JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
JUDICIAL REVIEW CAUSE NO 22 OF 2020

BETWEEN

THE STATE (On application of

ESTHER CECILIA KATHUMBA ……..……..... 1ST CLAIMANT

MONICA CHANG'ANAMUNO ……..... 2ND CLAIMANT

HUMAN RIGHTS DEFENDERS COALITION …..... 3RD CLAIMANT

CHURCH AND SOCIETY PROGRAMME THE LIVINGSTONIA SYNOD OF THE CHURCH OF CENTRAL AFRICA PRESBYTERIAN……..... 4TH CLAIMANT

PROPHET DAVID F. MBEWE ……..……..... 5TH CLAIMANT)

AND

PRESIDENT OF MALAWI ..... 1ST DEFENDANT

MINISTRY OF THE MALAWI GOVERNMENT RESPONSIBLE FOR HEALTH ..... 2ND DEFENDANT

INSPECTOR GENERAL OF THE MALAWI POLICE SERVICE ……..... 3RD DEFENDANT

COMMANDER OF THE MALAWI DEFENCE FORCE ..... 4TH DEFENDANT

ATTORNEY GENERAL ..... 5TH DEFENDANT

MALAWI COUNCIL OF CHURCHES ..... 6TH DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Mwafulirwa, Kagundu, Chitukula and Mchizi, of Counsel, for the 1st Claimant, 2nd Claimant, 3rd Claimant and 4th Claimant
Mr. Chiwaya, of Counsel, for the 5th Claimant
1st Defendant, absent and unrepresented
2nd Defendant, absent and unrepresented
3rd Defendant, absent and unrepresented
4th Defendant, absent and unrepresented
5th Defendant, absent and unrepresented
6th Defendant, absent and unrepresented
Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

Introduction

This is this Court's Ruling on two applications made by the 1st, 2nd, 3rd and 4th Claimants, on one hand, and the 5th Claimant, on the other hand, for interlocutory injunctions.

Application without notice for permission to apply for judicial review and Application for Interlocutory Injunction

On 17th April 2020, the Claimants filed with Court an application without notice for permission to apply for judicial review and an application for an order of interlocutory injunction.

The decisions which the Claimants seek to be judicially reviewed are as follows:

> *"(1) The decision to declare a lockdown without the attendant declaration of a state of emergency when the lockdown amounts to a substantial derogation from the fundamental rights under Chapter IV of the Constitution.*
>
> *(2) The decision to declare a lockdown without providing for social security interventions to marginalized groups in our society, which groups are in the majority, the decision being made with an effective view of punishing innocent Malawians.*
>
> *(3) The decision to promulgate Public Health (Corona Virus Prevention, Containment and Management) Rules 2020 (hereinafter referred to as "Covid- 19 Rules) and to implement them without parliamentary oversight as required by section 58 of the Constitution given that the effect of the rules is to substantially derogate from the fundamental rights under Chapter IV of the Constitution. Can a mere Minister lawfully suspend fundamental constitutional rights through the making of*

subsidiary rules and lawfully implement the rules before Parliament has a chance to review the rules; and

(4) The decision to promulgate and implement the Covid-19 Rules purportedly under section 31 of the Public Health Act where the rules expressly state that they authorize the taking of measures which are outside the scope of the parent statutory provisions and which are otherwise ultra vires."

The application is supported by five statements sworn by the 1st Claimant, 2nd Claimant, Honourable Kezzie Kasambala Msukwa, Mr. Gift Trapence and Mr. Moses Mkandawire respectively. The five sworn statements can be summarized as follows.

The 1st Defendant on the 6th April 2020 declared a state of disaster under section 32 of the Disaster Preparedness and Relief Act. The 2nd Defendant, who is also the Chairperson of a special cabinet committee on Covid-19 assembled by the 1st Defendant, conducted a press briefing on the 13th April 2020 in which he announced that the total number of confirmed cases had, as of that date, reached 16 infected people and 2 confirmed deaths.

On 14th April 2020 the 1st Defendant announced that the 2nd Respondent, in exercise of his powers under the Public Health Act, had decided to declare a nationwide lockdown effective from the 18th April to the 9th May, 2020. It was further announced the 2nd Defendant had made the Covid-19 Rules for the management of the outbreak, from whence the whole issue of a nationwide lockdown emanated from.

The 3rd Defendant is a constitutional body established under section 52 of the Constitution with a mandate to provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law.

