04-01-94

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.152 OF 1993

BETWEEN:

LAWRENCE TAULO & OTHER .... PLAINTIFFS

- and -

THE ATTORNEY GENERAL ..... 1ST DEFENDANT

- and -

CIRCLE PLUMBING LIMITED ..... 2ND DEFENDANT

CORAM: MBALAME, J.

Mhango, Counsel for the Plaintiffs
Kamanga, Counsel for the 1st Defendant
Msaka, Counsel for the 2nd Defendant
Tsoka, Official Interpreter
Jere, Recording Officer

R U L I N G

This is a unique and rare case in our Courts. It is peculiar in the sense that the facts surrounding it and indeed the reliefs sought by the plaintiffs are very rarein the circumstances. Because of its nature the case has attracted a lot of comments and publicity in the media. For some people it arouse anxiety and expectations. I am mindful that I have read and heard various comments about the case both on the radio and in various newspapers although I have avoided discussing it with anybody. Be that as it may, I approach the case with an open mind and in coming to my conclusion I have taken into account all what the plaintiffs filed herein and indeed all the evidence which emerged orally by way of cross-examination on some of the affidavits. I am grateful to all three Counsel for their great industry in their research which I have found to be very helpful. I shall in the course of this ruling be referring to some of it. I will not therefore acknowledge each and every authority separately to the Counsel who cited it. Indeed some of the authorities have been cited by both sides. It has been a long, protracted and nerve breaking case. The case was filed with the Court on 23rd September, 1993 although the actual hearing commenced on 6th December. The going was turbulent in that it was riddled with one application after another. There were also several adjournments. The final Court's sitting was on 18th March, 1994 when it was agreed that Counsel would submit

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written submissions. It was further agreed that these were to be with the Court by 8th April, 1994 thus concluding the hearing as it were. The three parties to the case filed affidavits sworn by witnesses for both the plaintiffs and the defendants. There were answers to the affidavits and in some cases I allowed applications to have the witnesses cross-examined. Although I have thoroughly gone through the affidavits and heard evidence on them, I do not intend to deal with each and everyone of them seperately as I shall bear the contents thereof in my mind throughout this ruling. There are some aspects of the case on which I have already given my ruling in the course of the hearing. The final orders will stand and so will some of the interlocutory ones unless otherwise so ordered. The plaintiffs' initially prayed for an order as follows:

"(a) Declaration that the said disposal and sale of Wico was improperly conducted in an arbitrary manner.

(b) Declaration that the sale of Wico is unjustified and unreasonable.

(c) Declaration that the disposal of Wico to the second defendant was biased against the interests of Wico's employees and Malawi's national interest.

(d) That the first defendants' decision was ultra vires the powers of Wico's directors.

(e) That the first defendants' decision to sell Wico be set aside and rendered null and void and that the principle of natural justice was not observed.

(f) An injunction to restrain the first and second defendants from putting into effect the concluded agreement for sale.

(g) Any other relief the Court may deem just.."

There was then an amended originating notice of motion of 21st January, 1994 which among other things asked for:-

"(1) Declaration that the sale of Wico to the second defendant was improperly conducted and arbitrarily carried out and tainted with invalidity.

(2) Declaration that the sale of Wico is unjustified and unreasonable.

(3) Declaration that the disposal of Wico to the second defendant was (biased) against the plaintiffs and against public interest.

(4) An order to set aside the sale of Wico on the grounds that it breached the principles of natural justice.

(5) An order of prohibition to restrain the first defendant and second defendant from putting to effect the purported sale.

(6) Such other order or orders as the Court may deem just including alternatively;

(7) An order of Mandamus that the Minister of Finance do set up a Council of inquiry to investigate the sale of Wico to the second defendant."

