IN THE SUPREME COURT OF APPEAL

MISCELLANEOUS CIVIL APPLICATION NUMBER 6 OF 2022

(Being Judicial Review Case Number 2 of 2022 – High Court of Malawi, Zomba Registry)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

STATE

VERSUS

DIRECTOR OF ANTI CORRUPTION BUREAU

(*Ex parte* MADALITSO NJIRIKA)

CORAM: **HON. JUSTICE J. KATSALA, JA**

A. Salimu, of counsel for the Applicant

I. Saidu, of counsel for the Respondent

Mrs Chintande, Court Clerks

RULING

Introduction

By this application Mr Madalitso Njirika (hereinafter "the applicant") seeks an order of this Court varying an order made by Mvula J sitting at Zomba Registry of the High Court of Malawi in which he refused to grant an order staying criminal proceedings against the applicant before the Senior Resident Magistrate sitting at Mangochi pending the determination of a

Judicial Review commenced by the applicant challenging the legality of the criminal proceedings. The application is opposed by the respondent who filed an affidavit to that effect.

Facts

The brief facts are that on 9 February, 2022 the High Court of Malawi sitting at Zomba granted the applicant, Madalitso Njirika, leave to apply for judicial review of "acts and omission of the Anti-Corruption Bureau around his arrest on 3 February, 2021 and subsequent remand in prison pending trial that commences on 17 February, 2022 before the Senior Resident Magistrate sitting at Mangochi". The claimant was aggrieved by the Anti-Corruption Bureau's decision to arrest him and charge him with the offence of Abuse of office contrary to section 25B (1) of the Corrupt Practices Act. The allegation (as per the documents before me) is that the claimant, being a Councillor for Mandimba Ward in Mangochi District, demanded and received the sum of K380,000 from one Chikalugwe Abdul who was contracted by Mangochi District Council to construct two classroom blocks at Kwiputi Primary School. The claimant is said to have told the contractor that as a Councillor he was supposed to get a cut from the contractor's dues for the project since it was taking place in his Ward.

Mr Chikalugwe Abdul paid a total sum of K380,000 to the applicant but later on lodged a complaint to the District Council and eventually the Police. It is alleged that, after discussions involving the complainant, the applicant and the Police, it was agreed that the applicant should refund the money to Mr Chikalugwe Abdul and that the matter be closed.

However, on 3 February, 2021 the applicant was arrested by the Anti-Corruption Bureau in respect of the same matter and remanded to prison pending trial. Thus, he feels that since the matter was already disposed of, his arrest and prosecution by the Anti-Corruption Bureau for the same acts amounts to double jeopardy and contravenes his rights under the Constitution.

Honourable Mvula J heard the application *ex parte* and granted leave to apply for judicial review but declined to make an order staying the criminal proceedings before the Senior Resident Magistrate at Mangochi pending the determination of the judicial review. The reason given by the Judge for the refusal is that, in his opinion, damages would adequately compensate the applicant in the event that he is found to have suffered injury from the arrest and prosecution.

The applicant is dissatisfied with the refusal to grant a stay of the criminal proceedings arguing that it defeats the whole purpose of the judicial review in the sense that the two proceedings (criminal and judicial review) will run concurrently and yet the judicial review is seeking to impugn the criminal proceedings. In other words, the judicial review will be rendered nugatory in the event that the claimant succeeds. It is for this reason that the claimant comes to this Court seeking an order varying the order made by Mvula J – so that the order granting leave for judicial review should include an order staying the criminal proceedings pending the conclusion of the judicial review.

As earlier on indicated, the application is opposed by the Director of the Anti-Corruption Bureau and an affidavit deponed to by one Joseph Mataya, a prosecutor in the Bureau, has been filed. The affidavit does not say much that is pertinent to the issue before this Court save that if the order sought is granted, the criminal proceedings will be delayed, and that in the event that the court finds that the arrest and prosecution were wrongful, the claimant can seek his remedy in damages.

Arguments

The applicant has argued that having granted the leave to apply for judicial review, the Judge should have also granted the injunction sought. There was no evidence to support the decision and/or conclusion that damages would be an adequate remedy for the injury that the applicant would suffer from the arrest and prosecution. How did the Judge arrive at this conclusion in the absence of material to warrant his exercise of discretion to that effect? In his view, this is evidence that the Judge wrongly exercised his discretion and this Court is entitled to vary the Judge's order.

On the other hand, the respondent has submitted that though they were not privy to the application for leave to move for judicial review (since it was made *ex parte*), they do not see anything wrong with the way the Judge exercised his discretion on whether to grant the injunction/stay sought or not. And the fact that the Judge declined to grant the injunction means that he was not satisfied with the evidence supporting that aspect of the application. They urge this Court not to tamper with the Judge's order.

