



IN THE MALAWI SUPREME COURT OF APPEAL
PRINCIPAL REGISTRY
COURT REFERENCE NO. 2 OF 2015

IN THE MATTER OF DR. BAKILI MULUZI AND THE ANTI-CORRUPTION BUREAU

AND

IN THE MATTER OF SECTION 101(2) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 42(2)(F) OF THE CONSTITUTION

AND

IN THE MATTER OF THE COURTS (HIGH COURT) (PROCEDURE ON THE INTERPRETATION OR APPLICATION OF THE CONSTITUTION) RULES

CERTIFICATION BY THE HONOURABLE THE CHIEF JUSTICE
(Under Section 9(3) of the Courts Act)

CORAM: **HON. JUSTICE A. K. C. NYIRENDA SC, CJ**
Chokocho, Counsel for the Applicant
Matemba, Counsel for the Respondent
Mthunzi (Mrs.), Recording Officer
Mwafulirwa(Mrs.), Principal Personal Secretary

RULLING

This matter is before me pursuant to Section 9(3) of the Courts Act, the Applicant seeking referral thereof to the High Court, sitting as a constitutional court, for determination of several issues that are considered to expressly and substantively relate

to or concern the interpretation or application of provisions of the Constitution.

The Applicant, Former Head of State of this Country, and Violet Whisky are jointly on trial before the High Court on criminal charges under the Corrupt Practices Act. In the course of the proceedings the Applicant made an application to have the matter referred for constitutional interpretation pursuant to Section 9(2) of the Courts Act, alleging that the whole trial against him perverts the Constitution in many respects but in particular Section 42, on the right to a fair trial, Section 88(1), on the Responsibility of the President in upholding the Constitution and Section 101(2) on the independence and exercise of powers conferred on the Director of Public Prosecutions.

The broad contention is that the proceedings against the Applicant were actuated entirely by malice and therefore an abuse of court process. Fundamentally, it is the case for the Applicant that the process resulted in fragrant violation of the Constitution in that:

- (a) the former Attorney General's and the former Director of Anti-Corruption Bureau's conduct in attempting to fabricate evidence against the Applicant undermined the accused's right to a fair trial under Section 42(2)(f) of the Constitution.
- (b) the former deceased President's conduct in using criminal proceedings to harass the Applicant for purely political reasons contravened his responsibility to defend and uphold the Constitution and to provide executive leadership in the interest of national unity in accordance with the Constitution as provided for in Section 88(1) of the Constitution.
- (c) the former deceased President's conduct in instructing the Director of the Anti-Corruption Bureau to arrest the Applicant for political reasons and the subsequent arrest and consent to prosecute by the Director of Public Prosecutions, undermined the independence of the Director of the Public Prosecutions under Section 101(2) of the Constitution.

Section 9(2) of the Courts Act provides for and sets the premise and threshold on matters for referral. The section states:

“Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by three judges.”

Section 9(3) of the Act complements the above provision and states:

“A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.”

These provisions read together, raise three issues. The first and straightforward issue is the composition of the High Court when hearing a matter that has been determined to be within the province of the sections. The second issue is the material determination of a matter as being within the ambit of the provisions. The third issue is the procedure that must be complied with to eventually place the matter before the constitutional panel of the High Court.

The tenets of each of these three subject areas could be discussed further. It is not my intention in the matter before me to prolong the discussion on all of these issues. The issue before me is not about the composition of the court. Indeed generally this requirement falls into place once a matter has been certified or when a certificate has been declined. Where a certificate has been issued the court will comprise of not less than three judges of the High Court. Where certification has been declined, the case would continue before the single judge of the High Court seized of the case who might be required to give opinion on the interpretation or application the constitutional provision in question.

The general jurisdiction of a single judge of the High Court under Section 108 of the Constitution has not been taken away by Section 9 of the Courts Act. We have said before, in the statement of Chief Justice L. G. Munlo, SC, in **Dr. Cassim Chilumpha, SC and Another v The Director of Public Prosecutions**, Criminal Case No. 13 of 2006:

“The first point which I want to dispose of is the submission by the Learned Counsel Kaphale to the effect that in the wake of Section 9(2) of the Courts Act, a High Court Judge no longer has the power to substantively interpret the Constitution. I found this proposition novel and I should caution against any enthusiasm to go that far. Section 108 of the Constitution gives the High Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings, to review any law and any action or decision of the Government, for conformity with the Constitution. Section 9(1) of the Courts Act makes it clear that every proceeding in the High Court and all business arising there out is to be heard and disposed of before a single judge. The original jurisdiction of the High Court Judges is therefore intact and has only been tampered with by those cases which come within the narrow confines of Section 9(2) and which need certification under Section 9(3) of the Courts Act. In my view, a single judge of the High Court has jurisdiction to interpret the Constitution.”