Put in a nutshell, the plaintiffs are employees of the Wood Industries Corporation Limited hereinafter referred to as Wico. As may be seen from the name the Company is of limited liability having been incorporated on 23rd July, 1984, 10 years ago, with the principal object of acquiring and taking over as a going concern the operations, undertakings and business then being carried on by the Department of Forestry of the Malawi Government. The government was the sole shareholder in the enterprise. It is said by the plaintiffs that the Company took over assets to the tune of K3, 122,871.00 from the government at the time of its incorporation. It would appear that the sailing was not smooth from the word go. Like some of the Statutory Corporations, the Company made losses after losses as the years went by so that in 1985 the World Bank had to intervene with a restructuring loan amounting to K12,562.082.00. This did not assist. The Company continued to be a wasting asset to the government. The government therefore decided to do away with it and this decision was made known to Parliament. On 26th March, 1993 the Minister of Finance had this to say to Parliament concerning the Company:

"Mr. Speaker, Sir, efforts to restructure the Wood Industries Corporation (Wico) continue. In 1992 a tender offering the sale of Wico to the public was issued. This offer was not taken up as bidders wanted to acquire the entire Company. To facilitate this the capital restructuring of the Company was undertaken. The authorized share capital of Wico was raised from K4,000,000.00 to K8,000,000.00. As an added advantage Wico has turned and has made a profit of 0.6 million Kwacha. This position is likely to be maintained in 1993. It is expected that the Company would now be fairly attractive to potential investors.

Having decided to sell the Company the government put advertisements in the Daily Times Newspaper asking for offers from the public sector. The Company was finally sold to Circle Plumbing Limited as a going concern. Hence this application.

This is an application for judicial review. It is in my considered opinion pertinent at this point of the ruling to remember that the remedy of judicial review is concerned with reviewing not the merits of the decision of the government in selling the Company in question but the decision making process through which the government arrived at that decision. The purpose for proceedings like this one is to ensure that people like the plaintiffs in this case are given fair treatment by the authority to which they have been subjected. Indeed it is wrong to substitute the opinion of this Court for that of the authority constituted by law to decide the matters in question. This in my judgment was the line of thinking in the case of the Chief Constable for North Wales Police v. Evans (1982) 1 W.L.R. 1155. Therefore I am only entitled to quash the decision herein if the government acted without jurisdiction or exceeded in jurisdiction or failed to comply with the rules of natural justice, in a case where those rules are applicable or where there is an error of the law on the face of the record or if the decision is unreasonable. It has to be borne in mind, a thing which is important to note, that I am not entitled on judicial review to sit as an appeal Court, that is not the duty of this Court in such proceedings. This Court cannot even interfere in any way with the exercise of any power or discretion which has been conferred on the first defendant, to wit the government in this case, unless it has been exercised in a way that is not that authority's jurisdiction. I sit here to see to it that lawful authority is not abused by unfair treatment. As has been said time and again if this Court were to attempt itself the task entrusted in the first defendant by the law then this Court would under the guise of preventing abuse of power be guilty itself of usurping power. It has to be borne in mind that public authorities are set out to govern and administer and if every act and decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration would be brought to a stand-still. The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by the administrative actions. Finally, perhaps I should mention that the prayers sought by the plaintiffs are by nature are discretionary. They are in the discretion of the Court and I bear in mind that I have to use that discretion judicially.

Pausing here for a while, it appears to me that there is one vital question I must decide before we can proceed. It is a question of the parties. These proceedings being for judicial review is the second defendant, Circle Plumbing Limited, amenable to such proceedings in law? In other words, does that Company qualify as a public body? Is it by any law answerable to the public for its action for its day to day running of the Company let alone what it chooses to acquire or dispose of? According to Order 53/1-14/12 of the Rules of the Supreme Court, judicial review lies against an interior Court or tribunal and against any persons or bodies which perform public duties. In

my view judicial review is confined to public law and not matters of private or domestic nature - see the case of R. v B.B.C. Exp. Levelle (1983) 1 All E.R. 241 and as Lord Diplock said in the case of Irc v National Federation of Self Employment and Small Businesses Limited (1981) 2 All E.R. 93:

> "In contrast to this judicial review is a remedy that lies exclusively in public law. In my view the language of Rule 1 (2)(3) of the new Order 53 shows an intention that on application for judicial review the Court should have jurisdiction, a declaration or an injunction as an alternative to making one of the prerogative orders whenever in its discretion it thinks that it is just and convenient to do so and that this jurisdiction should be exerciseable in any case in which the applicant would previously have had locus standi to apply for any of the prerogative orders."

