**IN THE MALAWI SUPREME COURT OF APPEAL**

**AT BLANTYRE**

**M.S.C.A. CIVIL APPEAL NO. 27 OF 2003**

(Being Civil Cause No. 50 of 2003 at Mzuzu District Registry)

**BETWEEN:**

**HON. J.Z.U. TEMBO.....1st APPELLANT**

**HON. KATE KAINJA.....2nd APPELLANT**

**- AND -**

**THE ATTORNEY GENERAL.....RESPONDENT**

**BEFORE: THE HON, JUSTICE KALAILE, JA**

**THE HON. JUSTICE TAMBALA, JA**

**THE HON. JUSTICE MSOSA, JA**

**THE HON. JUSTICE MTAMBO, JA**

**THE HON. JUSTICE TEMBO, JA**

**Stanbrook, QC, Mvalo and Mwakhwawa for the Appellants**

**Hon. Fatchi, SC, Attorney General, Banda, SC, Latif and Kaira for the Respondent**

**Beni, Recording Officer**

**Kunje(Mrs), Official Interpreter**

**JUDGMENT**

**KALAILE, JA**

This is an appeal against the decision of Chikopa, J sitting in the High Court, Mzuzu registry, and our decision in this appeal is unanimous. The two appellants were convicted of contempt of court for disobeying an order of injunction. The trial judge found that the contempt of court in question was criminal and that it involved both dishonesty and moral

turpitude.

The background to the appeal lies in a dispute between two factions of the Malawi Congress Party over the holding of a convention. One faction owed loyalty to the Hon. Gwanda Chakuamba, and the other faction to the Hon. J.Z.U. Tembo. The Tembo faction decided to hold the party convention and the Chakuamba faction opposed the idea of holding that convention, and, it was the Chakuamba faction which applied to Court for an injunction to stop the convention. The application was successful and the injunction was granted by Mkandawire, J. That injunction was disobeyed and Mkandawire, J found that both appellants attended the convention and accordingly adjudged them to be in contempt of court and fined each of them K200,000.00. The fines were duly paid.

As a consequence of their conviction, the National Assembly proceeded to pass a motion that the seats of the two appellants had become vacant on the grounds that they were convicted by the High Court of contempt of Court which according to the National Assembly was a crime involving both dishonesty and moral turpitude.

In the Court below, the appellants sought the determination of the Court on the following issues which we now reproduce seriatim that:

"1. The National Assembly usurped the powers of the Courts by assuming the function of interpreting matters of law, and thereby acted **ultra vires.** Accordingly that its decision is a nullity;

2. The contempt in question was in fact of a civil nature and therefore as it was not a crime it fell outside of the realms of section 51(2)(c) of the Constitution. Accordingly that it was wrong to declare the plaintiffs' seats vacant under that section;

3. In the circumstances the plaintiffs were not at all eligible to have their seats declared vacant;

4. The contempt in question did not involve dishonesty or moral turpitude as envisaged by section 51(2)(c) of the Constitution where the offence is required to be of a criminal nature;

5. The decision was arrived at in breach of principles of natural justice, particularly the need to afford the other party adequate opportunity to be heard;

6. The decision was arrived at in breach of the Constitutional right of the plaintiffs to lawful and procedurally fair administrative action;

7. The decision infringed the plaintiffs' political rights under the Constitution;

8. In the result, the plaintiffs have always been members of the National Assembly in the eyes of the law, and accordingly are fully entitled to, and have always been fully entitled to attend sittings of the National Assembly, and to all remuneration due to them as members of the National Assembly, and to all privileges and immunities of a member of the National Assembly; and

9. The defendant may be condemned in costs of the action."

The High Court found against the appellants who have now appealed to this Court on the following grounds:

a) that the learned judge correctly referred to Practice Notes to Order 52/1 of the Rules of the Supreme Court (1999 edition) on the categorization of civil contempt and criminal contempt but deliberately and wrongfully chose to ignore Practice Note No. 52/1/8 to Practice Note No. 52/1/20 and particularly Practice Note no. 52/1/14. Had the learned judge gone by the examples given under Practice Notes 52/1/8-52/1/20 on what is criminal contempt and what is civil contempt he would have found without difficulty that the contempt of Court which the plaintiffs were found guilty of, namely disobedience of an injunction, was civil.

