



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CASE NO. 11 OF 2023
(Before Honourable Justice Mambulasa)

BETWEEN:

THE STATE (ON THE APPLICATION OF
RIAZ JAKHURA)CLAIMANT

-AND-

INSPECTOR GENERAL OF POLICE.....DEFENDANT

MOHSIN NATHWANI.....1ST INTERESTED PARTY

JAVID ALAM.....2ND INTERESTED PARTY

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. John Chisomo Kalampa, Advocate for the Claimant

Mr. Neverson Chisiza, Senior Assistant Chief State Advocate for the
Defendant

Mr. Obet Chitatu, Court Clerk/Official Interpreter

RULING

MAMBULASA, J

Introduction

- [1] The Claimant approached this Court seeking permission to apply for judicial review and suspension of the decision of the Defendant to arrest and prosecute him until the determination of the judicial review. He alleges that the Defendant's decision is palpably frivolous, vexatious, absolutely groundless and total harassment and intimidation. Furthermore, that the said decision is also an abuse of prosecutorial discretion taking into account that the Defendant is taking instructions from a private person who intends to settle private scores with the Claimant.

- [2] The application was taken out under Order 10, rule 1 and Order 19, rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017.

- [3] The application was supported by a Sworn Statement made by the Claimant, Form 86A, Skeleton Arguments and grounds upon which relief is sought.

- [4] Upon perusal and assessment of the application, this Court directed that it should come with-notice to the Defendant. The direction was made pursuant to Order 19, rule 20 (4) of the Courts (High Court) (Civil Procedure) Rules, 2017.

- [5] The Defendant filed her Sworn Statement in Opposition to the application accompanied by Skeleton Arguments.

Issues for Determination

- [6] There are two issues to be determined by this Court at this stage.

6.1 First, whether or not this Court should grant permission to apply for judicial review as sought and prayed for by the Claimant.

6.2 Second, if permission to apply for judicial review is granted to the Claimant, whether or not, this Court should grant stay/suspension of the decision of the Defendant to arrest and prosecute the Claimant pending the hearing of the substantive matter.

The Claimants' Case

- [7] The Claimant is a businessman and managing director of Speedy's Limited (the company). One of the company's business interests is the importation of motor vehicles for resale in Malawi.

- [8] The company sold a car to one Mahmood Azhar Chaudhry on credit terms. Mr. Chaudhry failed to fully pay for the car.

- [9] The company decided to repossess the car. The Claimant and 3 others visited Mr. Chaudhry's house in Sunnyside, Blantyre to collect either the balance for the purchase price or the car.

- [10] Mr. Chaudhry claimed that in the process of collecting the car, he was assaulted by the Claimant and 3 others.
- [11] Mr. Chaudhry lodged a complaint. What is odd is that he did so to the Magistrate Court at Mbulumbuzi in Chiradzulu District when there are Blantyre Central, Blantyre, Limbe-Dalton and Midima Magistrate Courts well within reach. Mr. Chaudhry for some reason opted for a court outside Blantyre District.
- [12] That notwithstanding, the Magistrate Court at Mbulumbuzi issued a warrant of arrest for the Claimant and 3 others.
- [13] Mr. Chaudhry collected the said warrant from that court. Strangely enough, he did not request any police post in Blantyre or Chiradzulu Districts to execute it. He drove all the way to the Defendant's office in Lilongwe at the National Police Headquarters to serve on them the said warrant.
- [14] The Defendant allegedly instructed her Anti Motor Vehicle Theft Unit to effect an arrest. However, when the said Unit effected the arrests of the 3 others, the Claimant was abroad. He thus was not arrested. The warrant was subsequently cancelled.
- [15] Eventually, the Magistrate Court at Mbulumbuzi did the right thing. It transferred the matter to Blantyre where trial continues.
- [16] Mr. Chaudhry did not derive any joy from the failure of arrest of the Claimant. He has thus enticed, coaxed or prevailed over the Defendant to

find any means for the arrest and detention of the Claimant, however flimsy, vexatious, frivolous and unreasonable the grounds might be.

[17] So far, two occasions stand out. First, the Defendant ordered the arrest of the Claimant for the same car deal for which he is already being arrested.

[18] Second, while trial is on-going, Mr. Chaudhry lodged a complaint on yet the same matter that is in court but this time to the Defendant's Fiscal and Fraud Section. He complained that in the course of paying for the car, he had overpaid the company. He was thus defrauded.