Let me add and put the matter in this way. It is unthinkable to have a matter before our courts that has no bearing, none whatsoever, on rights, responsibilities and obligations of the human being. Virtually every cause of action relates to the rights, obligations and responsibility of human beings in one way or another. In the course of every litigation before court, it is about the interpretation or application of individual or group rights. With a permissive constitution as ours, every time courts undertake such a responsibility they are, necessarily, interpreting or applying constitutional rights and obligations, from labour rights, through contractual rights, family obligations, tortuous responsibility to rights and responsibilities under the criminal law. Constitutional interpretation or applications therefore runs across and is always before our courts in different ways, at different levels, but all the time.

Section 9(2) is meant to allow for opportunity to give appropriate guidance on the interpretation or application of a constitutional provision in deserving and selected proceedings, where the circumstances of the case expressly and substantively raise a constitutional matter for interpretation or application.

The issue that I raised with the parties in the instant case is not about the actual determination of whether what was brought before the court below falls within the ambit of Section 9(2) of

the Courts Act. What has been raised with the parties is about the procedure that must be followed in bringing cases up as referrals as provided for in the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules. Rule 8(1) provides:

“Where a referral to the court in relation to any matter on the interpretation or application of the Constitution is necessary as determined by an original court, the Judge or Magistrate or Chairperson of the original court shall, within seven days from the date of the determination, submit the referral in Form 3 of the Schedule, to the Chief Justice for certification under Section 9(3) of the Act.”

Counsel Chokotho, for the applicant, and Matemba, for the respondent are agreed, that the original court must make a determination that the matter is one where the interpretation or application of the Constitution is necessary. In other words there must be a determination by the original court about the necessity of the referral.

It has been argued by Mr. Chokotho that the procedure does not state in what form the original court’s determination should be. He considers that it is not necessary that the determination be in the form of a formal ruling. He envisages that since the original court has to prepare a certificate, the certificate alone would suffice as a determination, where the court has prepared one as in the instant case. Mr. Matemba, on the other hand reads the rule as requiring a formal determination and that the original court must make a separate ruling and not merely sign a certificate.

I would agree with Mr. Matemba on a simple reading of Rule 8(1). The important words of the Rule are “... **within seven days from the date of the determination, submit the referral in Form 3.**” It is very clear to me that Form 3 is separate from the determination. The original court must first determine and then prepare Form 3. Form 3 should be prepared any time after the determination but before the expiry of seven days “**from the date of the determination**”. (My underlining).

In ***R v Coates***, [2004] it was said “a case is determined when the decision is announced. Until then, even if agreement amongst judges is apparent, the case is not determined.”A

determination would therefore require the original court to hand down its decision on the matter and in our practice, a decision is handed down in writing. Where it is orally made, it must subsequently be reduced in writing. Rule 8(1) does not speak of a determination in Form 3. The Rule speaks about a determination that **must** be followed by Form 3. The matter can therefore only be due for consideration by the Chief Justice when both the determination and Form 3 have been prepared by the original court and placed before the Chief Justice.

I have also been addressed on the role of the Chief Justice on referrals. In particular the question is whether that role is judicial or administrative. It is safe at this stage of this matter not to dwell much on this issue when the real question is whether the matter is properly before the Chief Justice. Suffice though to mention that in the scheme of Section 9(2) and (3) of the Courts Act, read together with Rule 8(1) above, it is evident that the original court and the Chief Justice have distinct and separate roles in the process of referrals. The original court is required to determine the necessity of a referral and then place the matter before the Chief Justice. The Chief Justice would in turn, in the words of Section 9(3), consider whether the matter "is one which comes within the ambit of Section 9(2)."