The 4th Defendant is also a constitutional body established under section 159 of the Constitution and entrusted to, among other things, (a) uphold the sovereignty and territorial integrity of the Republic and guard against threats to the safety of its citizens by force of arms, (b) uphold and protect the constitutional order in the Republic, (c) assist the civil authorities in the proper exercise of their functions under this Constitution, (d) provide technical expertise and resources to assist the civilian authorities in the maintenance of essential services in times of emergency, and (e) perform such other duties outside the territory of Malawi as may be required of them by any treaty entered into by Malawi in accordance with the prescriptions of international law.

The 3rd and 4th Defendants on 16th April 2020 in Lilongwe held a joint press briefing wherein they announced that they were ready to deploy policer officers and soldiers to enforce the lockdown that was declared by the 2nd Respondent despite its unconstitutionality.

The application was brought under Order 19, rule 20(3), as read with Order 10, rule 27, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"]. Order 19, rule 20(3), of CPR falls within Part III of the said Order. This Part deals with judicial review and it provides as follows:

"20.- (1) Judicial review shall cover the review of-

(a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or

(b) a decision, action or failure to act in relation to the exercise of a public function in order to determine-

(i) its lawfulness;

(ii) its procedural fairness;

(iii) its justification of the reasons provided, if any; or

(iv) bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

(2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.

(3) Subject to sub-rule (4), an application for judicial review shall be commenced ex-parte with the permission of the Court.

(4) The Court may upon hearing an ex parte hearing direct an inter-partes hearing.

(5) Subject to sub-rule (6), an application for judicial review under sub rule (3) shall be filed promptly and shall be made not later than 3 months of the decision.

(6) The Court may extend the period under sub-rule (5).

21. An application for a mandatory order, a prohibiting order or a quashing order shall be made with an application to the Court for judicial review.

22. An application for a declaration or an injunction shall be made with an application to the Court for judicial review and the Court may grant a declaration or injunction where it considers that it would be in the interests of justice to do so having regard to-

(a) the nature of the matter in which relief may be granted by a mandatory order, a prohibiting order or a quashing order;

(b) the nature of the person or institution against whom relief may be granted by such an order; and

(c) all the circumstances of the case.

23. - (1) An application for judicial review shall set out the grounds for making the application and shall be supported by a sworn statement.

(2) An application under sub rule (1) shall name as defendant –

(a) for a declaration in relation to an Act or subsidiary legislation, the Attorney General;

(b) for an order that a person shall do or shall not do something, the person in question; and

(c) for an order about a decision, the person who made or should have made the decision.

(3) An application under sub rule (1) shall be served on –

(a) the defendant within 28 days from the date of filing the application;

(b) any other person who is directly affected by the application, within 28 days of filing the application; and

(c) other person the Court may order that he may be added as a party, within 28 days of filing the application.

24. The defendant shall, within 14 days of service of the application, file a defence supported by a sworn statement.

25. The Court shall set down a date for a scheduling conference not later than 28 days from the date of filing the Defence and Order 14 shall, with the necessary adaptation, apply to the application under this Part." – Emphasis by underlining supplied

We pause to note that rule 23 is very specific as to who can be named as a defendant and that the application should be served on, among other persons, the defendants. In this respect, the scheme under rule 23 is markedly different from what obtains under the Civil Procedure (Suits by or Against the Government or Public Officers) Act. Under the said Act, save as otherwise expressly provided by an Act of Parliament, suits by or against the Government have to be instituted by or against the Attorney General: see section 3 of the said Act. This raises a host of legal questions with the key one being whether a defendant named under rule 23(2) (b) and 23(2)(c) can be represented by the Attorney General without the Attorney General or such a defendant filing a Notice of Appointment of Legal Practitioner to

that effect. We will revert to this issue shortly when we discuss the Notice of Withdrawal filed by the Attorney General.

The application without notice for permission to apply for judicial review concluded with an application for an interlocutory order of injunction restraining "*the Defendants, either through themselves or through their servants, agents, subordinates, employees, or whomsoever on the Respondents' behalf, from effecting and or otherwise enforcing the lockdown declared by the 2nd Respondent until the final determination of this matter or further order of the Court*" [Hereinafter referred to as the "1st Application for Interlocutory Injunction"].

