

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 14 OF 2004

(Being High Court Constitutional Case No. 5 of 2004)

BETWEEN

THE MALAWI ELECTORAL COMMISSION.....1ST APPELLANT

- and -

THE UNITED DEMOCRATIC FRONT.....2ND APPELLANT

- and -

THE ATTORNEY GENERAL.....3RD APPELLANT

- and -

THE REPUBLICAN PARTY.....RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE

THE HONOURABLE MR JUSTICE TAMBALA, JA

THE HONOURABLE JUSTICE MSOSA, JA

THE HONOURABLE MR JUSTICE MTAMBO, JA

THE HONOURABLE MR JUSTICE TEMBO, JA

Kaphale, Counsel for the Appellants

Matenje, Solicitor General, for the Attorney General

Pacharo Kayira, Principal State Advocate, for the Attorney General

Charles Mhango/Chibambo/Nkhono, Counsel for the Respondent
Chingota (Mrs)/Chiume (Mrs), Court Reporters
Mchacha, Official Interpreter
Kunje (Mrs), Recording Officer

J U D G M E N T

Unyolo, CJ

As we indicated yesterday at the conclusion of hearing submissions made by learned Counsel on both sides, it was not possible for us to write and come up with a full and carefully reasoned judgment overnight. We said that we would today simply give a brief outline of the judgment. We took the view that this approach was in the interests of the parties and may be several other concerned persons as well that must be anxiously awaiting the outcome in this case. We will therefore write our formal judgment later.

The material facts of the case are as follows. By an expedited Originating Summons returnable on 12th May 2004, the Respondent, namely, the Republican Party, a political party representing its members and all members of what is known as the Mgwirizano Coalition Grouping, sought the determination of the Court below on divers questions pertaining to the forthcoming General Elections, namely:

- “1) Whether the 1st Defendant was correct in referring the issue of deployment by UDF of Government resources to the Office of the President, instead of the 1st Defendant taking steps to stop such deployment of public resources for campaigning purposes.
- 2) Whether or not the figure of 6,671,816 registered voters is probable and attainable for 2004 General Election, regard being had to Malawi’s population projection figures reported by the NSO.
- 3) Whether the period of verification from 26th to 30th April 2004 satisfied the requirement for the purpose of verifying Voters Roll for all the polling centres throughout the country.
- 4) Whether the period after verification has not abridged the requirement that there should be 21 days from closure of the verification process to the first polling date, and if

so whether the abridgement process of the 21 days is not unlawful.

5) Whether MEC's decision in effecting such abridgement has not affected the rights of the Plaintiffs and other stakeholders in view of the order of the Court in Miscellaneous Civil Application No. 28 of 1999 between Gwanda Chakuamba vs The 1st Defendant.

6) Whether the decision by the MEC to designate monitors for independent candidates does not justify designation of additional monitors for every presidential candidate, on each Polling Centre.

7) Whether the election would be free and fair without first addressing and correcting the irregularities complained of before going to the poll.

8) Whether recent admission by the Chief Executive Officer (Roosevelt Gondwe) that the Voters Roll figure appears to be on the high side, and is likely to be reduced after a clean-up process, does not demonstrate inefficiency and serious flaws in the electoral process."

The Respondent went on to ask the Court, by way of reliefs, to give such orders, declarations and directions as the Court would consider just and expedient in the circumstances of the case, including:

“(i) an order that the 1st Defendant's decision to fix time for inspection and verification for the period from 26th to 30th April 2004 has adversely affected the rights of the Plaintiff and other stakeholders to inspect the voters register within 21 days from the date before the polling day;

(ii) the abridgement of the 21 days from the end of the verification to the polling day occasioned by the 1st Defendant in consideration of S21 PPEA is unlawful;

(iii) that the 1st Defendant has failed to discharge its constitutional duty imposed by section 76(2)(d) of the Malawi Constitution, in that, it has failed to comply with statutory provision of section 29 and section 31 of PPEA as read with Section 8(i)(m) of the enabling Act;

(iv) an order that adequate time for verifying the Voters Roll be accorded to enable the Plaintiffs exercise their rights to fully and completely verify the Voters Rolls;

(v) an order requiring the 1st Defendant to justify the figure of 6,671,816 for Registered Voters;

(vi) an order that time for presenting names and particulars of monitors to man the presidential candidates voting at each polling centre be designated;

(vii) a declaration that the MEC has failed to take measures and to do such other things as are necessary for conducting free and fair elections.