[19] The Defendant directed her Fiscal and Fraud Section to arrest the Claimant. They did so on 5th December, 2022. He was granted police bail. A copy of the police bail marked, "RJ1" has been attached to the Sworn Statement of the Claimant.

[20] It is odd that since the arrest by the Fiscal and Fraud Section for the same transaction that the Anti Motor Vehicle Theft Unit attempted to arrest the Claimant and for which trial is going on, the Defendant has taken no steps to prosecute the Claimant.

[21] In short, the arrest was simply a means to harass the Claimant. Otherwise, where the Defendant was serious with prosecution, she would have done so promptly. It is now over 3 months and the Claimant has not yet even taken plea.

- [22] The current arrest and prosecution are frivolous, vexatious and completely groundless. There is attached to the Sworn Statement of Riaz Jakhura, a copy of the second bail order marked, "RJ 2".
- [23] The facts are that Nanette Private Limited allegedly won a tender to supply uniforms to the Malawi Police Service. This tender was a fraud. Nanette Private Limited did not in fact win any tender. It was itself tricked by fraudsters who made them believe that they had won the tender.
- [24] On the understanding that they had won the tender, Nanette Private Limited sought financing. In the process, it connected with Mr. Mohsin Nathwani, the 1st Interested Party, who subsequently linked them to Lilypeck General Trading LLC of United Arab Emirates. The 1st Interested Party is a great family friend and colleague to the Claimant.
- [25] Agreements were drawn up between Lilypeck General Trading LLC and Nanette Private Limited. One of them was an Escrow Agreement. It is attached and marked as exhibit, "RJ3" to the Sworn Statement of the Claimant.
- [26] The other was a Credit Supply Finance Agreement. It is also produced, shown and marked as exhibit, "RJ4" to the said Sworn Statement.
- [27] Pursuant to the two agreements, Lilypeck General Trading LLC made the uniforms. Mr. Mussa instructed Mr. Javed Alam, the 2nd Interested Party, to travel to India to pick up samples of the uniforms. The 2nd Interested Party obliged.

- [28] The reason for asking the 2nd Interested Party to travel was because, he is an Indian national and therefore did not require any visa and other similar international mobility requirements to travel and Nanette Private Limited made Lilypeck General Trading LLC believe that time was of essence. The 2nd Interested Party is employed as warehouse manager for the 1st Interested Party's business.
- [29] When it transpired that in fact Nanette Private Limited did not have a contract with the Malawi Police Service, the Defendant instituted investigations and arrested about 5 people who are currently answering charges of forgery and uttering false documents in court.
- [30] In these premises, it is difficult to see how and why the Interested Parties should be arrested and prosecuted. They are not connected to procurement of the alleged contract by Nanette Private Limited. All they did was to broker financing for Nanette Private Limited because Nanette Private Limited required trusted suppliers and financiers.
- [31] As for the Claimant, he was not involved at all in the whole transaction. It is difficult to see why he has to be arrested. He certainly cannot be arrested for being close family and colleague to the 1st Interested Party.
- [32] The only plausible explanation for the arrest of the Claimant is the same connection and private vendetta that Mr. Chaudhry has with the Claimant. The Defendant has allowed herself to be used as a readily available instrument for Mr. Chaudhry's oppression, harassment and vexation of the

Claimant. In other words, the Defendant is abusing her prosecutorial discretion to harass, intimidate and oppress the Claimant.

[33] In the circumstances of this nature, the Court has the power to intervene and investigate by way of review the question whether the Defendant is using her prosecutorial powers correctly.

[34] The impugned decision was made on Friday, 10th March, 2023 and it is a continuing one.

[35] The Claimant has lodged this application on Sunday, 12th March, 2023 i.e. within 48 hours of the making of the decision.

[36] The application has thus been brought promptly within 3 months. The Claimant seeks a direction that this matter be expedited as it involves his human rights and constitutionalism. The Claimant undertakes to act with dispatch in resolving this matter.

The Defendant's Case

[37] As stated in paragraph 5 above, the Defendant filed a Sworn Statement in Opposition to the application for permission to apply for judicial review as well as the interim relief sought by the Claimant.

