IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 85 OF 1994

BETWEEN

ANNIE CHISA

AND

ATTORNEY GENERAL

CORAM: **MWAUNGULU, J.**

Mbendera, Counsel for the Applicant
Limbe, Counsel for the Respondent
Kaundama, Official Interpreter
Katunga, Recording Officer

ORDER

Mwaungulu, J.

This is an application for judicial review under Order 53 of the Rules of the Supreme Court. The application is made by Annie Chisa against the Attorney General. It touches a motor vehicle registration number BJ 2412 which has been seized by the defendant and at the time of the application was in the custody of the police at the instruction of the defendant. The decision to detain the motor vehicle is the subject of the judicial review in which the plaintiff is claiming for orders of prohibition injunctions declarations and damages. The defendant contends that this is not a matter of judicial review and if it is a matter for judicial review the defendant was entitled to seize the motor vehicle under the contract the subject of these proceedings. The matter no doubt raises considerations of the scope and practice of the new procedure of judicial review. Even in England there has been much litigation and academic interest on the subject. Several cases, some of which will be considered in this case, have been to the Court of Appeal and the House of Lords. A lot of issues have been left open for future consideration. The advantages of the procedure have been acknowledged. This explains the accumulation of decisions on it. The courts have, however, been at pains to define its scope. This order is based on such consideration. Before coming to that, it is important to look at the events that have given rise to this application.

This matter arises in the context of government initiative to assist and introduce women in the transportation business. The initiative was originated and co-ordinated by the Ministry of Transport and Communication under the "Malawi Commercial Transport Project." Government acquired and solely owned a fleet of trucks. These trucks were hired to a number of interested women. To do this, Government sublet the motor vehicles to CBM Financial Services Ltd. CBM Financial Services Ltd. was to hire these trucks to women who on conditions of contract we will look at shortly were to pay by instalments in a given period at the end of which the women would buy the trucks.

The plaintiff is a business lady carrying on business in Nkhota-Kota. She is also a member of the National Business Women's Association. This association had a hand, although it cannot be stated precisely what involvement it had, in the project or under the contract. It probably had a liaison and counselling service between the plaintiff and the defendant. By an agreement of 1st July 1992 between her and CBM Financial Services Ltd., she subleased from CBM Financial Services Ltd. a Mercedes Benz truck registration number BJ 2412 for a period of 5 years commencing from 1st July, 1992 and expiring on the 31st of August, 1997.

There was a written contract. It runs in several pages. Only pertinent provisions can be highlighted for purposes of this application. The agreement expressly refers to the Government of Malawi. It states that the sub-lessor, CBM Financial Services Ltd., has hired from the Government of the Republic of Malawi, and states further that in the contract the expression "the lessor" refers to the Government of Malawi. In paragraph 3 of the agreement between the plaintiff and CBM Financial Services Ltd. the lessor, the Malawi Government, is to determine the insurer of the motor vehicle. In paragraph 4 the registration of the motor vehicle is always to reflect that the absolute ownership of the vehicle shall remain in the lessor. The lessors in paragraph 6(a), is also supposed to approve a person other than the vehicles suppliers agents for service of the motor vehicle. According to paragraph 6(b) any additions or alterations without authorization from the lessor shall become the property of the lessor. In paragraph 11, on sale of the motor vehicle, the sub-lessor is deemed to be the authorised agent of the lessor. There is therefore, in the agreement a lot to point to the position that Government has in the transaction the subject of these proceedings.

The plaintiff's performance of the contract was not a good one. She was late on her payments of insurance premiums on the agreement just as she was on actual instalments. By 29th of July, 1994 the insurance policy on the vehicle had been cancelled due to non-payment of premiums. She managed to settle the arrears by 26th August 1994. The motor vehicle was, however, impounded by police because of having no insurance cover. Since the motor vehicle was in police custody, after the premiums were settled, the Ministry of Transport and Communications instructed the police not to release the motor vehicle to her because her arrears on her instalments were running at K52,373.28. She contacted CBM Financial Services Ltd. to arrange for payment of arrears.