(viii) The 2nd and 3rd Defendants be ordered not to deploy Government financial, material or human resources for promoting its interest or undermining the Plaintiff during this campaign period.”

After hearing Counsel in argument, the Court below found, as regards the 1st Appellant, the Malawi Electoral Commission that is, that it, the said Malawi Electoral Commission, had erred and abdicated its constitutional and statutory duty in referring the complaint made to it by the Respondent relating to alleged abuse of public resources by the President and the United Democratic Front (UDF) to the Office of the President and Cabinet.

The lower Court further found that the verification process put in place by the 1st Appellant fell short of the statutory period prescribed for the purpose. The lower Court also found that the forthcoming General Elections would not be free and fair.

The lower Court then ordered a re-commencement of the verification process and that the date for conducting the polls be shifted forward by not more than seven days.

Further, the lower Court ordered that all excess ballot papers in the possession and custody of the 1st Appellant should be counted manually and deposited in a warehouse which should be under the control of the High Court. The keys of such warehouse were to be kept by the Registrar of the High Court, who was directed to procure an additional locking mechanism for the warehouse and to have it sealed.

The 2nd Defendant, the United Democratic Front (UDF) did not contest the proceedings and a judgment on admission was entered against it, with costs.

Finally, the lower Court found that the 2nd Appellant, namely, the Attorney General, was properly joined as a party to this case, in that he wrongly accepted the referral made by the 1st Appellant on an issue he had no jurisdiction or mandate to handle.

The Appellants appealed to this Court against these findings and orders. The 1st Appellant filed eight grounds of appeal. The 2nd Appellant filed four.

In the course of hearing the appeal yesterday, learned Counsel for the 1st Appellant withdrew six of the grounds of appeal and only argued two. The six grounds of appeal withdrawn related to the order the lower Court made concerning the shifting of polling date and the orders ancillary thereto. Observably, it was considered not necessary to pursue the appeal on those matters since the 1st Appellant had already acted on the order and shifted the polling date from the original date of 18th May 2004 to 20th May 2004.

For his part, the Solicitor General, representing the 2nd Appellant, withdrew the appeal by the 2nd Appellant wholly. The learned Solicitor General said he had instructions from the 2nd Appellant to withdraw the appeal because none of the orders made by the lower Court materially affected it negatively.

We have considered fully and carefully the submissions learned Counsel made and the various affidavits and documents they referred to in their arguments.

The first issue is a procedural one. Mr Kaphale, learned Counsel for the 1st Appellant, pointed out that nowhere in the Originating Summons did the Respondent raise the issue of extra ballot papers, or the relief given by the lower Court that the 1st Appellant should surrender or transfer the excess ballot papers to a third party. Learned Counsel pointed out that these matters were raised for the first time only during submissions and that he duly objected to these coming in without the Originating Summons being first amended. Mr Kaphale drew the attention of the Court that Mr Mhango, learned Counsel for the Respondent, in his submissions did not dispute this fact.

It is trite, and there is a wealth of authorities, that the issues for the determination of the court should be stated clearly and expressly in the originating summons, so too the reliefs sought. The reason for this is to inform the other side in advance of the nature of the case it has to meet and to prevent the other side being taken by surprise at the hearing. Cases are decided on issues on record.

In making its decision on this point, the lower Court appears to have relied on

sections 103(2) and 108(1) of the Constitution, which set out the jurisdiction of the Courts. Section 103(2) provides that the Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence. Section 108(1) provides that the High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

With the greatest respect, these two sections, in our considered view, do not detract from the requirement that a party must state expressly the issues it seeks to raise and the specific reliefs sought.

We wish to go further and say on this aspect that the Court must confine Counsel's arguments and submissions to those issues and reliefs as are particularised in the Originating Summons. The Court itself is as much bound by the issues on record as the parties are.

The finding of this Court, on the record of the lower Court, is that the Originating Summons does not contain, as an issue or question, what must be done with the excess ballot papers. The Originating Summons also does not contain, as a relief prayed for, that the ballot papers must be manually counted and the excess lodged in the custody of the Registrar or any other third party.