[38] The said Sworn Statement was not sworn or commissioned contrary to the requirements of the law.¹ Before considering the application, this anomaly was brought to the attention of the Defendant. However, no steps were taken to have the Sworn Statement sworn or commissioned. Therefore, legally speaking, there is no sworn statement at all from the Defendant.

[39] Assuming there was one, not commissioning it is a defect in substance. The position of the law on this point is very clear. It cannot be cured or saved.²

Claimants' Reply

[40] The Claimant filed a Sworn Statement in Reply. However, in view of the position taken by this Court in the immediately preceding paragraph, there was therefore nothing to reply to. That sworn statement will not be used in determining this application.

[41] In the end, this Court shall only use the Sworn Statement of the Claimant and the other documents referred to in paragraph 3 above for determining this application.

[42] That however, does not preclude this Court from hearing the Defendant on matters or points of law as contained in her Skeleton Arguments. They will be considered and given due weight in this application.

¹ See Order 18, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017.

² *Jam Willem Akster –vs- The State, Centre for Human Rights, Education, Advice and Assistance*, Constitutional Referral Cause No. 2 of 2021 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

The Law

[43] Order 19, rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

(1) Judicial review shall cover the review of-

- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
- (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine-
 - (i) its lawfulness;
 - (ii) its procedural fairness;
 - (iii) its justification of the reasons provided, if any; or
 - (iv) bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

(2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.

(3) Subject to sub-rule (3)³, an application for judicial review shall be commenced *ex parte* with the permission of the Court.

³ The reference to sub-rule (3) here does not make legal sense. It is clear to this Court that the drafters had in mind, sub-rule (4). It is proposed that if this observation be correct, then this should be addressed during the review of the Courts (High Court) (Civil Procedure) Rules, 2017.

- (4) The Court may upon hearing an *ex parte* hearing direct an *inter partes* hearing.
- (5) Subject to sub-rule (6), an application for judicial review under sub-rule (3) shall be filed promptly and shall be made not later than 3 months of the decision.
- (6) The Court may extend the period under sub-rule 5.

[44] From the above, it is worth-noting that there are a number of requirements that must be fulfilled by a claimant before they may be granted permission to apply or move for judicial review proceedings.

[45] As Justice Ruth Chinangwa noted in *The State (On application of Gertrude Hiwa, SC) and Office of the President and Cabinet and Secretary to the President and Cabinet*⁴ from Order 19, rule 20 quoted above, the Court has to consider the following requirements in an application for permission for judicial review:

45.1 There must be a law, an action or a decision of the Government or a public officer for conformity with the Constitution where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened; or

45.2 A decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural

⁴ Judicial Review Cause No. 42 of 2020 (High Court of Malawi) (Lilongwe District Registry) (Civil Division) (Unreported).

fairness, its justification of the reasons provided, if any, or bad faith, if any, where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened;

45.3 A person making an application for judicial review should have sufficient interest in the matter to which the application relates;

45.4 An application for judicial review should be filed promptly and shall be made not later than 3 months of the decision.

[46] In addition to the above requirements, case law has also developed other additional principles upon which permission to apply for judicial review is considered in our jurisdiction. For purposes of the present proceedings, one such relevant principle is that judicial review is not available in cases where there are other alternative remedies and the same have not been used or exhausted by a claimant.⁵

[47] In *R -vs- Inland Revenue Commissioners, ex parte Preston*⁶ the Court said:

...a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance.

[48] In *R -vs- Epping and Harlow General Commissioners, ex parte Goldstraw* ⁷ Sir John Donaldson MR stated that:

⁵ As above. See also *The State (On the application of Malawi Revenue Authority) -and- The Chairperson of the Industrial Relations Court and Roza Mbilizi* Judicial Review Case No. 52 of 2021, (High Court of Malawi) (Principal Registry) (Unreported) and *State (ex parte Aero Plastic Industries Ltd -vs- Director of Environmental Affairs* MSCA Civil Appeal No. 19 of 2019 (Unreported).

⁶ [1985] A.C. 835 at 852.

But it is a cardinal rule that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.

[49] It is not automatic that once there is an alternative remedy, then judicial review will not be available. The court must exercise its discretion in the particular case in light of the alleged alternative remedy. This is important because to give but one example, a tribunal may have been established under a statute but may not have been operationalized, and so, it cannot be said that an alternative remedy would be available. In that kind of case, a court would exercise its discretion in favour of granting permission for judicial review as the alternative remedy only exists on the statute book and not in reality.