On 5th September, 1994 CBM Financial Services Ltd. wrote to Ministry of Transport and Communications informing the Ministry of an adjustment to the payments by the plaintiff reducing the arrears to K44,873.28. What CBM Financial Services Ltd. said in this letter is important:

> "My attitude to this situation is that the decision has already been taken to impound the vehicles as a result of substantial arrears occurring. If the lessee is able to rectify the matter promptly you may choose to reconsider your position. However, technically the lease should be cancelled by writing to the lessee to that effect pointing to breach of the agreement as the reason. The truck could then not be returned to the lessee unless a fresh agreement was entered into.
>
> On balance I do not see how this lessee can manage to repay the arrears and accordingly I recommend your earlier decision should stand. The steps to be taken are included in the letter I said I would write to you concerning this lessee and the others."

In its letter of 16th September 1994, CBM Financial Services Ltd. reiterated the plaintiff's problems and inability to pay. The arrears were so serious as to "preclude your/our allowing them to continue using the trucks":

> "Technically you should instruct CBM to terminate or cancel the lease in terms of the clause (e). Having done that we would instruct the sub-lessee to return the truck in question to whatever point you "choose."

From this it can be seen that the lessor and sub-lessor had decided that due to the serious default of the sub-lessee the agreement should be terminated and facilitate the re-possession of the plaintiff's motor vehicle. The police on instructions from the Ministry of Transport and Communications, have not released the motor vehicle to the plaintiff.

The plaintiff, therefore, took out this action seeking judicial review of the decision of the Ministry of Transport and Communication. The plaintiff wants redress from the decision of the police or seizure of the applicant's motor vehicle, failure and/or refusal by the Ministry of Transport and/or the police to release and/or return to the applicant her said motor vehicle since 1994 and the decision by the Ministry of Transport to deprive and/or interfere with the property and contractual rights of the applicant on her contract with CBM Financial Services Ltd. He has prayed for various reliefs.

The plaintiff wants a declaration that the conduct of the police in seizing, impounding and detaining the applicant's vehicle is unconstitutional or alternatively, the

said conduct violates the applicant's constitutional rights. He prays further for a declaration that the police or Ministry of Transport do not have any locus standi in the contract arrangements between the applicant and the CBM Financial Services Ltd. That accordingly the conduct of the Ministry of Transport or alternatively the police is improper. He therefore, prays for a declaration that the Ministry of Transport and Communication and or the police are not entitled to detain or continue to detain the said motor vehicle and should be returned to the applicant. Further there should be a declaration that having regard to the matters complained of this court grant an order of prohibition and or an injunction requiring the vehicle to be delivered up to the applicant within such time as to this court might be reasonable. Finally the plaintiff seeks a declaration that the conduct of the Ministry of Transport in directing the seizure of the applicant's vehicle amounts to improper interference and or has caused violation of contractual rights for which the Attorney General is liable in damages to the applicant.

The damages in question sound in tort and contract. The lost value of the truck is put at K700,000.00, and loss of business K135,000.00. There is a claim for damages up to the time of delivery. There is a claim for a further K30,000.00 in relation to a contract between the plaintiff and a third party. All these damages are claimed against the defendant. The defendant claims that he was entitled to seize the motor vehicle under the agreement which the plaintiff has breached. The defendant contends moreover that this is not the sort of action where the plaintiff should proceed by judicial review.

The crucial question here is whether in this matter the plaintiff can proceed by judicial review. If he can then all the other remedies he has sought can be given on this application. If she cannot the application may be dismissed. The action need not be dismissed if I come to the conclusion that the other remedies, which could have been obtained if the plaintiff had proceeded by writ, are available to the plaintiff (Order 53, rule 9(5); **R. -v- British Broadcasting Corporation, exp. Lavelle** [1983] 3 All E.R. 241). If the matter is one which clearly should have proceeded by judicial review there is no choice but to dismiss the motion (**O'Reilly -v- Mackman** [1982] 3 All E.R. 1124); Lord Diplock concluded that "it would .... as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he is entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of order 53 for the protection of such authority." This proposition was followed in a decision delivered simultaneously, **Cocks -vs- Thanet District Council** [1982] 3 All E.R. 1135. Lord Bridge said:

> "Even though nullification of a public law decision can, if necessary be achieved by declaration as an alternative to an order of certiorari, certiorari to quash remains the primary and most appropriate remedy. Now that all public law remedies are available to be sought by the unified and simplified procedure of an application for judicial review, there can be no valid reason, where the quashing of a

decision is the sole remedy sought, why it should be sought otherwise than by certiorari."

Where, therefore, the proceedings should be by application by judicial review unless it falls in the exceptions, which cannot really be stated and each case should be decided on its own, judicial review should be the way to proceed (ibid).

This brings us squarely into the question of judicial review. Until Order 53 came into existence public law rights were enforced through the various public law remedies of certiorari, prohibition and mandamus. Together with these, courts could grant a declaration or injunction. The remedies were exercised in the High Court by virtue of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons and bodies which perform public duties and functions. There were procedural technicalities dictated by administrative law. (See per Ackner L.J. in **R. -v- In Land Revenue Commissioners ex p. National Federations of Self Employed and Small Business Ltd** [1980] 2 All E.R. 378.) The recommendations of the Law Commission is the progenitor to the new Order 53. The Commission recommended the introduction of a procedure, "application for judicial review", to enable parties to obtain the remedies of certiorari, prohibition mandamus, and, in appropriate cases, an injunction or declaration. The Law Commission were expecting a Statutory intervention. Surprisingly, the recommendation was introduced in the Rules of the Supreme Court before the Legislation which, although not taking the whole recommendation, came into effect in 1981 under section 31 of the Supreme court of Appeal Act. Section 31 gives effect to Order 53 (1) of the Rules of the Supreme Court.

That the recommendation was carried in the Rules of the Supreme Court without waiting for legislation was a blessing in disguise for this Court. It is a blessing however with a tinge of bitterness only in so far as we have to contend with similar questions that bedevil English Courts. It was, however, significant blessing. If the rule had been introduced by Statute the procedure by way of application for judicial review would not have applied to Malawi (Section 39 of the Courts Act). We would have been deprived of a very beneficent remedy in the area of public law.

Order 53, rule 1 of the Rules of the Supreme Court provides as follows:

"1. - An appliction for-
(a) an order of mandamus, prohibition or certiorari, or

(b) an injunction under section 30 of the Act restraining a person from acting in any office which he is not entitled to act,
shall be made by way of an application for judicial review in accordance with the provisions of this Order.

2. An application for declaration or an injunction (not being an injunction mentioned in paragraph (1)(b) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to-

   (a) the nature of the matters in respect of which releief may be granted by way of an order of mandamus, prohibition or certiorari,

   (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

   (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on application for judicial review."

Order 53, rule 1 the Supreme Court Rules does not alter the substantive law on public law remedies. It only provides a unified and simplified procedure for the different remedies. Consequently all principles that govern certiorari, prohibition and mandamus in so far as they do not relate to procedure are unscathed by Order 53. In **Reg. -v- Inland Revenue Commissioners, Ex P. Rossminister Ltd** [1980] A.C. 952, 1025 Lord Scarman said:

> "The application for judicial review is a recent innovation in our law. It is governed by R.S.C. Ord 53, r. 2 which was introduced in 1977. The rule made no alteration to the substantive law; nor did it introduce any new remedy."

Commenting on these last words, Lord Lowry said in **Roy -v- Kensington and Chelsea and Westminister Family Planning Committee** [1992] 1 A.C. 624, 646: `Indeed it seems to me that Lord Scarman, had the occasion demanded, might well have added the words "or abolish any existing remedies.'