It is also to be noted, and this is a worrisome point, that at the time the lower Court made the order regarding the excess ballot papers, it did not address itself to the practicability of the order being capable of enforcement. There were issues that had to be considered seriously, such as -

- (a) the locality of the ballot papers at the material time;
- (b) whether it was safe to open the boxes containing the ballot papers and remove the excess ballot papers and ensure the safety and security of the rest;
- (c) the expense of moving the excess ballot papers from wherever they were, all over the country, to some particular place or places;
- (d) the capacity of the Registrar of the High Court to handle the assignment given and to ensure the security of the excess ballot papers;
- (e) the difficulty of conducting a manual count at various places in the whole country; and

(f) The cost involved in the whole exercise, just to mention some.

Indeed, regard had also to be had to the closeness of time between the time the order was made, namely, on 14th May 2004, to the polling date on 18th May 2004.

We would also wish to mention that we are unable to join in the view taken by the lower Court that the storage of the ballot papers is a judicial issue for the Court. In our view, the Court has no legal mandate to keep the ballot papers. Further, we doubt the propriety of such an order without considering the interests of the other many stakeholders and interested persons or bodies involved in the electoral process.

We are also constrained to mention that in view of the ballot auditing system that the 1st Appellant has put in place, we do not think that there should be any genuine fear that the excess ballot papers, if left in the custody of the 1st Appellant, would be abused or misused. The involvement of monitors and observers, both local and external, in the electoral process would minimise the risk of abuse or fraud.

For the foregoing reasons, we are unable to uphold the order made by the Court below on this aspect relating, that is, to the transfer of the excess ballot papers to the Registrar of the High Court. The Court below erred in making the order herein. The appeal on this aspect therefore succeeds and the order herein is quashed.

We now turn to the remaining second ground of appeal. The thrust of the arguments on this aspect was that the 1st Appellant abdicated its responsibility when it referred the complaint it had received from the Respondent to the Office of the President and Cabinet (OPC). Observably, it is not disputed that this was what the 1st Appellant did upon receipt of the complaint made by the Respondent in this respect.

It is noted that the mandate of the 1st Appellant, both under section 76 of the Constitution and section 113 of the Parliamentary and Presidential Elections Act, is very clear. Under section 76(1) of the Constitution, the 1st Appellant is charged with the responsibility **to determine the electoral petitions and complaints related to the conduct of any elections**. And under section 113 of the Act, the Commission is required **to examine and decide on complaints alleging irregularity if not resolved at a lower level of authority** and that where the irregularity is confirmed, the 1st Appellant must take appropriate action.

Referring to the present case, when the 1st Appellant received the complaint that was made by the Respondent concerning the alleged use of public resources, the 1st

Appellant had both a constitutional and statutory duty and obligation to itself examine and determine the complaint. This was a serious complaint. Indeed, Mr Kaphale, learned Counsel for the 1st Appellant, conceded that use of public resources for campaign purposes is wrong. The 1st Appellant was clearly under a duty to deal with the complaint. The complaint had nothing to do with the Office of the President and Cabinet. It is also to be observed that the parties were well-known. The 1st Appellant could have easily called the parties and heard them. If any further or better particulars regarding the complaint were necessary, such a hearing would have provided an opportunity for such further and better particulars to be given. Indeed, we think that reasonably sufficient particulars had been furnished to enable the 1st Appellant to deal with the complaint.

To cut a long story short, we find that the 1st Appellant erred in referring the complaint on this aspect to the Office of the President and Cabinet, instead of dealing with it itself as required both under the Constitution and statutory law.

For the foregoing reasons, we uphold the decision of the lower Court that the 1st Appellant abdicated its duty both under the Constitution and statute. The appeal on this aspect is accordingly disallowed.

The question of costs is reserved. We will deal with it in the formal judgment.

PRONOUNCED in Open Court this 18th day of May 2004, at Blantyre.

Sgd

L E UNYOLO, CJ

Sgd

D G TAMBALA, JA

Sgd
A S E MSOSA, JA

Sgd
I J MTAMBO, JA

Sgd
A K TEMBO, JA