Law

It is settled that the grant or refusal of an injunction or stay order is a matter in the discretion of the court hearing the application. Further, it is also settled that a discretionary decision will not be interfered with merely

because the upper court thinks it would have come to a different conclusion. It must be demonstrated that the exercise of discretion was perverse, under a mistake of law or misapprehension of the facts or in disregard of principle. See *Re State v Chairperson of Industrial Relations Court ex parte Malawi Revenue Authority and Rosa Mbilizi* MSCA Case No. 56 of 2021 (unreported), *Finance Bank of Malawi Ltd v Tembo* [2007] MLR 99 and *Ministry of Finance and others v Mhango and others* [2011] MLR 174. It do not think there is anything more that I can add to these principles.

Analysis and disposal

Looking at the material which was before the Judge, I come to the conclusion that he properly addressed his mind to the nature of the application before him and to the correct principles of law applicable to such an application and came to the conclusion that inasmuch as he grants the leave to apply for judicial review, he should decline the request for an injunction. In his assessment, the applicant would be adequately compensated by way of damages for whatever injury he may suffer as a result of the prosecution in the event that the judicial review succeeds.

It is my view that the applicant has not demonstrated before this Court why the Judge's decision should be interfered with. All that the applicant has said is that there was no evidence before the Judge on which he could have made the finding that damages would be adequate remedy. In the same way, I would say that there was no evidence before the Judge showing that damages would not be adequate remedy.

I have always believed that the duty lies with the applicant to demonstrate to the court that an injunction or a stay should be granted because, in the circumstances, damages would not be adequate remedy. He who alleges must prove. Where a party seeking an injunction or an order of stay fails to demonstrate to the satisfaction of the court why the order of injunction or stay should be granted, it is only right and proper that the request be refused. And it must be remembered that even where one provides the required evidence, the court can still refuse to grant the injunction if, on good grounds, it comes to the conclusion that it is not proper to do so.

In cases like the present, where there is application for leave to move for judicial review which also includes a request for an order of stay or injunction, it is necessary that judges must assess whether indeed the stay or injunction should be granted or not. It should not be granted as a matter of course. I say this because it has been seen that sometimes the applicant's interest is more in the stay or injunction than in the determination of the judicial review. Hence, an applicant tends to slow

down or indeed grind to a halt once the stay or injunction is granted. In my opinion, this should never be allowed to happen and it must be guarded against at all times.

In the Australian case of *New Ackland Coal Pty Ltd v Smith* [2017] QSC 216 Applegarth J stated:

> "In circumstances in which I proceed on the basis that the application for judicial review does raise questions to be tried, I turn to the balance of convenience. The exercise of the power to grant a stay or to suspend an administrative decision of the present kind - like the power to grant an interlocutory injunction - is designed to minimise irreparable harm until at least the parties' rights and interests can be determined more fully at a final hearing. In deciding where the balance of convenience lies, a court has to consider competing rights and interests and also has to consider the interests of affected third parties and broader interests concerning the public interest, including the proper administration of the law."

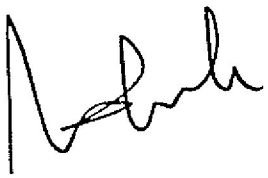
I totally agree with this approach and I would encourage all judges to take cognizant of it and proceed likewise. The grant of a stay or injunction should never be treated as a matter of course. There is need to assess the application for injunction or stay in the same way we assess it when it is made in its own right. Gone are the days when you could grant a stay or injunction as a matter of course saying that if the other party is aggrieved then they will apply to set it aside. Such approach has led to an increase in applications to set aside the stays or injunctions which, inevitably, has added to the ever-increasing case load before the judges. So, as part and parcel of active case management, judges need to be meticulous, as always, in the way they handle such applications.

The applicant has alleged that if the criminal proceedings are allowed to proceed, he will suffer double jeopardy since he will be prosecuted for a matter which was already resolved by the Police. I would not want to say anything on this argument for fear of prejudicing the judicial review itself but suffice to say that I am not sure if it would be in the public interest that issues of corruption and abuse of office by public servants should be resolved in the manner that the present case is alleged to have been. I am not sure if the alleged refund of the bribe/gratification that was extorted would exonerate the applicant from prosecution for the alleged offence. I have not received submissions on these questions as such I am not entitled to express an opinion. I am sure the court hearing the judicial review will have to determine if the doctrine of double jeopardy as envisaged in the

Constitution is indeed applicable in the applicant's circumstance. I will leave the issue at this point.

In the result, I find that there are no grounds justifying this Court's interference with the Judge Mvula's order refusing to grant an order of injunction/stay restraining the prosecution of the applicant before the Senior Resident Magistrate sitting at Mangochi. The application is dismissed with costs.

Made at Blantyre this 19th day of April, 2022.



J N Katsala
JUSTICE OF APPEAL