b) The finding of the learned judge below that the contempt in question, namely disobedience of an injunction, was of a criminal nature was against the legal definitions and descriptions of "criminal contempt" and inconsistent with the examples given of civil contempt and criminal contempt.

c) The learned judge correctly defined "crime" but inexplicably contradicted himself by finding that the plaintiffs' conduct posed a serious threat to society capable of injuring it and that therefore their conduct fitted both the definition of criminal contempt and crime, when it clearly did not. Had the learned judge properly addressed his mind to the definitions of "crime" and correctly applied those definitions to the facts he would have found that the appellants did not commit a crime.

d) The finding of the learned judge below that the disobedience of an injunction by the appellants was a crime was against the legal definitions of "crime" as well as the weight of authority on what is a crime.

e) Having correctly stated that "a crime involving moral turpitude" means moral turpitude must be inherent in the crime, the learned judge erred in proceeding to the

conclusion that the relevant contempt was a crime involving moral turpitude.

At this point of the judgment, it may be wise to state the provisions of section 51(2)(c) of the Constitution. That section reads as follows:

"Notwithstanding subsection (1), no person shall be qualified to be nominated or elected as a member of Parliament who has, within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude."

Leading Counsel for the respondent Mr. Banda, proceeded to defend and uphold the findings of the lower Court by dealing with these grounds of appeal. He started by submitting that a mere disobedience of an injunction may not necessarily be a criminal contempt and that the case of **Scott -v- Scott** (1913) A.C. 419 makes it clear. Counsel further drew the attention of the Court to cases where mere disobedience of an injunction was also held to be a criminal contempt.

Mr. Banda argued that in the case of **Attorney General -v- Times- News Paper** (1972) A.C. an interim injunction was issued barring the Times Newspaper from publishing the contents of a book called the **Spy Catcher.** The defendants flouted the injunction. Lord Oliver observed at page 218 of the judgment:

"When, however, the prohibited act is done not by the party bound himself but by a third party a stranger to the litigation that person may be liable for contempt. There is however this essential distinction that his liability is for criminal contempt .....because his act constitutes a**wilful interference with the administration of justice by the Court in the proceedings** in which the order was made."

It was argued for the respondent that the appellants in this appeal were not parties to the civil cause in which the injunction was granted. They were very interested third parties who had received notice of the injunction and defied it. Then Mr. Banda cited the case of **British Columbia government Employee Union -v- Attorney General of Columbia** 19882 S.C.R. where an injunction was granted restraining picketing and attendant activities near Court premises in a particular place in British Columbia. The defendant union continued picketing and was duly found guilty of criminal contempt of Court.

The next case which Counsel reverted to is**Peter Chupa -v- The Mayor of the City of Blantyre and Others** Civil Cause No. 133/2001. What happened in this case is that the applicant, Peter Chupa, brought proceedings against the Mayor of the City of Blantyre alongside three Police Officers and obtained an order of injunction which stipulated that

the defendants, their servants or agents be restrained from disrupting or interfering with the plaintiff from holding a public meeting at Ndirande Community Ground on a specified date. That Order of injunction was defied by the defendants'. Twea, J stated in that case that:

"The parties were agreed that contempt consists of committing acts which tend **to interfere with the administration of justice.** This includes contempt in the face of the Court, such as insulting behaviour to the Court or violence to judicial officers. This is what has been called "criminal" or "special" contempt. But in respect of "civil" or "ordinary" contempt, it will be termed criminal if it involves misconduct or refusal to obey specific orders of the Court. To this extent it will be criminal and will be treated and dealt with as such. The parties in this case argued that there was a valid Court order and that this Court order was not obeyed. They further agreed that to this extent the contempt in issue takes the proportions of criminal conduct and that the burden and standard of proof will be, to that extent, at criminal level."

Lastly, we wish to refer to the Canadian case of **Poje -v- Attorney General for British Columbia** (1953) S.C. 2516 at 527. In that case Wellock J. observed:

"The context in which these incidents occurred; the large numbers of men involved and the public nature of the defiance of the order of the Court transfer the conduct here in question from the realm of a mere civil contempt such as an ordinary breach of injunction with respect to promote rights in patent or trade mark for example into the realm of public depreciation of the authority of the Court tending to bring the administration of justice into scorn."

