

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.1980 OF 1994



ESTATE OF FLORA KAPITO.....PLAINTIFF

AND

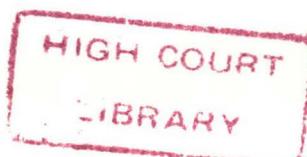
THE ATTORNEY GENERAL.....DEFENDANT

CORAM: R.R. Mzikamanda, Senior Deputy Registrar
Mr Mhone for the defendant

RULING

This is a summons under Order 14A of The Supreme Court Practice Rules. It is to determine a preliminary question of law namely whether S138 of the Constitution deprives a citizen of his or her right of recourse to the ordinary courts within the period of limitation.

Mr Mhone argues that so long a citizens claim is within the statute of limitation, the right of that citizen to have recourse to the courts cannot be taken away by another law even if the same is within the constitution. Section 103(3) of the Constitution of the Republic of Malawi defines the powers and jurisdiction of the courts and provides them with exclusive jurisdiction. The effect of S138 of the Constitution is to take away the exclusive jurisdiction of the court. Section 41 (2) of the Constitution guarantees the right of the citizen to have access to any court of law or any other tribunal for the



adjudication of his or her matters. Mr Mhone asks this court to rule that a tribunal is not a constitutional court and therefore cannot be set up to exclude the jurisdiction of the courts. Mr Mhone argues that despite the existence of S143 of the Constitution which provides for a waiver of the limitation period the same can only be done on equitable grounds if the court sees fit. Parliament intended to limit the question of waivers to cases which had passed their limitation period. Parliament must have been aware that for a case within the limitation period they could either commence in the ordinary court or in the tribunals. It would there be wrong for the state to deprive eligible litigants of the right to commence the action in this court when they have been properly brought. The National Compensation Tribunal is not in existence yet and will only be set up in future Mr Mhone submits that it is an assault on the independence of the judiciary and that if that was specific intention of Parliament then it should have specifically uprooted the statute of limitation before the constitutional courts. Holding that the National Compensation Tribunal excludes this court from proceeding in this matter would be to flout the very provisions of S103 of the Constitution which states that this court and the Supreme Court have exclusive jurisdiction over all matters and no pararel courts shall bet set up. The National Compensation Tribunal can have its decision come under judicial review in terms of Section 142 of the Constitution. Therefore the National Compensation Tribunal cannot be a court. It is a judicial forum inferior to the Constitutional Court. He urges the court to find that individual rights guaranteed under the Republic of Malawi Constitution and to which access is guaranteed under S141 of the Constitution through the Constitutional Courts cannot be taken away particulary when they are within the Statute of Limitation by setting up a tribunal even if that tribunal is set up under the very same constitution.

Mrs Chikaya Banda for the Attorney General contends that what Mr Mhone is doing is to question the validity of Section 138 of the Constitution in so far as it bars legal proceedings in these courts. He is seeking judicial review of an Act of Parliament. She cited the case of Regina v Jordan 1967 Criminal Law Review 483 where the defendant was sentenced to 18 months imprisonment with hard labour for an offence under the Race Relations Act 1965 of England. The defendant argued that the Act was invalid as it curtailed freedom of speech. The Court ruled that Parliament was Supreme and there was no court to question the validity of its Act. Mrs Chikaya Banda argued that Section 138 of the Constitution renders these proceedings illegal in the courts if commenced after the Constitution. Whether it deprives citizens of their rights is for Parliament to rectify. If parliament felt that there should be a tribunal to hear such cases as the present then no person can come to this court and question those powers. It is not for the Attorney General to answer why the setting up of the National Compensation Tribunal is postponed. S41(2) provides that every person shall have access to any court of law and goes on to say 'or any other tribunal with jurisdiction for final settlement of legal issues." Mrs Chikaya Banda argues that a person has the right either to institute proceedings in a court of law or where there is a specific provision to a tribunal. There is no question of interfering with the independence of the judiciary. S142 of the Constitution makes it clear that the National Compensation Tribunal is neither a court of superior nor one of concurrent jurisdiction with the High Court. Section 138 confers a special duty on the National Compensation Tribunal as far as cases of abuse of power or office are concerned. Only when the National Compensation Tribunal feels that it is in the interest of justice that this matter can be remitted to the High Court and the High Court can legally sit and hear the matter will it relinquish its jurisdiction. It is very difficult to envisage a situation where a citizen can be denied his right of legal redress for the simple reason that he was following

procedure laid down by Parliament. Mr Mhone's concerns are uncalled for. She asks this court to attach simple and ordinary meaning of the words of Section 138 of the Constitution "Judges must apply the law and are bound to follow the decisions of the legislative as expressed in statutes or Acts of Parliament." The application is unfounded and only wishes to mislead the court and should be dismissed.