[50] The permission application like the present one serves two purposes. First, it eliminates at an early stage, applications that are either frivolous, vexatious or hopeless. Second, it ensures that an application is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.⁸

[51] At the permission application stage, there is no need for the Court to go into the matter in depth. If the Court is satisfied that there is an arguable case,

⁷ (1983) 3 All E.R. 257 at 262.

⁸ *The State (On the application of Dr. Justice Michael Mtambo) -and- Judicial Service Commission and The President of the Republic of Malawi*, Judicial Review Case No. 25 of 2022 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

then it follows that permission to apply for judicial review should be granted where all the other requirements have also been fulfilled by the Claimant.⁹

[52] In relation to the exercise of discretion whether or not to prosecute a criminal suspect the following principles are relevant. *Blackstone's Criminal Practice 2004* paragraph D1.61, at page 1038, states as follows:

[The decision to initiate proceedings] is a matter within the discretion of [the prosecuting authority], acting through the officers to whom he delegates his authority. Neither the police authority, nor the government, nor even, subject to one exception, the courts can dictate to [the authority] how he exercises his discretion. In *Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2QB 118, Lord Denning MR said (at p. 136):

I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land...He must decide whether or not suspected persons are to be prosecuted...But [in this] he is not a servant of anyone, save the law itself. No Minister of the Crown can tell him...that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

[53] In paragraph D1.72 at page 1044, *Blackstone* states:

A decision not to prosecute is susceptible to judicial review because no other remedy is available. A decision to prosecute stands on a different footing: arguments relating to abuse of process may, for example, be raised in the course of the trial itself. It thus appears that in the absence of dishonesty, *mala fides*, or

⁹ n5 above.

some exceptional circumstance, a decision to prosecute cannot be raised by way of judicial review (*DPP, ex parte Kebilene* [2000] 2AC 326).

[54] The above position of the law has been followed by Malawian Courts. In *The State and Director of the Anti-Corruption Bureau ex parte Globe Electronics Limited and Mohamed Abdul Gaffar Kassam*¹⁰ the High Court (Kenyatta Nyirenda J) sitting said:

Unless something very untoward happens in the way the prosecutor has conducted his duties, leaving him or her alone seems a sacrosanct ethos to be respected at all costs and in all-weather by the courts and the litigating public.

[55] In *The State and Director of Anti-Corruption Bureau ex parte Tayub and others*¹¹ the High Court (Potani J), as he then was, said:

In the determination of the case at hand, the court would wish to state with a lot of emphasis that conducting investigative and prosecutorial processes lies in the discretion of the investigative and prosecutorial authority...Such being the case, the court should only stop the authority in its tracks, by way of judicial review, if there is something latently and glaringly amiss with the processes undertaken.

[56] Potani J later on said:

¹⁰ Judicial Review Cause No. 3 of 2017, (High Court of Malawi) (Principal Registry) (Unreported).

¹¹ Judicial Review Cause No. 29 of 2017, (High Court of Malawi) (Principal Registry) (Unreported).

The court entirely agrees on the need for caution when faced with a case of this nature considering that the decision to investigate and prosecute those suspected to be involved in corrupt practices is the preserve of the respondent. It is the considered estimation of this court that it would be against public policy and indeed public interest to have those suspected to indulge in corrupt practices brought to book if the court unnecessarily intervenes in the investigative and prosecutorial processes under the guise of judicial review. The court would also hasten to say that the law through the criminal justice system provides a forum the respondent's investigations and decision to prosecute would be tested and if found wanting, the applicants would be acquitted.

[57] In *State –vs- The Commissioner General of the Malawi Revenue Authority, ex parte Chihana*¹² the High Court (Mbvundula J) sitting, as he then was, held that a suspect's right to be heard is not necessarily violated by reason of his arrest on suspicion of his having committed some offence, and unless the applicant establishes illegality, irrationality, impropriety, dishonesty, *mala fides*, or some other exceptional circumstance, on the part of the investigative and prosecutorial authority, the prosecutorial process must not be curtailed by judicial review.

[58] In *State –vs- Director of Public Prosecutions, ex parte Trapence and another*¹³ the High Court sitting in a constitutional matter applied and accepted a Fijian case of *Matululu –vs- Director of Public Prosecutions*¹⁴ which held that while the court agreed that courts have the unlimited jurisdiction to review all constitutional decisions whether administrative or

¹² [2017] MLR 459.

