

M.B.S. Panjo.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 958 OF 1994



BETWEEN:

THE NATIONAL CONSULTATIVE COUNCIL.....PLAINTIFFS

- and -

THE ATTORNEY GENERAL.....DEFENDANTS

CORAM: TAMBALA, J.

Msisha, of Counsel, for the Plaintiffs

Chimasula Phiri, of Counsel, for the Defendants

Phiri (Miss), Official Interpreter

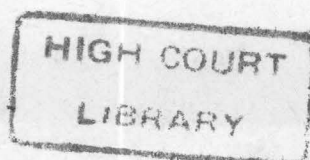
R U L I N G

This is the defendants' application to set aside the ruling which I made on 14th May 1994. The ruling with which the defendants are dissatisfied declared unlawful and unconstitutional the conduct of the Police in erecting road barriers at various places across the main public roads of this country. It is supported by an affidavit sworn by Counsel for the defendants. The plaintiffs contest it.

Counsel for the defendants' affidavit argues that the order which I made contravenes section 22 of the Police Act. Section 22-(1) of the Police Act provides:

"Notwithstanding any other law in force in Malawi, any superior police officer or any inspector stationed in any area, or any administrative officer of any area where there is no superior police officer or inspector, may, if he considers it necessary so to do for the maintenance and preservation of law and order or for the prevention or detection of crime, erect or place barriers in or across any road or street or in any public place, in such manner as he may think fit."

It was argued by Mr Chimasula Phiri that section 22-(1) limits the application of the Bill of Rights contained in the Constitution. He contended that the placing of road barriers across public highways by the police is lawful in the light of section 22(1) of the Police Act. Mr Msisha argued that the Constitution is supreme law and a provision of an ordinary Act of Parliament cannot override its provision. He also pointed out that the Police Act was enacted in 1945, while the Bill of Rights was included in our Constitution in 1993. Then a new Constitution came into force on 18th May 1994. He argued that the provisions of the Constitution repealed section 22-(1) of the Police Act to the extent that it was inconsistent with them.



It can also be argued that section 22-(1) authorises the erection of a road barrier only for a specific purpose. If, for instance, police receive information that a crime has been committed and that the culprit may be arrested if a road block is established, the police could erect such road block. The police could stop and search a limited number of vehicles and persons consistent with the information received. Section 22-(1) would, therefore, envisage the establishment of a road barrier for a limited purpose and for a short period.

The scope of section 22-(1) and its effect on the Bill of Rights contained in the new Constitution are matters which are likely to be canvassed and resolved during the trial of the action. It is not the duty of this Court to consider and pass judgment on these issues. What is clear is that there are here serious issues to be tried.

In paragraph four of the affidavit, the defendants contend that the *ex-parte* order compromised preservation of law and order and the prevention and detection of crime. Paragraph five states:

"That the defendant contends that matters of national security should be upheld at all times."

I would state that the preservation of law and order, the prevention and detection of crime and national security are matters of great concern to the Courts of this country. The Courts and the Police are ultimately entrusted with the duty to preserve law and order and to ensure that people live in an environment in which peace and security prevail. However, matters of national security, preservation of law and order, and the prevention and detection of crime should not overshadow the importance of human rights. Authoritarian regimes all over the world, and for time immemorial, have oppressed their subjects and violated the rights of the individual under the pretext of maintenance of law and order, prevention of crime and maintenance of national security.

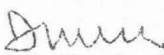
There is need to strike a balance between the needs of the society as a whole and those of the individual. If the needs of the society in terms of peace, law and order, and national security, are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individual. That is the only way they can contribute to the development of a free state. Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their constitution.

Paragraph seven of the affidavit argues that the **ex-parte** order offended against the rule of natural justice, which states that no person may be condemned without being heard. There is clearly no merit in this. Order 29 of the Rules of the Supreme Court provides for the making of **ex-parte** orders. If Counsel is unhappy with such orders, the only option left to him is to ask Parliament to pass law which would make O.29 inapplicable to this country. Surprisingly, Counsel initially sought an **ex-parte** order staying the operation of the order made on 14th May. This demonstrates that Counsel for the defendants finds O.29 helpful at times.

Paragraph nine contended that the **ex-parte** order caused panic and a sense of insecurity to all Malawians. I found no evidence to support this assertion.

Having considered very carefully the defendants' application, and after listening to the arguments of both Counsels, I found no compelling reason for reversing the order which I made on 14th May 1994. Perhaps I should only make it clear that that declaration shall remain in force till the action commenced by the plaintiffs is tried and concluded. The defendants' application is dismissed. The costs of these proceedings shall be in the cause.

MADE in Chambers this 23rd day of May 1994, at Blantyre.


D G Tambala
JUDGE