Mr. Banda went on to demonstrate how the conduct of the appellants was on all fours with the contemnors' conduct in the **Poje** case by submitting that the Court should therefore imagine the situation where delegates from one faction of the party had gathered from different parts of the country to come and attend the convention. The issue of the application for an injunction to stop the convention was widely publicised and the granting of the injunction stopping the convention was also widely publicized in the country and outside. The whole country waited breathlessly wondering whether the appellants would or would not hold the convention. It is against this background that the appellants, inspite of that wide publicity given to the granting of the injunction that they publicly and defiantly went ahead and held their convention. This Court was invited to constantly put these facts to the fore as they provide a proper perspective to the conviction for contempt of Court.

Mr. Clive Stanbrook, leading Counsel for the appellants, dealt with each of the authorities cited above as well as their attendant submissions in the following way. First is the case of **Scott -v- Scott** (1913) AC 417 at 462 where Lord Atkinson quotes with approval from the judgment of Lord Moulton in the Court of Appeal:

"It is only the legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act....."

Counsel for the appellants Mr. Stanbrook, further argued the point that to be an effective remedy civil contempt has always incorporated a disciplinary element. Thus **coercion** and **deterrence** are to be found alongside each other in the frame work of a civil contempt. Although "civil contempt" is concerned with breaches of Court orders or undertakings in civil litigation, for the benefit of parties, the Court may wish primarily in such cases to coerce parties into compliance with its orders, or, alternatively, as in the present case, it may be primarily concerned to punish disobedience where the time for compliance has passed. This point is clearly illustrated by the case of **Re Grantham Whole Fruit, Vegetables and Potato Merchants Limited** [1972] 1 WLR 559 where Megarry J. observed that: **"In this type of case a motion for committal is, of course, a means of putting pressure on the contemnor to obey the order, but it is not this alone: it is also a means of imposing any penalty thought proper in respect of the contempt that has already been committed."** The appellants' disobedience falls within the parameters of the dictum of Megarry J. in the **Re Grantham case**. This was Mr. Stanbrook's submission.

So far, we have captured the submissions of both parties to this appeal. To sum up, the respondent's argument is captured very forcefully in some of the cases cited by their leading Counsel, namely the cases of **Poje -v- Attorney General** for **Columbia** and that of **United Nurses of Alberta -v- Alberta (Attorney General)** [1992] I.S.C.R. which emphasized the public nature of the defiance and the open and flagrant defiance of Court orders in cases involving criminal contempt. Counsel for the appellants distinguishes the **Poje** case from the one before us by pointing out that the case arose because a large group of American woodworkers, part of a Trade Union, were picketing a dock in Vancouver so as to prevent the loading of a cargo of timber. The plaintiff obtained an injunction against these trade unionists. Even in the face of warnings from the Sheriff that they were acting in defiance of the Court's order, they were totally recalcitrant. Mr. Stanbrook argued vigorously that this case can be distinguished from the one under consideration because in the**Poje** case, there was collective coercion of third parties, warnings from the police, conditions of public outrage and, finally, the issue of writs by the Court itself. The present case involves a mere disobedience of a Court order.

In dealing with the case of United Nurses of **Alberta -v- Alberta (Attorney General),** this is what Counsel for the appellants observed. There was a directive issued by an appropriate administrative board under Alberta's Labour Relations Act forbidding nurses

in Alberta from striking. The union went on strike regardless and were found guilty of criminal contempt and fined. The issues for determination were:

(1) Whether the union had the status to be found in criminal contempt;

(2) Whether the offence of criminal contempt violated the Canadian Charter of Rights and Freedoms;

(3) Whether a directive of a provincial board filed in the Court could give rise to criminal contempt; and

(4) Whether the proceedings violated the Charter because the union was not permitted to cross-examine on the affidavits filed by the Crown.

The majority decision was that the union may be held liable for a criminal offence (including criminal contempt) at common law. The criminal contempt must be distinguished from civil contempt in that criminal contempt is to punish conduct calculated to bring the **administration of justice by the Courts into disrepute**, whereas, civil contempt is to secure **compliance with the process of a tribunal** including but not limited to, the process of a Court.

In Mr Stanbrook's opinion, the **Alberta** case is clearly one of criminal contempt because of what Lord Moulton observed in the Court of Appeal in **Scott -v- Scott** stating that:

"It is only the **legislature** that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act....."

In the **Alberta** case the criminal contempt related to an offence emanating from statutory provisions where the penal provisions were prescribed by statute. As observed by Mr. Stanbrook, this case does not advance or expound the difference between civil and criminal contempt regard being had to the narrow divide between the majority and minority opinions of the bench on what constituted criminal contempt.