¹³ [2018] MLR 337.

¹⁴ [2003] 4 LRC 712.

executive, when it comes to executive powers, the courts will review those only in rare and extreme circumstances.

[59] The High Court also accepted the itemization of the so called rare and extreme circumstances laid down in the *Matululu* case in which a decision falls reviewable as:

59.1 in excess of the DPP's constitutional or statutory powers;

59.2 contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion;

59.3 in bad faith;

59.4 in abuse of process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved; and

59.5 where the DPP had fettered his or her discretion by a rigid policy preventing her to prosecute certain offences.

Application of the Law to the Facts

[60] As correctly observed by Justice Ruth Chinangwa in the case cited above in paragraph 45, it is noted from the reading of Order 19, rule 20 (1) (a) and (b)

of the Courts (High Court) (Civil Procedure) Rules, 2017 that a claimant need not satisfy both requirements. A claimant needs only satisfy one of them at any given point in time. That is not to rule out the possibility that there may never be cases where a claimant may have to satisfy both requirements, where such cases have presented themselves. It is important to mention at this juncture that this Court subscribes to the modern view that this rule settles the issue that there are two types of judicial review in Malawi. First, constitutional judicial review having its origins in the American jurisprudence premised on Chief Justice John Marshal's articulation of the same in *Marbury –vs- Madison*.¹⁵ Second, judicial review of executive and administrative action developed in English public law.¹⁶

- [61] In the instant case, the most applicable one is Order 19, rule 20 (1) (b) namely, a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the claimant is affected or threatened.

¹⁵ 5 U.S. 137 (1803).

¹⁶ See A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 14th Edition, 725. See also, Austin Bwagadu Boli Msowoya, "Judicial Review in Malawi: Demystifying the Constitutional Grant, the Constitutional Court (?) and the Oxymoron of Certification" A paper presented at the Malawi Law Journal Launch Conference on 16th to 17th July, 2008 held at Sunbird Mount Soche Hotel in 2008; *The State (On the application of The Malawi Law Society) –and- Prosecutor Levison Mangani, SACP, The Chief Resident Magistrate (Lilongwe) and Secretary to the President and Cabinet*, Judicial Review Case No. 6 of 2023 (High Court of Malawi) (Principal Registry) (Civil Division) (Unreported).

- [62] The Claimant in this application is questioning the decision of the Defendant to arrest and prosecute him in violation of his rights to liberty, movement, human dignity and self-worth. He contends that this is a proper case where the Court should intervene and grant him the permission to apply for judicial review and stay the decision pending the ultimate determination of judicial review.
- [63] The Claimant also contends that he had a legitimate expectation that the Defendant would not abuse her prosecutorial discretion. He argues that abuse of power, arbitrariness and unfairness by government and public authorities are regarded as contrary to the citizen's legitimate expectations.¹⁷
- [64] The Claimant urges that where it is demonstrated that criminal proceedings that the Defendant intends to carry out constitute an abuse of prosecutorial discretion, the Court should not hesitate in putting a halt to such proceedings. He relies on a Kenyan case of *Joram Mwenda Guantai –vs- The Chief Magistrate, Nairobi*¹⁸ where it was held:

...the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression...[I]f the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.

¹⁷ Wade and Forsyth's *Administrative Law*, 7th Edition, 418.

¹⁸ Civil Appeal No. 228 of 2003 [2007] 2 EA 170.

[65] The Claimant further relies on another Kenyan case of *Kuria & 3 others –vs- Attorney General*¹⁹ which held as follows:

The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality...

[66] Similarly, in the case of *Republic –vs- Chief Magistrate's Court at Mombasa, ex parte Ganijee & another*²⁰ another Kenyan decision, it was noted as follows:

It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is

¹⁹ [2002] 2 KLR 69.

²⁰ [2002] 2 KLR 703.

not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the appellant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...

- [67] The Claimant submits that the Defendant is abusing her prosecutorial powers because the Claimant is not connected in any way to the dealings of Nanette Private Limited. He is neither a director, shareholder, employee of the company. The Claimant is not even connected to the procurement of any alleged contract between Nanette Private Limited and Malawi Police Service and is not even connected to the financing of Nanette Private Limited in the tender or order for them to supply uniforms to Malawi Police Service.

