



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL DIVISION  
JUDICIAL REVIEW CAUSE NO. 47 OF 2021  
(Before Honourable Justice Mambulasa)

**BETWEEN:**

THE STATE (ON THE APPLICATION OF CENTRE FOR MINDSET  
CHANGE LIMITED)..... CLAIMANT

-AND-

THE PRESIDENT OF MALAWI.....1<sup>ST</sup> DEFENDANT

-AND-

THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT

-AND-

ANTI - CORRUPTION BUREAU.....3<sup>RD</sup> DEFENDANT

-AND-

DR. BAKILI MULUZI.....4<sup>TH</sup> DEFENDANT

-AND-

**DR. JOYCE BANDA.....5<sup>TH</sup> DEFENDANT**

**-AND-**

**PROF. ARTHUR PETER MUTHARIKA.....6<sup>TH</sup> DEFENDANT**

**CORAM: HON. JUSTICE MANDALA MAMBULASA**

Mr. Oscar Taulo, Advocate for the Claimant

Ms. Irene Chikapa, Advocate for the 1<sup>st</sup> Defendant

Mr. Victor Samuel Chiwala, Advocate for the 3<sup>rd</sup> Defendant

Mr. Tamando Chokocho, Advocate for the 4<sup>th</sup> Defendant

Mr. Obet Chitatu, Court Clerk

### **ORDER**

**MAMBULASA, J**

#### **Introduction**

[1] On 6<sup>th</sup> August, 2021 the Claimant filed a without-notice application for permission to move for judicial review of the decisions and conduct of the Defendants as stated below:

1.1 Decision or conduct by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants in failing to act and provide response to the inquiry and complaint respectively lodged by

the Applicant thereby depriving the Applicant and Malawian citizens of their right to information and protection from further abuse of the said TPIN;

- 1.2 Decision and/or conduct by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants respectively in ignoring and failing to act in relation to the exercise of their respective public duties in dealing with inquiry and complaints lodged thereby fettering or abdicating their authority or public function;
- 1.3 Decision and/or conduct by the 3<sup>rd</sup> Defendant in conducting an inquiry on the 6<sup>th</sup> Defendant only, and excluding the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

[2] The Claimant also sought interim reliefs as follows:

- 2.1 An interim order compelling the Defendants to provide the Applicant with the documents stated below:
  - 2.1.1 Summary of transactions or goods imported using the TPIN of citizen number one by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants with their consent or knowledge, if any, during their tenure as Presidents [of Malawi];
  - 2.1.2 Summary of transactions or goods imported using the TPIN of citizen number one with or without knowledge of the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants;

2.2 An order of injunction prohibiting the 3<sup>rd</sup> Defendant from conducting any inquiry on the 6<sup>th</sup> Defendant only, and excluding the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants pending *inter-partes* hearing for application for an order of continuation of an order of injunction.

[3] The application was said to have been sought on some grounds and supported by a Sworn Statement made by Phillip Kamangirah, Executive Director of the Applicant. It is not necessary to reproduce the contents of the said Sworn Statement as well as the grounds for making the application. It is enough to mention that these two were there.

[4] The file was brought to the attention of this Court on 9<sup>th</sup> August, 2021. Having read and considered the application, this Court directed that pursuant to Order 19, rule 20 (4) of the Courts (High Court) (Civil Procedure) Rules, 2017 the application should be heard *inter-partes*.

[5] The Court further made the following directions:

5.1 That the Claimant should serve the Defendants with the entire application by or before the close of business on 12<sup>th</sup> August, 2021;

5.2 That the Defendants should file and serve on the Claimant all the relevant documents either in response or opposition, as the case may be, on or before 18<sup>th</sup> August, 2021.

5.3 Hearing of the application shall take place on 23<sup>rd</sup> August, 2021 at 09:00a.m.

[6] The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed the relevant documents as ordered by this Court.

[7] On Friday, 20<sup>th</sup> August, 2021 in the late afternoon, the Claimant filed a Notice of Withdraw[al] of Legal Proceedings. It was to the effect that the Applicant wholly withdraws and discontinues this present action/proceedings herein.

### **Issue for Determination**

[8] The only issue falling for determination before this Court is:

Whether or not the Claimant having filed a notice of withdrawal of the legal proceedings, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are entitled to costs?

### **The Law**

[9] Order 12, rule 42 of the Courts (High Court) (Civil Procedure) Rules, 2017 is to the effect that the claimant may discontinue his claim at any time.

[10] Order 12, rule 49 of the Courts (High Court) (Civil Procedure) Rules, 2017 expressly provides that:

Unless the Court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which the notice of discontinuance was served on the defendant.

- [11] Order 31, rule 1 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

A party to a proceeding shall not be entitled to recover costs of the proceeding from any other party to the proceeding except under an order of the Court.

### **Analysis and application of the law to the facts**

- [12] Order 12, rule 42 of the Courts (High Court) (Civil Procedure) Rules, 2017 is clear that a claimant may discontinue his claim at any time. However, the withdrawal and discontinuance is not without consequences.
- [13] Order 12, rule 49 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides for liability for costs where a notice of discontinuance has been filed with the Court by the claimant and served on the defendant or defendants. The liability falls squarely on the claimant to pay costs of a defendant or defendants incurred on or before the date on which the notice of discontinuance was served on them, unless the Court orders otherwise.
- [14] Order 31, rule 1 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 is also crystal clear that a party to a proceeding shall not be entitled to recover costs of the proceeding from any other party to the proceeding except under an order of the Court.


[15] Order 12, rule 49 of the Courts (High Court) (Civil Procedure) Rules, 2017 cannot be read in isolation. There must still be an order of the Court on the issue of costs as provided for under Order 31, rule 1 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017. In other words, these two rules must be read together where there is filed a notice of discontinuance by the claimant and the same is served on the defendant or defendants.

### **Finding and determination**

[16] In view of the foregoing, following the filing of the notice of withdrawal of legal proceedings by the claimant in this matter and service of the same on the defendants, this Court awards costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants incurred on or before the date on which the said notice was served on them.

[17] The costs shall be assessed by the Registrar of this Court, if the same shall not be earlier on agreed by the parties.

[18] Made in Chambers this 23<sup>rd</sup> day of August, 2021 at Blantyre, Malawi.

  
**M. D. MAMBULASA**  
**JUDGE**