The application without notice for permission to apply for judicial review and the 1st Application for Interlocutory Injunction came before me on 17th April 2020. Having considered the applications, I granted the Claimants permission to apply for judicial review. Regarding the 1st Application for Interlocutory Injunction, I granted it "*for a period of 7 days, that is, up to 24th April 2020 at 9 o'clock in the forenoon*" when the application was to be heard inter-partes. I also directed the Claimants to have the Court documents served on the first five Defendants not later than 20th April 2020.

Application to Discharge Permission

On 21st April 2020, the Attorney General filed with the Court an application for an order discharging permission for judicial review that was granted on 17th April, 2020 (Application to Discharge Permission). For reasons which appear shortly, I have reproduced below the wording of the body of the Application to Discharge Permission:

> *"INTER PARTES APPLICATION FOR AN ORDER DISCHARGING PERMISSION FOR JUDICIAL REVIEW*
>
> *(Under Order 10 r 1 and 3 of the Courts (High Court) (Civil Procedure) Rules and under Courts Inherent Jurisdiction)*
>
> *LET ALL PARTIES attend Court on the 24th day of April, 2020 at 9 o'clock in the fore noon on hearing of an application for an order discharging permission for judicial review that was granted on 17th April 2020.*
>
> *TAKE NOTICE the sworn statement of NEVERSON CHISIZA filed herewith shall be used in support of the application."*

The Application to Discharge Permission is not complete: it does not state the party or parties making the application. Needless to say, it is very important that the

application should expressly state the party making the application. It will be recalled that, in terms of Order 19, rule 23, it is not only the Attorney General who can be named as a defendant in judicial review proceedings. As exemplified by this case, there are six defendants and each one of these has a right to see how best to conduct his or its case. In the premises, it would foolhardy for the Court and, indeed the other parties, to assume that an application to discharge permission for judicial review filed by the Attorney General is an application made by all the defendants to a case.

The take-home message is that an application must be worded in such a way that the identity of the party making the application can easily be known.

The Application to Discharge Permission was actually supported by two statements (not just one as stated in the body of the Application) sworn by Dr. Dan Namarika, and Mr. Neverson Chisiza**,** Principal State Advocate in the Attorney General's Chambers, respectively.

The Sworn Statement by Dr. Dan Namarika will be quoted in full:

> *"DEFENDANT'S SWORN STATEMENT IN OPPOSITION TO THE APPLICATION FOR INJUNCTION*
>
> ***1.*** ***THAT*** *I am the Secretary for Health and a member of the Special Cabinet Committee on Covid-19 (the Committee) and therefore, am duly authorized to swear this sworn statement on behalf of the Defendants.*
>
> ***2.*** ***THAT*** *the Minister of Health travelled to Karonga as a result of which, he is not able to swear a sworn statement.*
>
> ***3.*** ***THAT*** *facts set out in this sworn statement are based on personal knowledge of this matter and some have passed on to me in my capacity as Secretary for Health and member of the Committee and are to the best of my knowledge and belief, true and correct.*
>
> ***(a) Brief Background***
>
> ***4.*** ***THAT*** *in or around November, 2019, a strange and deadly virus hit Wuhan, Hubei Province in China. The virus causes an illness known as Covid-19, characterized by severe acute respiratory syndrome. The said virus is highly contagious. Within months, the virus has spread to almost all the countries in the world, infecting millions of people and killing hundreds others across the world.*
>
> ***5.*** ***THAT*** *on or about 12th March, 2020, the World Health Organization declared Covid-19 as a pandemic.*

6. ***THAT*** *currently, there is no vaccine or medical treatment for Covid-19. The only way is to prevent the spread of the virus. This, however, is a very big challenge because the virus is highly infectious.*

7. ***THAT****, like almost all other African countries, Malawi has not been spared by the virus. So far, Malawi has registered 17 cases of Covid-19 and 2 have been confirmed to have died from the virus.*

(b) Legality of the Lockdown

8. ***THAT*** *in exercise of powers conferred upon the Minister of Health under section 31 of the Public Health Act, he promulgated Public Health (Corona Virus Prevention, Containment and Management) Rules (the Rules) as one of the ways of preventing, containing and managing the virus.*

9. ***THAT*** *I verily believe that the Minister of Health, has mandate under section 31 of the Public Health Act to enact the rules and therefore, I believe that he acted within his legal mandate.*

10. ***THAT*** *the said rules were duly gazetted on 9th April, 2020. The Minister informed me that he was advised by the Attorney General which advice he held to be correct, and I also hold the same to be correct that the said rules attained the force of law on the date they were gazetted.*

11. ***THAT*** *the Minister proceeded to declare a lockdown pursuant to rule 11 of the Rules. I believe that the said declaration was well within the Minster's mandate since it is provided for under the Rules which rules were made in exercise of his powers under section 31 of the Public Health Act.*

(c) Would the lockdown substantially and significantly affect fundamental rights and freedoms recognized by the Constitution?