- [68] The Claimant alleges that the only plausible explanation for his arrest and intended prosecution is that he has a business feud with Mr. Chaudhry and further that the Defendant is using the Claimant's closeness to the 1st Interested Party to influence and cause her to harass, intimidate him with arrests and prosecution.
- [69] It is in light of the above that the Claimant finally submits that his prosecution be halted pending the hearing of the substantive judicial review proceedings.
- [70] The Defendant agrees that prosecutorial discretion is amenable to judicial review. She relies on the case of *Regina –vs- General Council of the Bar, ex parte Percival*²¹ where it was held that prosecutorial decisions were in principle reviewable, although the precise limits of judicial review would depend upon the powers of the body subject to judicial review, the procedure which it was required to follow and the manner in which it had dealt with the particular complaint.
- [71] The Defendant also cited the case of *R –vs- Inland Revenue Commissioners, ex parte Mead and another*²² where it was held that even though a decision to prosecute an adult is amenable to judicial review, the circumstances in which such a challenge happen are rare and extreme.

²¹ (1990) 3 WLR 323.

²² (1993) 1 All E.R. 772.

[72] The Defendant also relies on the case of *Matululu –vs- Director of Public Prosecutions*.²³

[73] The Defendant further cited *Norman Paulosi Chisale –vs- Inspector General of Malawi Police Service*²⁴ where Chikopa SC, JA made an illuminating observation on prosecutorial discretion when he said that:

Beginning with the injunction, we doubt any court can grant it. It is too general/wide and is clearly equal to an unnecessary interference in law enforcement police work. Like we said in *Maseko*'s case whether or not to arrest or prosecute is a decision which law enforcement including the police make after due consideration. Granting the injunction sought by the Applicant would prevent law enforcement from engaging in such consideration. They would effectively never arrest/prosecute even in the face of good enough reasons. We agree that the citizenry should be protected from unlawful arrests...It is our further view however that our laws have an inbuilt protective mechanism against instances, potential or actual of the abuse of the powers of arrest. It specifically lays out how and when an arrest can/should be made. In either case we think it better, unless the situation leaves us with no other choice, to deal with alleged abuses after the arrest than to order the police not to arrest at all.

[74] The real question in this application revolves around the decision of the Defendant through her Fiscal and Fraud Section made on or around 10th March, 2023 arresting and intending to prosecute the Claimant in relation to a tender to supply uniforms to the Malawi Police Service allegedly won by

²³ n14 above.

²⁴ MSCA Criminal Appeal No. 33 of 2020.

Nanette Private Limited which apparently has absolutely nothing to do with the Claimant.

- [75] According to the Claimant's evidence, his first arrest was in connection to a motor vehicle which his company, Speedy's Limited sold to Mr. Chaudhry. He is answering a charge of fraud other than false pretenses in relation to that transaction. The trial is ongoing. This charge was allegedly at the instigation of one, a certain Mr. Chaudhry.
- [76] The second arrest is in connection with a tender to supply uniforms to the Malawi Police Service that was apparently won by Nanette Private Limited and not the Claimant. The Claimant contends that he is neither a director, shareholder, employee or in any way connected to Nanette Private Limited. He apparently has absolutely no business transactions, dealings or relationship with Nanette Private Limited. The Claimant argues that the decision to arrest and prosecute him on this second transaction is based on extraneous considerations motivated by a private individual to settle private scores. That private individual is also Mr. Chaudhry. The Defendant charged him with the offence of illegal externalization of forex and money laundering. Trial for this is yet to commence.
- [77] This Court has repeatedly read the evidence by the Claimant to try and appreciate what it is that Mr. Chaudhry did to influence the Defendant to take a decision to arrest and prosecute the Claimant in relation to the tender for the supply of uniforms to the Malawi Police Service and was not able to find anything. In the first case, there is an allegation that Mr. Chaudhry obtained a warrant of arrest at a Magistrate Court in Mbulumbuzi in

Chiradzulu District against the Claimant and served it on the Defendant in Lilongwe to execute it. That is no longer in issue. In the second case, it is not clear in the mind of this Court what exactly one can point at as to show that the Defendant was unduly influenced in its decision making process to effect an arrest and later on, prosecute the Claimant at the instigation of one, Mr. Chaudhry. What is clear though from the Claimant's evidence is that the charge of illegal externalization of forex and money laundering against the Claimant relates to the tender to supply uniforms to the Malawi Police Service. This is a standalone transaction.

