of Education Science and Technology Miscellaneous Civil Cause No. 82 of 1997* (Unreported)

In this application the claimants, if granted permission to commence Judicial Review, would like the court to make the following declarations:

- a. A declaration that the impugned decisions of the Respondent are and unreasonable in the Wednesbury sense;
- b. A declaration that the said decisions were made in bad faith;
- c. A declaration that the said decisions are unconstitutional;
- d. An order quashing the Respondent's said decisions.

The Claimants, in their application have argued that the Respondent is shamelessly acting in utter abuse of power without listening to the plea of the Applicants, and therefore in blatant disregard for their right to property and to have a livelihood once they get back to Malawi without their property. This is notwithstanding the fact that their contracts and the MPSR entitles them to 4 days in a hotel in the United States after sending their property to a shipper, and to seven days in a hotel in Malawi as they await the arrival of their property so that they can then find a house and take their property thereto in order to have a bearable and dignified livelihood.

It has further been argued that the said decisions were also made in utter bad faith in that the Respondent made them in clear abuse of power, not willing to lend an ear, or to seek a work around, the genuine concerns of the Applicants as regard their property and their livelihood back home. The Respondent made repeated threats of leaving the Applicants to their own devices should they not be

repatriated, when the duty to repatriate them was that of the Malawi Government through the Respondent, and when all the unexplained failures to repatriate them were all the fault of the Malawi Government through the Respondent's failure to properly execute the recall process and through his failure to make proper arrangements through traditional processes using the traditional and efficient shipper.

Furthermore, it has been argued that the impugned decisions of the Respondent are a violation of the Applicants legitimate expectations in that the same goes against the established tradition and procedures for shipping the property of recalled diplomats from the United States, whereby a schedule of vessel booking is submitted to United States State Department, and the owner of the property is required to collect a document of title in person upon production of his identity documents. The decision of the Respondent will mean that the diplomats will leave the United States without collecting their documents of title. The procedure of arranging to leave the Applicants property in warehouses is novel, and departs from the established practice of their property only being collected from their houses straight to the shippers only where a container had been confirmed for shipping on a precise date, and a tracking number was provided to the owner of the property to track the movement of his property until it got to Malawi.

According to the claimants the established shipping procedure has always been made in such a way that the property of recalled diplomats is shipped in time to coincide properly with the leaving of the diplomats, so that when they arrive back in Malawi, they arrive together with their property, in order that they should not have to face the hardship of whole families arriving in Malawi and staying in destitution for indeterminate periods without their property, causing them extreme hardship and embarrassment. In that regard, all diplomats' contracts provide for a four-day stay at a hotel in their foreign duty station so that they can move to hotels when their property has been collected from their homes by the shippers, and a seven-day stay in a hotel on arrival in Malawi, so that they can get their property and have ample time to sort out their accommodation in Malawi only after receiving their property.

The said decisions are also unconstitutional in that they threaten the Applicants rights to property and to pursue a livelihood in Malawi by exposing the property to risk of loss through not making proper arrangements for its shipping.

Further, the said decisions are also unconstitutional in that they threaten to violate the Applicants right to pursue a livelihood after their return to Malawi in that the decisions will definitely have the effect of keeping the Applicants in Malawi without their property, and therefore without a livelihood and in great hardship,

distress and embarrassment, as they and their families await the uncertain and indefinite arrival of their property.

It has been argued on behalf of the Defendants that the Claimants' application is misconceived, frivolous, vexatious and a waste of court's time. The Defendant's decision is not amenable or fit for judicial review as it is a pure labour matter for which the Claimants have alternative remedy before the Industrial Relations Court. It has been further argued that the present matter does not reveal a serious issue for further inquiry in a judicial review proceedings.

The defendant has sought to demonstrate that the Claimants' main argument is the safe shipping of their property from the United States to Malawi in light of the decision of the Defendant to implement their recall. According to the Defendant, this is a matter where damages would be an adequate remedy as the property can be easily valued and that the Defendant would easily pay the said damages. Further, the Claimants have not shown the court that they have the capacity to indemnify the Defendant should the main judicial review proceeding fail.

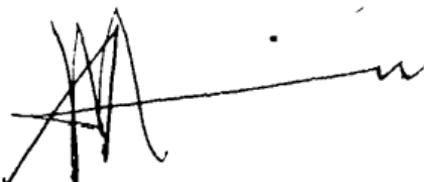
The court had the occasion to carefully study and consider all the documents on the record. The court also had the occasion to listen to and consider the arguments advanced by counsel for both parties. Having done so, the court is satisfied that the claimants have not established adequate legal grounds for the grant of the relief sought. In the court's considered view there seems to no serious issue for further inquiry in a judicial review proceeding. The only issue that is in contention being the safety of the Claimants' personal effects which, if a proper record is maintained, may adequately be remedied by way of damages in case of partial or even total loss. Accordingly, it is the considered view of this court that an order granting the claimants permission to commence Judicial Review proceedings not tenable in the present cause.

APPLICATION FOR STAY

The Claimants made an application for an order of stay of the implementation of the Defendant's decision contained in his letter of 15th December 2021. The stay was to subsist until the hearing and determination of the Judicial Review proceeding. Granting of the order of stay was conditional upon the court allowing the Claimants to commence judicial review. The court has refused to grant the claimant permission to commence judicial review. Consequently, the prayer for stay of the implementation of the Defendants' decision must fail.

In view of the forgoing, I proceed to dismiss the claimant's application for permission to commence judicial review proceedings and the application for stay. Accordingly, the interim order staying implementation of the implementation of the Defendant's decision contained in his letter of 15th December 2021, that I made on 14th January 2021 is discharged.

Pronounced in Chambers this 20th day of January 2022 at Lilongwe in the Republic of Malawi.

A handwritten signature in black ink, appearing to be 'Simeon Mdeza', written over a horizontal line.

Simeon Mdeza
JUDGE