(i) Right to Life and Right to Human Dignity, Right to freedom of conscience, Right to equality and non-discrimination

12. ***THAT*** *through the Committee, Government has come up with National Covid-19 Preparedness Response Plan (the Response Plan). There is now shown to me a copy of the Response Plan exhibited hereto and marked '**MoH1'.***

13. ***THAT*** *as will be noted in the Response Plan, Government has allocated money to support the vulnerable group including the ultra-poor in our society, both in urban areas as well as rural areas.*

14. ***THAT*** *the money under Mtutukula Pakhomo Project (social cash transfer) has already been paid to all 28 districts for 4 months in advance in preparation for the lockdown. It not true that there is no social security in place.*

15. ***THAT*** *further Government will use the already established committees at grassroots level including block leaders and traditional leaders, Village Development Committees (VDC), Area Development Committees (ADC), District Councils, City Councils and Municipality Councils and other similar structures in allocating resources to the people.*

16. ***THAT*** *conclusively, it is not true that people's right to life will substantially and significantly be affected by starving to death, and right to human dignity as people will be forced to beg.*

17. ***THAT*** *I have to emphasize that Government is run by people with ability to adapt the measures put in place at any time in order to serve the people of Malawi.*

18. ***THAT*** *a proper reading of the rules clearly establishes that the right to equality and non-discrimination will not be violated. Neither will the right to freedom of conscience be violated.*

(ii) Rights of children to maintenance, right to marriage, right to economic activities, right to development, right to freedom of association, right to freedom of assembly, political rights, access to justice, and the right of accused persons

19. ***THAT*** *further, I believe that the Rules and in particular, the lockdown do not substantially and significantly derogate the aforementioned rights. It is my belief that the said rights will still be enjoyed but restrictively.*

20. ***THAT*** *it therefore cannot be said that the Rules and the lockdown substantially and significantly affect fundamental rights recognized in the Constitution.*

21. ***THAT*** *further, I have been advised by the Attorney General which advice I hold to be true that the rights under (ii) above are not absolute. They can be limited in a way recognized by the Constitution.*

22. ***THAT*** *I therefore pray that the Court should consider the urgency of the matter herein and the need to allow Government handle the pandemic in the best way it deems fit by discharging the order of interlocutory injunction obtained herein.*

23. ***THAT*** *I understand that this sworn statement shall be used in court proceedings and that I make this sworn statement consciously acknowledging that if I have made a false statement I may commit perjury and be liable to substantial penalty."* - Emphasis by underlining supplied

We pause here to observe that the sworn statement is headed "DEFENDANT'S SWORN STATEMENT ..." The sworn statement is in respect of one defendant only. Which particular defendant is this?

The Sworn Statement by Mr. Neverson Chisiza states:

"1. The Attorney General is acting on behalf of the Defendant in this matter and therefore, I am duly authority to make this sworn statement.

2. Unless stated otherwise, the statements of fact that I depose to herein are from information imparted upon me by my clients and I verily believe the same to be true

3. Through an ex parte application, the Claimants herein obtained permission for judicial review of the 2nd Defendants decisions in promulgating and implementing Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (the Rules) and enforcing a lockdown thereunder.

4. The Claimants were also granted an interlocutory application restraining the Defendants from implementing the lockdown.

5. In support of the said applications, the Claimants filed 5 sworn statements.

6. I believe the sworn statement of Hon Kezzie Kasambala Msukwa, MP is void on the basis that he is not a party to the proceedings. Neither is he representing any party to the proceedings. His sworn statement should therefore be struck off the record.