It is also significant that under Rule 3(1) of the Courts (High Court)(Procedure on the Interpretation or Application of the Constitution) Rules, the Chief Justice is in fact guided on the considerations to make in certifying proceedings under Section 9(3) of the Act. In the nature of the considerations under that Rule, the Chief Justice's role cannot be said to be merely administrative. The same is true about the role of the original court.

What is more is that we should be concerned with any attempt to make referrals an administrative arrangement. Court referrals could very easily become an unruly horse or a runaway train if not properly regulated and judicially determined. It would be very easy for referrals to become a common practice and yet a lethal tool to stifling proceedings. Under Rule 8(2) it is provided:

"Where the original court has made a referral under subrule (1), the proceedings in the original court shall be stayed pending a decision of the Court."

Coupled with this provision, it is not difficult to see how referrals could cripple proceedings if all the litigants had to do was to cry out “the Constitution”, and by it alone gag the hands of the original court as well as the Chief Justice. Referrals should therefore not be left to be as a matter of course.

It is for these paramount and overriding considerations that the Courts Act, together with the Rules, have laid down the procedure that must be followed as well as the requirements that must be accomplished in court referrals.

On record is a ruling by the Honourable Judge in the original court. His Lordship was therefore aware, and rightly so, that he had to make a ruling on the application before him. The real issue is therefore not about the ruling but much about what happened and what the ruling says. Let me start with what happened as much as I can establish from the record. For that purpose, It is important that I set out the summons by the Applicant in full as follows:

“SUMMONS FOR STAY OF PROCEEDINGS FOR BEING UNCONSTITUTIONAL AND AN ABUSE OF THE COURT PROCESS

(Under Section 5, 101(2), 88(1) 42(2)(f) of the Constitution and Section 4(3) of the Corrupt Practices Act and under the Inherent Jurisdiction of the Courts.

LET ALL PARTIES concerned attend the Judge in Chambers on the 23rd day of April, 2015 at 08:30 o’clock in the forenoon on the hearing of an application on the part of the accused for the determination of the following questions namely:-

(a) Did the former deceased’s President’s conduct in instructing the Director of the Anti-Corruption Bureau to arrest the Applicant for political reasons and the subsequent arrest and consent to prosecute by the Director of Public Prosecutions to prosecute the Applicant not undermine the independence of the Director of the Anti-Corruption Bureau and the Director of Public Prosecutions, provided for in Section 101(2) of the Constitution and Section 4(3) of the Corrupt Practices Act.

(b) Did the former deceased’s President’s conduct in using criminal proceedings to harass the Applicant for purely political reasons not contravene his responsibility to defend

and uphold the Constitution and to provide executive leadership in the interest of national unity in accordance with the Constitution and the laws of the Republic as provided for in Section 88(1) of the Constitution?

(c) Did the former Attorney General's and Director of Anti Corruption Bureau's conduct in attempting to fabricate evidence against the accused not undermine the accused's right to a fair trial provided for in Section 42(2)(f) of the Constitution?

Take notice that the above-named Applicant applies to the Court for an Order in the following terms:-

(i) A declaration that the former deceased President's conduct in instructing the Director of the Anti-Corruption Bureau to arrest the Applicant for political reasons and the subsequent arrest and consent to prosecute by the Director of Public Prosecutions to prosecute the applicant undermines the independence of the Director of Public Prosecutions as provided for in Section 101(2) of the Constitution and that of the Director of the Anti-Corruption Bureau as provided for in Section 4(3) of the Corruption Practices Act.

(ii) A declaration that the former deceased President's conduct in using criminal proceedings to harass the Applicant for purely political reasons contravenes the President's responsibility to defend and uphold the Constitution and to provide executive leadership in the interest of national unity in accordance with the Constitution and the laws of the Republic as provided for in Section 88(1) of the Constitution.

(iii) An Order staying permanently Criminal Proceedings in Criminal proceedings in Criminal Case No. 1 of 2009 and Criminal Case No. 2 of 2009 in the High Court of Malawi, Principal Registry for being an abuse of the Court process, unconstitutional and therefore void.

Dated this 8th day of April, 2015."

What I am curious about is whether these were summons seeking referral pursuant to section 9(2) and (3) of the Courts Act or was it merely an application for stay of the proceedings. Further, reading through the summons one gets a distinct impression that the application was intended to be an end in itself. The orders sought do not seek that the matter be placed before the Chief Justice for certification. The summons simply do not speak for a referral. On the contrary, what is sought is a

permanent stay of the proceedings for being an abuse of the court process, a rather strange prayer I must say. Where a prayer is premised on abuse of court process, it would invariably be for dismissal of an action and not for a stay of the action. All this is to say the summons itself leaves a lot to be desired. There is a more substantive side of the matter that I should come to.