Judicial review as a remedy in public law is governed by the same principles that governed the remedies it was intended to accentuate. First, judicial review lies against persons or bodies with judicial, quasi-judicial and administrative functions. (**Ridge -v- Baldwin** [1963] 2 AU E.R. 66) Judicial review lies against inferior courts or tribunals and any person or body performing public functions. In this particular case the bodies involved are the Ministry of Transport and Communications and Police. That judicial review lies against these is not disputed. The issue is covered by

authority, **Pyx Granite Co. -v- Minister of Housing and Local Government** [1959] 2 All E.R. 1; **Chisiza -v- Minister of Education** (Misc. Civ. Ca. No 10 (1993) (Minister) As I have said, there is no question here that the Minister or the police are liable for judicial review. The question here is whether this is a matter for application by judicial review.

This leads us to the second principle on which judicial review is granted. It has been said several times that judicial review is a public law remedy; it is not available to a person protecting a private right. A lot has been said in England on this principle and most of it because the pristine considerations of judicial review as a remedy in public law were in cases where proceedings were sought to be struck out because one of the parties had or had not proceeded by way of application for judicial review. The case of **O'Reilly -v- Mackinan** was where the plaintiff having no remedy at private law proceeded by ordinary action. The House of Lords, confirming the decision of the Court of Appeal held that the action should be struck out because the proceedings should have been by way of application for judicial review. In **Cocks -v- Thanet District Council** there was a similar result. In both of these cases, although stressing that where the right in question emanates from a public right, the plaintiff must make an application by way of judicial review, it is obvious from the opinions from the House that that is only a general rule. In **O'Reilly -v- Macknam** Lord Diplock said:

> "My Lords, order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law nor does section 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within Order 53 and the Rules Committed and subsequently the legislature were, I think for this reason content to rely upon the express and inherent power the High Court exercised upon a case to case basis to prevent its abuse whatever might be the form taken by that abuse."

His Lordship continued in the following words:

> "Accordingly I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would be necessarily always an abuse to seek in an action began by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law."

He concluded in the following words:

> "My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issued in a claim for infringement of a right of the plaintiff arising under private law."

The case of **Au Bord Bainne Co-operative Ltd -v- Milk Marketing Board** [1984] 2 C.M.L.R. 584 was a case in which the action was based on private law rights whether or not it was also based on public law rights. The Court of Appeal held that the plaintiff was right to proceed by ordinary action other than judicial review. Sir Donaldson M.R., after citing the statement of Lord Diplock in **O'Reilly -v- Mackman** said:

> "In so doing he (Lord Diplock) stressed that it was a general rule, subject to exceptions to be resolved on a "case to case basis" and not a rule of universal application. In particular he drew attention to the possibility of exceptions where all parties consented or where the invalidity of the public law decision arose as a collateral issue in a claim for infringement of a right of a plaintiff arising under private law."

All these cases where there was an application to strike out proceedings or pleadings on the basis that applications should or should not have been made by way of judicial review proceeded on the fundamental distinction that judicial review was a remedy for rights under public law. Where the applicant is enforcing rights under private law the proper remedy was an action under private law. Where the action was on rights protected under private law the plaintiff could still proceed under remedies in private law even if there was a public law issue. What is clear, however, is that judicial review is not available to enforce rights that are protected by private law and the plaintiff must proceed in his remedies under private law.

In **R -v- British Broadcasting Corporation ex p. Lavelle**, Woolf, L.J., referring to remedies that had been covered by judicial review under Order 53, Rule 1, said,

> "Rule 1 has since received Statutory confirmation in almost identical terms in s. 31 of the Supreme Court Act 1981. There is nothing in r 1 or s 31 which expressly extends the circumstances in which prerogative remedies of mandamus, prohibition or certiorari are available. Those remedies were not previously available to enforce private rights but were what could be described as public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing breaches of ordinary obligations owed by master to his servant. An application for judicial review has not and should not be

extended to a pure employment situation."

Where, therefore, rights protected by private law are in issue public law remedies covered by judicial review are inappropriate. The question that immediately arises is what are "private rights," rights under private law" public law rights etc."?

