IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 1 OF 2003

(Being High Court Lilongwe District Registry
Miscellaneous Civil Cause No. 1428 of 2002)

BETWEEN:

HON. J.Z.U. TEMBO.....1ST APPELLANT

HON. KATE KAINJA.....2ND APPELLANT

-vs-

THE HON. SPEAKER OF .....RESPONDENT
THE NATIONAL ASSEMBLY

BEFORE: THE HONOURABLE, MR. JUSTICE TAMBALA,JA
THE HONOURABLE JUSTICE MSOSA, JA
THE HONOURABLE MR. JUSTICE MTAMBO, JA
Mr. Mvalo, Counsel for the Appellant
Mr. Kamanga, Counsel for the Respondent
Mr. Kaira, Counsel for the Respondent
Mr. Mchacha, Court Official and Recording Officer

JUDGMENT

TAMBALA, J.A.

The appellants are Hon. John Zenasi Ungapake Tembo, Member of Parliament for Dedza South Constituency and Hon. Kate Kainja, Member of Parliament for Dedza South West Constituency. On 13th December, 2002, the National Assembly passed a motion in Parliament mandating the Speaker of Parliament to publish in the gazette a notice under section 63-(2) of the Constitution that the Parliamentary seats of the said Hon. Tembo and Hon. Kate Kainja had become vacant following their conviction for contempt of court; the National Assembly took the view that contempt of court is a crime involving dishonesty or moral turpitude. On 18th December, 2002 the appellants were granted, by the High Court at Lilongwe, an interlocutory injunction restraining the Speaker from executing the motion. On 27th December, upon the application of the Hon. Attorney General, the injunction was dissolved. The appellants were displeased with the High Court's decision in dissolving the injunction. They therefore, appealed to this court.

The relevant facts of this case are that on 17th June, 2002, Mkandawire, J., sitting at the Principal Registry in Blantyre granted an order of injunction against the appellants. The injunction restrained the appellants from holding a Malawi Congress Party Convention on 22nd June, 2002 at the Natural Resources College in Lilongwe. Despite the fact that they were duly served with the order of injunction, the appellants defied the injunction and proceeded to conduct the Convention. Following contempt of court proceedings brought before the High Court at Blantyre Principal Registry, Mkandawire, J., On 11th October, 2002 found the appellants guilty of contempt of court for wilfully disobeying an order of injunction. The learned judge ordered each appellant to pay a fine of K200,000.00 or serve 12 months imprisonment with hard labour in default of paying the fine. The appellants were also ordered to pay costs of the court proceedings. The fines were paid by the appellants.

On 12th December, 2002, Hon. Paul Maulidi, Member of Parliament for Blantyre North and also Deputy Secretary General of the United Democratic Front Party successfully moved the National Assembly sitting at Lilongwe to pass a resolution requiring the removal of the appellants from Parliament on the ground that they had been convicted of a criminal offence involving dishonesty or moral turpitude. Hon. Maulidi claimed, and Parliament agreed, that the conviction for contempt of court constituted a conviction of a

crime involving dishonesty or moral turpitude. The Speaker of the National Assembly was then mandated to cause publication in the Government Gazette that the two appellants had vacated their parliamentary seats. Such publication would pave the way for holding bye-elections in the appellants' respective constituencies. The appellants would be barred from contesting in such bye-elections.

On 18th December, 2002 Mr. Mvalo representing the appellants brought before the High Court, Lilongwe Registry, an application for leave to commence judicial review proceedings. He was seeking the court's intervention to consider whether the National Assembly was correct when it decided that a conviction of contempt of court constituted a conviction of a crime involving dishonestly or moral turpitude. The appellants also claimed that events in Parliament prior to the passing of the motion in question showed that the National Assembly violated rules of natural justice. At the same time, learned Counsel for the appellants applied for an interlocutory injunction to restrain the National Assembly from executing the motion which it passed. On the same day, 18th December, 2002 Kumange, J., granted, in favour of the appellants, leave to apply for judicial review of the decision of the National Assembly and an order of interlocutory injunction.

On 24th December, 2002, Hon. Attorney General and Hon. Maulidi applied to the same court which granted the order of interlocutory injunction to have the order vacated. The application was heard on 27th December. It was successful. The injunction was vacated, as we have said above.