I am aware that I did in this very same case grant an injunction in favour of the second defendants. However, it is to be borne in mind that that was a seperate application. Now the question is what public duty did the second defendant perform in the purchasing of Wico? Was it a public body or tribunal? The answer must certainly be in the negative. In my judgment the second defendant was a wrong party to these proceedings. It follows that the proceedings against it are a misguided missile. The action against the second defendant in judicial review is untenable in law and cannot be sustained. It is accordingly dismissed with costs.

I now turn to the first defendant who I think has the capacity to be sued in judicial review proceedings being a government. Mr. Mhango who appears for the plaintiff has made written submissions as did the first and second defendants. He embraces the following areas:

> "(a) By whom was the decision to privatise Wico taken and what conditionality was to govern the sale under the application imposed by Company Law?
>
> (b) Employees legitimate expectation (natural justice).
>
> (c) Whether the decision to sell Wico to the second defendant was susceptible to judicial review.
>
> (d) Irrationality of the decision process."

As will be seen (c) has already been dealt with. The reliefs sought he says include a declaration that the decision of the first defendant was unlawful because it was illegal or frivolous, irrational or in breach of legitimate expectation and

for an order to quash the decision. One of Mr. Mhango's arguments has been the role and function of the directors of Wico vis-a-vis the first defendant. he has to this effect referred to this Court both the Memorandum of Association of the Company and some of the work of L.B. Gower in his book "Modern Company Law". He has also referred me to the provisions of our Companies Act, Act number 19 of 1984. It is I think pertinent to set out the paragraphs and sections he has referred this Court to. He has quoted Gower on page 136 who says:

> "..... Directors can if they are so advised disregard the wishes and instructions of the members in all matters not specifically reserved (either by Act or Articles) to the General Meeting ..... The old idea that the General Meeting alone is the Company's primary organ and the Directors are merely the Company's agents or servants at all times subservient to the General Meeting seems no longer the general law as it is certainly not the fact."

He then quotes the same author at page 540 who says:

> "..... what is involved is a sale by a Company for whom the directors are acting. Any payment received by them must therefore be accounted for to the Company."

He also cited section 149(a) of the Companies Act which provides:

> "Notwithstanding any provisions in the Company's Articles the directors of a Companyshall not without the approval of an ordinary resolution of the Company:
>
> (a) sell, lease or otherwise dispose of the whole or substantively the whole or the undertaking or all the assets of the Company."

He has also cited Article 76 of the Memorandum of Association of Wico which reads:

> "The business of the Company shall be managed by the directors ..... and may exercise and do all such acts and things as are necessary to carry into effect all objects, purposes, authorities, powers and discretions provided in the Memorandum of Association."

Clause 3(c) provides:

> "The objects for which the Company is established are:

(e) To sell the undertaking of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares."

Mr. Mhango has in my judgment thoroughly attacked the affidavit deposed by Mr. Mwambakulu who is currently the Comptroller of Statutory Bodies. I have carefully read and re-read his affidavit and bearing in mind the cross-examination by Mr. Mhango on this affidavit I thought he, Mr. Mwambakulu, impressed me as a very truthful witness. Indeed, not only did he assist the Court in some of the technical aspects of the process of the sale but also was prepared to concede errors wherever they occurred. He did not give me the impression he came to Court to mislead it. The next point Mr. Mhango took out was that of employees legitimate expectation. It was his view that privatisation carried out with it an implicit claim as to the legitimate role of the state and rights of individuals. He has particularly referrred to the safeguards accorded by Article 23 of the Declaration of Human Rights which I need not quote. In his conclusion he said that these constitional safeguards created legitimate expectation on the part of every citizen of Malawi to be consulted before any decision of general application potentially capable of adverse effect on their employment can be made. With respect to Counsel I am completely at a loss as to how the foregoing can support the plaintiffs' case especially when we are talking of judicial review. It is trite law that the relationship between the plaintiffs and Wico Ltd. which was then wholly owned by the first defendant was that of master and servant. There was a contract of employment between the two parties and under that contract each one of them had his rights as provided by the law. The employee could resign at any time on giving proper notice or on payment in lieu thereof and likewise the employer could terminate his services. This indeed applies even to direct servants working under government. In this respect, therefore, the employees had no power whatsoever to control the Company or its shareholder, the first defendant. Put the case this way, supposing A owns a farm on which he employs a number of people, do these people as employees have power to tell A how to run the farm let alone what to do with it? The contract is for the employee to work for A as he is employed to do and A's obligation is to remunerate them for their services. If A wanted to sell the farm he has no obligation under the law to seek the consent or permission of the workers. The best he can do in my opinion is to notify them of the sale and pay them their dues as per their contract agreement.