Malawi law, in spite two constitutions after independence, is affected by the accident of history by jurisprudence under English Law. The concepts of "private law rights" public law rights" etc are as alien as they are under English Law. In **Davy -v- Spelthorne Borough Council** [1984] 1 A.C. 262, 276 Lord Wilberforce said:

> "The expressions "private law" and "public law" have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are a convenient expression for descriptive purposes. In this country, they must be used with caution, for, typically, English Law fastens not upon principles but remedies."

Under English Law, however, the concepts have been defined. Lord Wilberforce said:

> "Before the expression "public law" can be used to deny a subject a right of action in the court of his choice it must be related to positive prescription of law, by statute or statutory rules."

In other words remedies under public law can be traced to existence of a statute or statutory rules. This, however, is partially correct because a public authority can be liable, as we shall see, for breach of statutory duty, a tort, for misfeasance or non-feasance. There would be an infringement of a private right the remedy for which is an ordinary action rather than an application for judicial review. The most apt definition of these concepts, however, comes from Oliver, L.J., in **Bourgoin S.A. -v- Ministry of Agriculture** [1986] Q.B. 716, 761:

> "Rights in "private law" and "public law" rights are expressions which have appeared in English jurisprudence only relatively recently. The former is used in the context of an argument in the present appeal to signify the rights which enabled an injured individual to seek all or any of the remedies available from the armoury of the law for the breach of a duty owed specifically to him, and is to be distinguished from the "right (if that is the correct word) to have the law properly and fairly enforced and administered to by a public authority in the performance of its duties to the public at large."

That breach of duty against the individual can arise by contract, law or statute. The remedies are provided for in the general law. In some cases such breach of duty can

exist simultaneously or together with duties that bodies or persons exercising public duties or functions perform. In each case it is possible to determine whether the action is based on remedies in public law or private law. The matter is well illustrated in dismissal of officers by public bodies or tribunals set under statutes to deal with such problems. In **Roy -v- Kessington and Chelsea and Westminister Family Practitioner Committee** [1992] A.C. 624 the House of Lords held that a claim by a general medical practitioner that the Family Practitioner Committee acted wrongly in reducing the amount to be paid as practice allowance under the National Health Service Regulations should have been litigated in an ordinary action even though the claim involved a challenge to a public law decision. This was a case where the action was based on a contract of employment. There was also a duty on part of the committee to act fairly. Lord Lowry, who gave the decision of the House, said:

> "The answer is that Dr. Roy had a right to a fair and legally correct consideration of his claim. Failing that, his private law right has been infringed and he can sue the committee... Dr Roy's printed case contained detailed arguments in favour of a contract between him and the committee, but before your Lordships, Mr Lightman simply argued that the doctor had a private law right."

The existence of a contract is an indication of existence of private rights, (**Reg -v- East Berkshire Health Authority exp. Walsh** (1985) Q.R. 152; **Wadi -v- Cornwall and Isle of Scilly Family Practitioner Committee** (1985) I.C.R. 492. It is not, however, decisive. Lord Lowry said in **Roy -v- Kensington and Chelsea and Westminister Family Practitioner Committee** [1992] 1 A.C. 624, 649:

> "But the actual or possible absence of a contract is not decisive against Dr. Roy. He has in my opinion a bundle of rights which should be regarded as individual law rights against the committee arising from the Statute and regulations and including the very important private law rights to be paid for the work that he has done."

In law government is a legal entity. It can enter into legal transactions with and like a private citizen. It has duties, contractual or tortions, like other private citizens. In those situations it is amenable in private law just like its citizens. In such a case it is not in the realm of public law. It is in the realm of private law. The public law remedies are only available when Government is meddling with public law rights.

The essence of public law rights is that they are directed at the public at large and any one against who they have been denied can have recourse to judicial review. This is what the Courts have meant when they say that judicial review is only available to those who can establish a sufficient interest. Its because these rights are available to the public at large that it is only logical that their violation should not be at the instance of the whole public which, so to speak, has been wounded but to that person who has a particular interest which has been affected. Public Law rights are distinct from private law rights in that in the latter, even though a body or person performing

public functions or duties may be involved, the rights which it is claimed have been violated can be traced to a relationship that is only applicable to the particular person. The relationship could be tortions or contractual or whatsoever. The hallmark of the private law rights is that, unlike public law rights which are directed to the public law at large, they pertain only to the applicant.