The summons was filed on 8th April, 2015 and on the same day it was placed before the learned Judge who made the following observation:

“This application requires me to deal with the issue of stay. I cannot proceed without hearing the ACB. The nearest and convenient date to hear the application is the 23rd April, 2015 to enable the State to respond meaningfully at 08:30 am.”

Despite this ruling and setting down the matter for 23rd April, 2015, the court sat the following day, 9th April, 2015. The court started by making the following observation:

“Court welcomed counsel and explained that since the referral is going to affect the criminal case, the state needs to be around so that they give their input and for the sake of transparency. The court proceed to air out its observations which are on a separate sheet but forming part of this record. After these observations when the court revealed that it does not see any issue for referral of a constitutional nature, Chokocho came in to respond.”

Mr. Chokocho then addressed the court. It would have been interesting to quote the whole of Mr. Chokocho’s submission but I believe what led the court below to make a rather flustered and mixed up ruling is when counsel submitted:

“Our presence is not for determination of the summons per se as the matters raised by our summons are of a constitutional nature. Section 9(3) gives sole discretion for determining whether a matter is constitutional to the Chief Justice. Once a matter has arisen that may relate to the application or interpretation of Constitution, the court would make a referral.”

Upon this submission the court then said:

“The issue at hand is whether constitutional violations outlined above, if such a finding was made, not involve the interpretation or application of the Constitution in respect particular to the criminal case at hand. Rule 8 of the Courts Act pertaining to the interpretation of the Constitution requires this court to make a referral if it finds it necessary. I believe that is a preliminary step which should not prevent the Chief Justice from making a final determination even if the views of this court are that it is not necessary. As such it would appear that a referral from a subordinate court is automatic despite the court’s reservations. In any case detailed consideration will be made on the filed originating motion upon which arguments from the Attorney General and the Applicant are fully considered. In the light of this, and a written order to follow, I refer the matter to the Chief Justice for his final determination.”

The written ruling was made 14th April, 2015. The concluding paragraph states:

“... From the court’s representations made at the beginning, whether it is necessary to refer the matter to the Chief Justice, it is really futile as the court just has to refer the matter for certification by the ultimate authority. In view of this, the constitutional matter is referred to the Chief Justice for certification if the matter really raises constitutional issues which impact on the criminal proceedings underway. Attached hereto is court Reference No. 2 of 2015 in consonance with Form 3 of the Rules.”

Much could be said about how the matter was handled and managed in the court below. It is not clear why the matter was suddenly moved forward from 23rd April, 2015, to 9th April, 2015. I have already raised doubts as to whether what was before the court was an application for referral or an application to extinguish the proceedings entirely. What I also see is that the Form 3 submitting the referral to the Chief Justice was in fact sealed and signed by the Judge on 8th April, 2015, the day the summons was filed and the day the Judge said he would not proceed to hear the matter because he wanted both parties to attend and be heard. It is apparent to me that the signing of Form 3 at that time was in error or at least a mistake on part of the Judge.

What is more though, going through the record, part of which I have quoted, the learned Judge was not sure about his role at that stage in the matter. As discussed earlier, the process of

referrals is clearly and purposely regulated. In the language of Section 9(2) of the Courts Act, the matter should be one which expressly and substantively relates to, or concern the interpretation or application of the provisions of the Constitution. The expressions expressly **and** substantively are to be read conjunctively on a simple reading of the provision. Rule 8 (1) requires the original court to determine that a matter has indeed arisen under Section 9 (2) of the Courts Act. By his ruling, the learned Judge in effect declined to make a determination in terms of and as called upon by Rule 8(1). In his opinion “referral from a subordinate court is automatic”. This was a misdirection on part of the court. The learned Judge was supposed to decide whether it is necessary or not necessary for the matter to be submitted to the Chief Justice for further consideration. For all these reasons, this matter is returned to the original court for the learned Judge to determine as he might consider appropriate.

PRONOUNCED this 29th day of October 2015, at Blantyre.

A. K. C. Nyirenda, SC
CHIEF JUSTICE