Strictly speaking, I should have dismissed the application right out at the outset if Mr. Mhango did not add the words "as citizens of Malawi" to the plaintiffs title. In actions of judicial review which are mostly by way of affidavits these Courts have learned to be patient enough to wait until all the

evidence has been put before them. Indeed in this case not only did the parties file additional affidavits some of the deponents were called to be cross-examined bringing fresh evidence to light. In short, the decision to proceed with the case could be said to be more or less an interlocutory a ruling. This is acceptable in law in cases of this nature. I now still have the power to consider the position having heard all the evidence as to whether the plaintiffs have sufficient interest even as citizens of Malawi in this case. This is a matter which could not have been finally and conclusively decided at the preliminary stage. I am supported in this view by the case of Irc v National Federation of Self Employed and Small Businesses Ltd. (Ibid) where Lord Wilberforce said at page 96:

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all or no sufficient interest to support the application then it would be quite correct at the threshhold to refuse him leave to apply. The right to do so is an important safeguard against Courts being flooded and public bodies harrassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or duties in law of those against whom the relief is ask, the position of the applicant in relation to those powers or duties and breach of those said to have been committed. In other words the question of sufficient interest cannot in such cases be considered in the abstract or as an isolated point. It must be taken together with the legal and factual context."

Lord Diplock had this to say at page 105:

> "Rule 3(5) specifically requires the Court to consider at this stage whether it considers that the applicant has sufficient interest in the matter in which the application relates. So this is a threshhold in question in the sense that the Court must direct its mind to it and form a prima facie view about it on the material that is available at the first stage. The prima facie view so formed if favourable to the applicant may alter on further consideration in light of further evidence that may be before the Court at a second stage of the hearing of the judicial review itself."

Lord Frazer of Tully Belton said at page 107 in the same case:

> "The Court which grants leave at that stage will do so on the footing that it makes a provisional finding of sufficient interest subject to reversal later on and is therefore not necessary to be critised merely because the final decision is that the applicant did

not have sufficient interest but where after seeing the evidence of both parties the conclusion is that the applicant did not have sufficient interest to make the application the decision ought to be made on that ground."

I think Lord Roskill nailed the last nail on the coffin in that case and went on to cite with approval the Practice Directions that is found on notes to Order 53/3-1/11 which is as follows:

"If an applicant has a direct personal interest in the relief which he is seeking he will very likely be considered as having a sufficient interest in the matter to which the application relates. If, however, his interest in the matter is not direct or personal but is a general or public interest it will be for the Court to determine whether he has a requisite standard to apply for judicial relief. Clearly the formula "sufficient interest" is not intended to create a class of persons popularly known as "private Attorney General" who seeks to champion public interest in which he is not himself directly or personally concerned under the guise of applying for judicial review."

At page 108 Lord Frezar of Tully Beaton suggests that:

"The correct approach in such a case is in my opinion to look at the statute under which the duty arises and see whether it gives any express or implied right to persons in the positions of the applicant to complain of the unlawful act or omission."

It is to be borne in mind that the principal plaintiffs in this case Lawrence Taulo and his colleagues at Wico are the ones sueing and that there is no proof of any other person who is not an employee of Wico in the group. Not even the directors of Wico who were directly involved in the day to day running of the Company have joined them or complained. In my view I regard the plaintiffs as a group of Attorney Generals seeking to achieve their own goals under the guise of public interest. If they had any grievance or complaint against the first defendant and indeed any subsequent employer I think such grievances can be readdressed under some other law and not in judicial review proceedings. In my considered opinion therefore inspite of my earlier ruling I do not think the plaintiffs can be said to have sufficient interest in the case.