Now turning to this case without even deciding the issues that have been raised, the matter arises from a contract. No relationship other than this contractual one exists or existed between the Ministry of Transport and Communication and the plaintiff. There was no public duty or part of Government to enter into the arrangements which, as we have seen, were to assist women to enter into the commercial transport sector. It was a good policy but one that emanates from no duty known to any civilised Government. It is quite clear from the agreement that the plaintiff entered in that the Government was the prime mover and owner of the trucks until the plaintiff paid all the instalments under the agreement. For some reason, which it is not necessary for me now to decide on their propriety, Government has seized the motor vehicle which was hired to the plaintiff on hire purchase.

It is not that Government is proceeding under any of its co-ercive or plenipotentiary powers. Despite that the motion has been conjured in lofty terms so as to appear as if there are violations of the plaintiff's constitunal rights, Government is acting purely on a contractual relationship where it thinks, correctly or erroneously, it is a party. That transposes this case out of those where the plaintiff can make an application by way of judicial review. It appears that the police in continuing to detain the motor vehicle are acting on instructions of the Government in pursuance of the contract. In that sense they are agents of the Government. The police are not working on any of their usual powers. Obviously if the government has no cause of action on the contract, its refusal to let the police to have the car makes Government liable to the plaintiff for detinue or conversion. Consequently the remedies are available to the plaintiff in private law. If the police have no jurisdiction, it could be that their action could be the subject of judicial review. Their acting, however, is only incidental to the rights which the Government in pursuance of the contract mentioned thinks it has under the contract. The plaintiff would therefore, have to sue the Government for violation of her rights under the contract. This case therefore, does not involve a remedy in public law. The plaintiff cannot proceed on judicial review. The plaintiff's remedies are through an ordinary action.

There is a further reason why judicial review should be refused in this case. There are countermanding affidavits which point to disputation of facts on the matter. These disputations can be best resolved by trial of the action. A judicial review is appropriate where the facts are accepted. The remarks of Woolf L.J. in **Reg. -v- Derbyshire County Council ex parte Noble** [1990] I.C.R. 808 were cited by Lord Lowry in **Roy -v- Kensington and Chelsea F.P.C.** Woolf L.J. said:

> "Although at this stage the court is not concerned with the merits of the application but the question as to whether or not it was a matter which could be appropriately dealt with on an application for judicial review, it is right that I should

> indicate that an affidavit was filed on behalf of the council by Mr Eric Cobb, who was the director and treasurer of Derbyshire County Council and County director from 1987 to April, 1988 and who is now a consultant of the council, in which he purports to give an explanation on behalf of the council as to why it has adhered to its decision. I draw attention to that affidavit because at least it can be said, having regard to the contents of the affidavit, that the present application is one which is unsuitable for disposal on an application for judicial review - unsuitable because it clearly involves a conflict of fact and a conflict of evidence which would require investigation and would involve discovery land cross-examination. Cross-examination and discovery can take place on an application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

Lord Lowry's comment on this statement are humbling.

> "The concluding observations, by a Judge who is an acknowledged authority on the subject, remind us that oral evidence and discovery, although catered for by the rules are not part of the ordinary stock-in-trade of the prerogative jurisdiction."

These remarks apply with equal force to the case here. The circumstances in which the motor vehicle was seized are not clear from the plaintiff's story. It looks as if the defendants were acting from wrong. This is vindicated by the affidavit in opposition. I would be very slow to exercise my discretion to afford the plaintiff the remedies she seeks on judicial review.

The remedies that the plaintiff seeks could have been obtained if the action had commenced by writ. I order that the parties proceed as if the action was commenced by writ. The affidavits should be taken as pleadings. Costs to the respondent.

Made in open Court this 21st day of February, 1996.

D. F. Mwaungulu
JUDGE