Mr Mhone has referred to a number of American constitutional Law cases. He argues that the Republic of Malawi Constitution is a hybrid of the British Constitution and American Constitution. Therefore there should not be rigid application of principles of Constitutional interpretation applicable in Britain. By this argument I am inclined to believe that Mr Mhone has gone to the root of the problem we have in this matter i.e how best to interpret our Constitution in order to give full effect to the basic principles incorporated in it. Indeed S11(1) of the constitution recognises that the Republic of Malawi Constitution is unique. It provides

"Appropriate principles of interpretation of this constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this constitution".

The difficulty, it seems to me, is to reconcile the provision of Section 103 (2) and Section 138 (1) of our constitution. Section 103(2) of the Constitution provides.

"The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence"

Section 138(1) of the Constitution provides:

"No person shall institute proceedings against any Government in power after the commencement of this Constitution in respect of any alleged criminal or civil liability of the Government of Malawi in power before the commencement of this Constitution arising from abuse of power or office save by application first to the National Compensation Tribunal which shall hear cases initiated by persons with sufficient interest."

It is to be observed that Section 103(2) of the Constitution gives the courts jurisdiction in all matters of a judicial nature. It may be argued here that while the judiciary has jurisdiction over all issues of judicial nature it does not have exclusive jurisdiction over all matters of a judicial nature because the section does not say so. What the section says is that the judiciary "shall have exclusive authority to decide whether an issue is within its competence". If this analysis is taken to its extremes it may be argued that the judiciary may have its jurisdiction over all matters of a judicial nature with other bodies such as the National Compensation Tribunal. This reasoning may find support in Section 142(10) of the Constitution which provides.

"The High Court shall not be excluded from hearing application for judicial review of the decisions of the Tribunal nor shall a determination by the Tribunal be a bar to further criminal or civil proceedings in an appropriate court against

a private person for the duration of the existence of the fund."

If this approach is preferred then it may be said that the National Compensation Tribunal does not oust the jurisdiction of courts. What is obvious is that the National Compensation Tribunal is not part of the judiciary. It would be interesting to know whether it is not concurrent with the courts and whether that is consistent with the provisions of the constitution (See S103 (3) of constitution. On the other hand if S103(2) of the constitution is read as a whole and understood to mean that the courts have exclusive jurisdiction over all matters of a judicial nature and exclusive authority to decide whether an issue is within its competence then Section 138(3) of the Constitution becomes a fetter on the exclusive authority of the court. That Section provides

"Notwithstanding subsection (1), the National Compensation Tribunal shall have the power to remit a case for determination by the ordinary courts where the National Compensation Tribunal is satisfied that the Tribunal does not have jurisdiction, or where the Tribunal feels it is in the interest of justice to do so."

It would be interesting if the ordinary courts would refuse to hear a matter remitted to it by the Tribunal on the grounds that the Tribunal feels it is in the interest of justice to do so. It would appear that what the Tribunal would be doing is to decide whether a matter is within its competence or within the competence of the ordinary courts thereby usurping the exclusive authority of the ordinary court to decide whether the matter is within its competence or not. Again Section 138(1) of the Constitution seem to suggest that the National Compensation

Tribunal is the first place to go to on matters within its ambit. The words "abuse of power or office" are not defined and this may be a source of uncertainty on the part of claimants. In those circumstances would it be correct to shut out a claimant from the court of law? The answer seems to be in the negative. Section 41(2) of the Constitution is clear. It provides that:

"Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues"

The idea of a National Compensation Tribunal is a very noble one but it should not be used to suppress human rights by delaying redress or providing less than adequate redress because the funds appear depleted. It has been submitted that the National Compensation Tribunal remains unfunctional more than a year after it was supposed to be functional. No body has an idea how to proceed. Yet the Tribunal is supposed to last 10 years throughout which period it must be functional. If the submission is correct claimants must already have been deprived of a whole year within which they should have lodged their claims.

To the extent that Section 138 of the Constitution oust or purports to oust the jurisdiction of the ordinary courts it must be invalid. Section 11(4) of the constitution provides that:

"Any law that outsts on purports to oust the jurisdiction of the courts to entertain matters pertaining to this constitution shall be invalid"

In my view a contrary approach would breed absurd results. It seems to me that the ordinary courts should be left as independent as the Constitution intended them to be.

MADE in Chambers this 27th day of September, 1995.

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a long, sweeping horizontal stroke that tapers to a point on the right.

R.R. Mzikamanda

SENIOR DEPUTY REGISTRAR