Learned Counsel for the appellants filed eleven grounds of appeal i.e. grounds 2a to 2k inclusive. He argued grounds a, b and c together. The two principal arguments made by learned Counsel on these grounds are that the Speaker of the National Assembly was rightly sued when he was made a defendant in judicial review proceedings. The purpose of the judicial review proceedings was to call upon the court to review the decision of Parliament which required the appellants to vacate their parliamentary seats on the ground that they had been convicted of a criminal offence involving dishonesty or moral turpitude. The other argument is that even if the Speaker of the National assembly was wrongly sued, an error as to parties is a procedural error which can be cured by an amendment. Learned Counsel contends that the learned Judge was wrong to dissolve the injunction on the sole ground that the appellants had committed a procedural error.

There is no doubt that the appellants were wrong to sue the Speaker of the National Assembly in the present case. The question whether the Speaker of the National Assembly can be sued as a party in judicial proceedings for a decision made or an act done by him in his official capacity was authoritatively decided in the case of the **PRESIDENT OF MALAWI** and the **SPEAKER OF THE NATIONAL ASSEMBLY**

v. KACHERE and **Others M.S.C.A. CIVIL APPEAL NO**. **20 of 1995.** That case decided that it would be wrong to sue the Speaker of the National Assembly where a decision made or an act done by him in his official capacity is in issue. The correct party is the Attorney General. It is our view that any decision of the High Court which decides or purports to decide to the contrary is clearly wrong. That disposes of the first argument.

As regards the second argument that a procedural error can be cured by an amendment, we agree that such errors are rectified by an amendment. But clearly learned Counsel did not ask the court to allow him to make the necessary amendment. We are not impressed by Counsel's argument that the learned Judge in the court below should have ordered that the necessary amendment should be made, pursuant to 0.20 rule 8 of the Rules of the Supreme Court. A decision regarding which party to sue is an important decision which is made by a party or his Counsel after a careful consideration of the facts of the case. The task of which party to sue must be performed by the litigant and not the court. It is no business of the court to assist a litigant in choosing for him the correct party to sue. Where a litigant is represented by Counsel it would not be proper for the court to assist Counsel in making a decision regarding the correct party to sue. To do otherwise would undermine the essence and spirit of our adversarial system of litigation. Courts are not in the habit of forcing an amendment on a litigant: See **CROPPER v. SMITH (1884) 26 Ch.D 700.**

Section 4 of **Civil Procedure (Suits by or against the Government or Public Officers) Act Cap 6:01** requires at least two months notice before commencing a court action against Government through the Attorney General. In the present case the National Assembly passed the motion in question on 13th December, 2002. It would seem that the appellants were desperate to obtain an injunction against the National Assembly's decision urgently. They were not prepared to wait for two months before obtaining such injunction. That would explain why they preferred and insisted to sue the Speaker and not the Attorney General. But the law cannot be evaded in that manner. Again, according to **section 10** of the **Civil Procedure (Suits by or against the Government or Public Officers) Act,** no injunction can be granted against Government, but instead a court may make a declaration of the rights of the parties. It would seem that the appellants fearedthat they could not obtain an injunction from the court if they sued the Government through the Attorney General. It is correct that an injunction cannot be granted against the Government. That is the law. Now, you do not avoid the law by deliberately suing a wrong party. We find no merit in the arguments made by learned Counsel for the appellants in respect of grounds a, b and c.

Grounds e, f, g and i related to judicial review proceedings. Briefly, the appellants contend, in these grounds, that the learned Judge in the court below erred when he dismissed the application for judicial review, during the hearing of an application to dissolve an interim injunction. It would seem that the learned Judge dismissed the application for judicial review on two grounds. The first was that wrong parties were sued as respondents. The second was that the principal issue to be determined in the judicial review proceedings was the construction of section 51-(2)(c) of the constitution

and whether the appellants' conviction of contempt of court was caught within that constitutional provision. It was the view of the learned Judge that the construction of a constitutional provision and the issue whether the appellants were convicted of a crime involving dishonesty or moral turpitude were not proper subject matter for judicial review. He took the view that those matters could be dealt with in proceedings commenced by originating summons.

We take the view that the learned Judge in the court below was wrong to dismiss the application for judicial review. The application which was brought before him requested him to discharge the injunction. It was not about dismissing judicial review proceedings. After dissolving the injunction the appellants would have sufficient time to bring an application to amend the application for judicial review to reflect the correct parties to the action.