Lastly, Mr. Stanbrook addressed the Court by asking the question - What is obstruction or interference with the course or the due administration of Justice? He cited Lord Diplock's dictum in **Attorney General -v- Times Newspapers Limited** (H.L. (E) )

[1974] AC at 309. (Per Lord Diplock):

"The due administration of justice requires **first** that all citizens should have unhindered access to the constitutionally established Courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; **secondly,** that they should be able to rely upon obtaining in the Courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in Courts of law; and **thirdly** that, once the dispute has been submitted to a Court of law, they should be able to rely upon there being no usurpation by any other person of the function of that Court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of Court. The commonest kind of conduct to come before the Courts on applications for committal for contempt of Court has been conduct which has been calculated to prejudice the second requirement. This is because trial by jury has been, as it still is, the mode of trial of all serious criminal offences, and until comparatively recently has also been the mode of trial of most civil cases at common law which are likely to attract the attention of the public."

Counsel went on to submit that the definition of the phrase "obstruction or interference with due administration of justice" correlates well with the definition and scope of contempt in facie curiae. The two, requirements, as observed by Lord Diplock, are the common denominator of criminal contempt. Therefore criminal contempt is restricted and limited to conduct in facie curiae, and conduct disrupting the orderly course or the due administration of justice.

In the context of these principles,we can now assess the facts of the present case. The contempt is certainly not in facie curiae, nor is it directed at the Courts and did not in any real sense obstruct or interfere with the course of justice. Further, the contempt proceedings were not a matter taken on the initiative of the Court. In the circumstances, it seems to us that this case does arise out of the traditional common law scope of a civil contempt.

As far as we can see, the present case turns on three pillars. The first of these pillars is the case of **Scott -v- Scott** (1913) AC 417. Civil contempt is described in that case by Lord Atkinson thus:

"If a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court."

We are satisfied without doubt that the case before us falls squarely within that exposition of the law.

The second pillar which also demonstrates that the facts of this case related to a civil contempt are the Rules of the Supreme Court (1999 edition). From pages 879 to 881 of those Rules, it is stated therein that contempts of Court in paragraphs **a to k** are civil, and the rest that follow thereafter are criminal. Specifically it states under paragraph **f** that disobedience to a judgment or order to abstain from doing an act is a civil contempt.

The third of these pillars is Halsbury's Laws of England 4th edn. Volume 9 at paragraph 52. Paragraph 52 states that it is a civil contempt of Court to refuse or neglect to do an act required by a judgment or order of the Court within the time specified in the judgment or order, or, to disobey a judgment or order requiring a person to abstain from doing a specified act. This statement of the law is further echoed in Black's Law Dictionary, 6th edition at page 245. It is stated therein that civil contempt is a species of contempt of Court which generally arises from a wilful failure to comply with an order of Court such as an injunction as contrasted with criminal contempt which consists of contumelieus conduct in the presence of the Court. Punishment for civil contempt may be a fine or imprisonment, the objective of such punishment being compliance with the order of the Court. Such contempt is committed when a person violates an order of Court which requires that person in specific and definite language to do or refrain from doing an act or series of acts.

In our considered judgment, the case before us should be determined purely on common law principles and not under any statutory provisions such as those applicable in England after the Contempt of Court Act 1981 was enacted. Any English cases after 1981 should be taken into consideration with caution. The same caution applies with regard to cases from the United States and Commonwealth countries where contempt of court is regulated by statutory provisions. In Malawi, contempt of Court is not prescribed for by legislation and this is why we still apply the common law.

In the result, we hold that the contempt of Court which the appellants were convicted of is not a crime, but a civil contempt of Court, and, therefore, that the conviction falls outside the ambit of sections 51(2)(c) and 63 (1)(e) of the Constitution of the Republic of Malawi.

Having decided that the contempt of Court in the case before us is one of a civil nature, we do not see any need to go through the academic exercise of determining whether or not the contempt involved moral turpitude or dishonesty. Accordingly, we allow the appeal. The respondent shall pay the costs of the appeal.

**DELIVERED** in Open Court this 23rd day of December, 2003 at Blantyre.

Sgd.....

J. B. Kalaile, JA

Sgd.....

D. G. Tambala, JA

Sgd.....

A.S.E. Msosa, JA

Sgd.....

I. J. Mtambo, JA

Sgd.....

A.K. Tembo, JA