I now turn to the next allegation by the plaintiffs where it is argued that the sale of Wico was illegal, frivolous and irrational. The basic argument was that the decision to sell was illegal and irregular because it was not decided by the directors of the Company. In the first place I would venture to say that these directors were put there and appointed by the

first defendant, the sole, and only shareholder of the Company. Put bluntly and politely, they were mere agents of the government. They had no shares to dispose of as they had none to start with. The power therefore rested in the sole shareholder to do what it wanted with its shares. Mr. Mhango referred to this Court Gower on Company Law. It is to be borne in mind that that is a mere text book and that much as it may be persuassive to the decisions of Courts, it cannot be said to be authority. Indeed the learned author does not seem to be sure whether it is still the law or not when he says ".....seems no long the law". The directors were mere agents and answerable to the Company, that is the shareholder of the Company who happens to be the first defendant. Nothing in the Memorandum and Articles of Association empowers the directors of Wico to dispose of any shares. Their duty was just to manage the Company. A lot has been said by Mr. Mhango to the effect that the first defendant sold the Company without the knowledge of the Company Directors. I do not agree. As early as 29th October, 1990 the Chairman of the Board of Directors of Wico Dr. Chikhula (saddly now deceased) was appraised of the intention to privatise Wico in addition to advertisements appearing in the local press and to the Minister's speech in Parliament. Exhibit "POW" to the affidavit of Mr. Mwambakulu sworn on 8th November, 1993 is, in my judgment, of utmost importance. It is a letter dated 29th October, 1990 from the Comptroller of Statutory Bodies to the Chairman of Wico and one of the paragraphs was in the following terms:

> "As Chairman of this Company it is important that you are kept in the picture on the progress on privatisation. Recently the government finally agreed detailed contents of the "privatisation to offer" document which has been prepared by the consultants."

The evidence before me clearly shows that the Board of Directors was well aware of the issue of privatisation of Wico and that from time to time they discussed it in their Board meetings. It cannot therefore be said that the sale was without their knowledge.

I would agree with Mr. Mhango when he submits that it is the basic principle of Administrative Law that the decisions involving public elements are susceptible to be challenged in Courts on the basis of impropriety arising from unreasonable-ness, irrationality and illegality. As was held in the case of Associated Provisional Picture houses Limited v Wedensbury Corporation (1948) 1 K.B. page 223, these Courts are also entitled to review the decision of administrative bodies where there has been an abuse of power such as bad faith or procedural irregularity. There is indeed a long list of cases to support this proposition which Mr. Mhango has also cited. I have, as indicated earlier on, scrutinized the evidence before me and I see no bad faith on the part of the first defendant, nor do I

see any procedural irregularity in the sale of Wico on its part. Mr. Mhango went at length to try and show that the first defendant did not follow some of the procedures it had set for the disposal of the Company. For example, he has attacked the extension of deadlines for bids from the public sector. I see nothing wrong with the extension as this was done to enable itself to obtain better offers.

The events leading to the sale of Wico are very clear in the evidence. There is clear evidence that advertisements were made in the Daily Times Newspaper which at the material time was the widest circulating paper. In response to the said advertisement fourteen Companies showed their initial interest. Finally, the bids came from six Companies:

Bidder	Amount	Period of Repayment
1. Circle Plumbing	9.1 million Kwacha	3 Years
2. Sunder Furniture	7.5 million Kwacha	4 Years
3. Alda (M) Ltd.	6 million Kwacha	6 Years
4. General Tinsmith	5.5 million Kwacha	5 Years
5. Tractor Ltd.	4 million Kwacha	4 Years
6. Chifu Ltd.	9 million Kwacha	9 years

At a later stage there came in the employees own offer, an offer called "management by out". The privatisation committee considered this offer along with the others above. It is to be noted that at that time the employees were better placed and were aware of the Company's financial standing and that the first defendant had absorbed all the World Bank loans. They offered 7.1 million Kwacha but they did not indicate the period in which to pay nor did they indicate the mode of payment. They did not even supply the necessary information. From the foregoing it can be seen that the offer by Circle Plumbing was not only convincing but the highest of them all. I see no irregularity on the part of the government in accepting that offer in an open deal like this one. All in all I find that the action by the plaintiffs against the first defendant, the government, is not only misguided but also misconceived and untenable in law. I therefore dismiss the action with costs.

PRONOUNCED in open Court this 4th day of July, 1994 at Blantyre.

R.D. Mbalame
JUDGE