



**IN THE MALAWI SUPREME COURT OF APPEAL  
AT BLANTYRE  
MSCA CIVIL APPEAL NO. 11 OF 2010**

*(Being High Court Miscellaneous Civil Cause No. 146 of 2009)*

**BETWEEN:**

THE STATE, THE DEPUTY GOVERNOR OF THE RESERVE  
BANK OF MALAWI ..... APPELLANT

- AND -

CLF FOREX BUREAU & OTHERS ..... RESPONDENT  
CASH

**CORAM: THE HON. JUSTICE NYIRENDA, SC, JA**

Masumbu, Counsel for the Appellant  
Kaphale & Chokhotho, Counsel for the Respondent  
Balakasi, Official Interpreter  
Ethel Matunga Chisale (Ndunya), Senior Personal Secretary

**R U L I N G**

**NYIRENDA, SC JA**

This is an application for stay of execution of the judgment of Honourable Justice Manyungwa in the High Court made on the 5<sup>th</sup> day of March 2010. By that judgment the Court made a number of declarations, orders and remedies which, in the appellants' consideration, would lead to serious irreparable damage to the economy of the country if

executed because some of the orders that the Court made would allow the respondents to immediately start operating their forex bureaux albeit without licences. The respondents see no merit in the application as, in their view, there is no evidence that irreparable harm would be suffered by the appellants or that the appeal would be rendered nugatory if stay was not granted.

It seems to me this application can be dealt with in a very short discussion of the issues but in order for me to do that I should set out the developments in the matter.

As summarised in the judgment of Justice Manyungwa the facts are that the respondents were all operators of forex bureaux whose licences expired towards the end of December, 2006. The respondents' bureaux and those of others were consequently closed. Before the licences were considered for renewal, early 2007 Government introduced new regulations under the Exchange Control Act namely Exchange Control (Foreign Exchange Bureaux) Regulations 2007. The Regulations introduced a number of requirements and measures which the respondents and several other forex bureau operators would have to comply with for their licences to be renewed. The fact is, the Regulations were intended to control and regulate the activities of forex bureaux at large.

The respondents and other operators found the Regulations rather oppressive, cumbersome and tantamount to denying them the right to operating their businesses and therefore a contravention of their right to economic activity.

By Civil Cause No. 16 of 2007 the respondents, together with other bureau operators, sought, by way of judicial review, ~~sought~~ to challenge the decision by Government to make and introduce the Regulations among other reliefs. In the course of those proceedings the respondents were granted an injunction against the invocation of the Regulations and the closure of their business operations until the determination of the judicial review.

The respondents continued to operate their bureaux on the strength of an injunction until the 27<sup>th</sup> March 2009 when, by its judgment, the court dismissed the respondents' action in its entirety except for requiring the Government to recast the relevant Regulations in some respects. The result of the dismissal of judicial review meant the respondents could no longer operate their bureaux.

The present case arises out of attempts by the respondents to renew their licences which have been refused by the appellants for various reasons which I need not go into with any detail. Suffice to sum it up and say that the applications were rejected because, according to the appellants, the respondents had not complied with the set "Guidelines for Licencing and Operating Foreign Exchange Bureaux and had not passed what was referred to as the "fit and proper test" required of the respondents before their licences could be renewed.

The case before Justice Manyungwa was again by way of judicial review where, in the main, the respondents challenged the decision making process, contending they were not accorded a hearing and that in any event the decisions made by the appellants refusing them licences were unreasonable or were based on unreasonable considerations.

As stated earlier Justice Manyungwa found for the respondents and determined, most importantly, that the grounds upon which the appellants refused to renew the respondents' licences were irrational and unreasonable; tantamount to defying logic. Having so determined the Judge proceeded to make a number of declarations and orders in that regard and further made remedial orders.

I am not here to determine the appeal and should therefore resist the slightest temptation to comment on the lucidity of the declarations, orders and remedies that were made by the Honourable Judge; but I believe I am entitled to

observe that the some of the declarations, orders and remedies are not easy to comprehend and contextualise. That makes it difficult even for purposes of the present application to give the most appropriate directions.

Be that as it may, I should still start from the premise that it is now our jurisprudence that it is not the usage of our courts to stay execution of judgments unless there are compelling reasons to do so, **Globe Wholesalers –v- Lusitania Limited**, 11 MLR 333, **National Bank of Malawi –v- Nkhoma t/a Nyala Investments**, MSCA Civil Appeal No. 6 of 2005.

Of the declarations, orders and remedies made by the learned Judge a few explain the position of the matter and I proceed to set them out in the words of the judgment:

*“Consequently I make the following orders and declarations:*

*(1) That the decisions by the respondent requiring all applicants to acquaint themselves with the elements of the **fit and proper test** and comply therewith within less than six (6) days before submitting their responses to the fit and proper test is null and void on the basis that the same is wednesbury unreasonable and in breach of the applicant’s legitimate expectations.*

*(6) An order akin to **certiorari** quashing the decisions not to renew the applicants’ forex bureau licences for being **irrational, wednesbury unreasonable**, being procedurally unfair and in breach of section 43 of Constitution and for being in breach of the applicants’ legitimate expectations.*

*(7) An order akin to **certiorari** quashing the respondents’ decisions to order the immediate closure of the applicants’ forex bureaux.*

(8) An order akin to **certiorari** quashing the respondents' decisions ordering the applicants to sell all their forex to Commercial banks under normal banking practices and an order akin to **mandamus** requiring the commercial banks to reinstate the applicants' foreign currency balances to their status quo ante.

(9) An order of **prohibition** restraining the respondents from refusing the applicants' to operate their forex bureaux on the grounds of non renewal of their licences.

Since remedies are a discretionary matter I accordingly order as follows:

(A) In the case of Travellers Forex Bureau as their application was refused due to an undesirable director and since the same had been removed that should proceed subject to the applicant satisfying other requirements to renew the licence or that the applicant be asked to resubmit their application.

(B) As regards Kallia Forex Bureau I make a similar order.

(C) In the case of CLC Forex Bureau in view of the fact that no justifiable reason was given for the refusal to renew the licence I hereby quash the respondent's decision refusing the renewal of the licences and order that upon satisfying the requirements unless they be precisely told the aspects of the test they failed.

(D) And finally in respect of Cash Point Forex Bureau, Safari Forex Bureau and Cambio Forex Bureau I quash the Respondent's decisions and order that in view of the short time they were given

*the respondent do reconsider their application afresh based on the information which is already in the respondent's possession."*

My understanding of the totality of the declarations, orders and remedies is that the Court nullified all the decisions made by the appellants and went further to prohibit the appellants from refusing the respondents operate their forex bureaux on the ground that they do not have licences. The Court went further by the remedies at A to D to require the respondents provide appropriate information and comply with the requirements for application for renewal of their licences. By the same remedies the Court then instructed the appellants to properly consider the respondents' applications. In saying all this, the Court never said the appellants must in any event renew the respondent's licences. The judgment merely requires the appellants do their statutory duty and assess the respondents' applications in compliance with the law as to procedure and reasoning.

The judgment of the court below was made on the 5<sup>th</sup> March 2010. If both the respondents and appellants have been minded to heed the declarations, orders and remedies, they should be very close by now to addressing the matter.

It is therefore the considered view of the Court that the solution to this matter lies with the parties and not with the court staying execution of judgment. The application is therefore dismissed. Costs are in the cause.

**MADE** in Chambers this 29<sup>th</sup> day of April 2010 at Blantyre.



A.K.C. Nyirenda, SC,  
**JUSTICE OF APPEAL**