[78] The two charges are completely different from each other. It is difficult to see how Mr. Chaudhry influenced the Defendant to arrest and prosecute the Claimant herein in relation to the tender to supply uniforms to the Malawi Police Service through Nanette Private Limited whose connection with Mr. Chaudhry has not been demonstrated to this Court.

[79] The arrest of the Claimant by the Defendant was already effected in connection with the tender to supply uniforms to the Malawi Police Service. He is on bail. What remains now is prosecution. As to when prosecution will commence, it is up to the Defendant. If at all there is delay in commencement of prosecution in respect of this specific transaction, the Claimant, is legally represented. His legal practitioners know what to do.

[80] As correctly observed by the Supreme Court of Appeal for Malawi and of course the High Court of Malawi, our laws have inbuilt mechanisms against instances, potential or actual, of the abuse of the powers of arrest, and this Court would add, even prosecution. In the absence of the actual evidence of

what exactly was Mr. Chaudhry's role in the second transaction, this Court is unable to see how he influenced the Defendant to arrest and prosecute the Claimant. It would be against public policy and indeed public interest to have those reasonably suspected to have committed an offence, such as one levelled against the Claimant herein, to have the Court unnecessarily intervene in the investigative and prosecutorial processes under the guise of judicial review. This Court agrees with the Defendant's submission that the Claimant has failed to establish sufficient ground for it to intervene in this matter.

- [81] The fact of the matter is that every arrest will almost inevitably involve infringement of some rights of the accused person. Getting cue from the Supreme Court of Appeal for Malawi and the cases decided by the High Court of Malawi, this Court would be very slow to intervene in cases involving the exercise of prosecutorial discretion, unless there was something very untoward or patently and glaringly amiss with the process undertaken by the Defendant. As the Claimant stated in his evidence, the Defendant carried out investigations in the second transaction which resulted in a number of persons being apprehended and are currently answering charges of forgery and uttering false documents. Those persons include the Claimant and the Interested Parties. The only difference is that the Claimant is answering a charge of illegal externalization of forex and money laundering but also arising from the same uniforms' transaction. This Court is not satisfied that the Defendant took a decision to arrest and prosecute the Claimant based on instructions that were given to her by a certain Mr. Chaudhry in order to settle personal private scores. The circumstances in which such instructions were given to the Defendant by Mr. Chaudhry in the

uniforms' transaction have not been disclosed to this Court. At best, the Claimant's assertion seems to be based on mere conjecture that his arrest was because of the business feud he had with one, Mr. Chaudhry.

[82] The due enforcement of all laws with which the Police are directly charged lies on the Defendant and her service. It is for her to decide on the disposition of her service and the concentration of her resources on any particular crime or area. No court should give her directions on such a matter. She is answerable to the law and the law alone. Through the same law, her investigations and decision to prosecute the Claimant will be tested and if found wanting, there are remedies that would be available to the Claimant.

[83] In view of the foregoing, this Court finds that the Claimant has not made out a compelling case establishing illegality, irrationality, impropriety, dishonesty, *mala fides*, or some other exceptional circumstance on the part of the Defendant requiring this Court to intervene to halt the impending prosecution of the Claimant. Even applying, *mutatis mutandis*, the rare and extreme circumstances laid down in the *Matuhulu* case to the Defendant, the Claimant has not been able to satisfy this Court on the need for it to intervene in this matter. Consequently, permission to apply for judicial review is denied.

[84] Having declined to grant permission to apply for judicial review, the interim relief of stay or suspension of the decision of the Defendant has no legs to stand on. It automatically falls away.

[85] Costs are awarded in the discretion of the Court.²⁵ Where the Court decides to make an order for costs, the general rule is that the unsuccessful party pays the costs of the successful party.²⁶ The Defendant is awarded costs of this application and the same are to be assessed by the Registrar of the Court if they will not be agreed by the parties.

[86] Made in Chambers this 19th day of May, 2023 at Blantyre, Malawi.


M. D. MAMBULASA
JUDGE

²⁵ Section 30 of the Courts Act, Cap. 3:02 of the Laws of Malawi. *See also* Order 31 rule 3 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017.

²⁶ Order 31 rule 3 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017.