It is correct that in judicial review proceedings the court is concerned with the decision making process and not the merits of the decision under review. It could therefore be argued that the issue of construction of a statute, constitutional provision or document which was dealt with in the decision under review would not be a subject of judicial review. However in an appeal in which the principal issue is whether an interim injunction granted on 18th December, 2002 was properly dissolved, we find it unnecessary to resolve the question whether the issue of construction of section 51-(2)(c) and the appellants' conviction for contempt of court could be a proper matter for judicial review proceedings. We take the view that that issue may be carefully considered and resolved in the pending judicial review proceedings. Then the appellants also complained that in the course of making the decision in question the National Assembly breached rules of natural justice. Clearly the judicial review proceedings should have been spared at least for the purpose of considering whether the National Assembly failed to observe principles of natural justice when they debated the motion and passed it. It is our clear opinion that the learned Judge in the court below was wrong to dismiss the application for judicial review.

In ground d the appellants contend that there was no satisfactory ground for dissolving the injunction. The injunction was granted against the Speaker of the National Assembly, Hon. Paul Maulidi and the United Democratic Front Party. Clearly all the three respondents were wrong parties. The learned Judge in the court below was justified in holding that the appellants brought an application for judicial review against wrong parties. He was right to strike off the said respondents from the proceedings. The question would be having struck off the three respondents from the proceedings, against whom would the interlocutory injunction stand? Clearly the appellants lost the injunction when it became clear that they sued wrong parties. Even if the appellants rightly sued the Attorney General, they would not, according to **section 10 of Civil Procedure (Suits by or against Government or Public Officers) Act,** be entitled to an injunction. The appellants' application for an interlocutory, injunction in the court below was misconceived. It was wrongly granted and the injunction could not survive an

application for its dissolution.

In ground h the appellants claim that the learned Judge in the court below wrongly thought that the judicial review proceedings related to the contempt of court proceedings which were brought at the Principal Registry in Blantyre. We find no justification in such claim. One of the documents which was filed in the court below when an application for leave to apply for judicial review was made is called "NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW' (O.53, r 3). The document clearly shows that the decision in respect of which relief was sought was -

" The passing of the motion by the National Assembly on the 13th day of December, 2002 that the Honourable Speaker do publish in the gazette notice under section 63 (2) of the Constitution that the seats of Honourable John Zenasi Ungapake Tembo.....and Honourable Kate Kainja.....have become vacant by virtue of a conviction.....by the High Court of Malawi of contempt of court which is a crime involving both dishonesty and moral turpitude."

The originating summons filed by Counsel for the appellants to commence judicial review proceedings made it quite clear that what was required to be reviewed was the motion of the National Assembly passed on 13th December, 2002 at the request of Honourable Paul Maulidi, Member of Parliament for Blantyre North Constituency. Then at page 6 of his ruling the learned Judge states -

"The gist of the matter lies in the fact that the two

applicants were removed from membership of the National Assembly, and upon being aggrieved with the decision thereof, applied to this court for leave to apply for judicial review."

Clearly, Mkandawire, J., did not make a decision to the effect that the two appellants should be removed from Parliament. The learned Judge simply ordered them to pay a fine. It was the National Assembly which made the relevant decision. We are satisfied that the learned Judge in the court below correctly understood that the application for judicial review concerned the motion passed by the National Assembly on 13th December, 2002.

In grounds j and k the appellants contend that the ruling of the learned Judge is unclear and that it lacks consistent reasoning. They also say that the learned Judge's decision is generally against the principles on which an interlocutory injunction may be dissolved. We have demonstrated, when we considered ground d, that the injunction was properly dissolved. We are therefore unable to find grounds j and k useful. Learned Counsel for the appellants must appreciate and give credit to the learned Judge for hearing the application on 27th December, 2002 and making and pronouncing his ruling on the same

day. He must have written the ruling when it had become dark as he complains at page 11 of the ruling that he could not read the Rules of the Supreme Court due to darkness. The learned Judge deserves praise for making a speedy ruling, and not unfounded criticism.

The appellants' appeal relating to the dissolution of the interlocutory injunction is disallowed on the ground that the injunction was granted against wrong parties and also on the further ground that even if the appellants had brought their action against the proper party, namely, the Attorney General**section 10 of Civil Procedure (Suits by or Against the Government or Public Officers) Act**, clearly prohibits the granting of injunction against Government. The appellants' appeal relating to the dismissal of the application for judicial review is allowed.

The appeal is partly allowed. Each party shall bear its own costs.

DELIVERED in Open Court this 28th day of April, 2003 at Blantyre.

Sgd.....

D.G. Tambala, JA

Sgd.....

A.S.E. Msosa, JA

Sgd.....

I. J. Mtambo, JA