*7. I also believe that the sworn statements of **Gift Trapence** and **Moses Mkandawire** are fatally defective because they do not conform to the procedure laid down by the Supreme Court in **Ex Parte Kajoloweka case** (as argued in the skeleton arguments) in the following way:*

7.1 The sworn statements do not establish that the deponents have locus standi.

7.2 The sworn statements have not exhibited the objects of the NGOs the deponents purport to represent.

7.3 The sworn statements have not exhibited the constitutions of the respective NGOs

7.4 Failure to identify the people whose interest they claim to represent.

8. I believe that the foregoing omissions make the said sworn statements fatally defective. They too, should be expunged from the court record.

9. What then remains are the sworn statements of Hon Esther Cecilia Kathumba, MP and that of Hon Monica Chang'anamuno, MP.

10. As will be noted, these sworn statements barely establish an arguable case for judicial review. They only adopted the sworn statements that we seek the court to strike off for being defective.

11. I repeat the foregoing and state that the said sworn statements cannot 'satisfy court' to grant permission for judicial review.

> *12. Further, under the rules of procedure (the CPR), it is mandatory that the Applicant should outline Grounds for Judicial review. There are no grounds for judicial review herein.*
>
> *13. It is on the above grounds that I humbly pray that permission for judicial review should be discharge with costs."* – Emphasis by underlining supplied

Before moving on, it has to be observed that the two sworn statements do not cure the "incompleteness" in the Application to Discharge Permission regarding the identity of the party or parties making the application.

Consolidation of Proceedings

On 17th April 2020, the case of **Prophet David F. Mbewe (On his own behalf and on behalf of the Registered Trustees of the Living Word Evangelistic Church) v. Malawi Council of Churches and Attorney General,** HC/PR Civil Cause No. 112 of 2020, was commenced at the Principal Registry in Blantyre. The Claimant seeks, among other reliefs, "*a permanent order of injunction restraining the Defendants from suspending religious gatherings or implementing or enforcing the suspension of religious gatherings or the complete closure of religious gatherings against the Claimant or any church in Malawi until the hearing and determination of this matter or till a further order of the Court*". The Claimant state that the suspension of religious gatherings infringes the constitutional rights of the members of Living Word Evangelistic Church to religious liberty, economic activity and development.

The Claimant also applied for an interlocutory injunction restraining the Defendants by themselves, their servants or agents or any person whosoever, "*from suspending religious gatherings or implementing or enforcing the complete closure of religious gatherings against the Claimant and all churches in Malawi whether there is lockdown or not until the hearing and determination of this matter or till a further order*" [hereinafter referred to as the "2nd Application for Interlocutory Injunction"]

The 2nd Application for Interlocutory Injunction is supported by a statement sworn by the 5th Claimant. The statement starts with a background relating to the promulgation of the Convid-19 Rules. Thereafter, the statement is as follows:

> *"8. **THAT** in respect of the same, some churches like Catholic church of Malawi, Seventh day Adventist Church, Nkhoma Synod of the CCAP and Malawi Assemblies of God have announced to suspend church gathering and advised their members to close churches.*

9. ***THAT*** *in respect of the same, Malawi Council of Churches intends to implement the suspension of closure of the churches in lockdown. The Malawi government in essence intend to enforce the closure of the churches through enforcement.*

10. ***THAT*** *this decision to close or suspend churches intend to be implemented without consultation from our churches and hence acting against the procedure or the power of the law.*

11. ***THAT*** *this decision will at large affect and infringe our constitution rights to religious liberty, economic activity and development.*

12. ***THAT*** *this decision is not a public policy not a law at all but just procedural decision made by them big churches that will affect or at large.*

13. ***THAT*** *for us to earn a living we are expect people to gather and worship so we can find food to eat, pay rentals for the church, buy electricity and pay bills. The suspension of will at large put our life and the operation of the church at risk.*

14. ***THAT*** *as church and other churches also have staff working in our churches like guards and cleaners who also expect to receive their pecks through gathering of the people and to collect offering.*

15. ***THAT*** *further, our members rights to religious liberty will be violated and limited. If this is implemented, they are ought to be given a chance to pray and exercise their faith.*

16. ***THAT*** *as of fact, we as church we are aware of the measures put in place for religious gatherings and we undertake to implement the same. We understand that they are enforcement officers in place to implement the directives and orders and the Act. That closure or suspension of the church gatherings will in essence have a devastating impact to us as a church. As a result, our rights and liberty will be violated.*

17. ***THAT*** *we as a church are aware that religious gathering shall be regulated by*

a. *Maintaining a distance of 2 meters individuals in all directions no exceeding 50 in number, including clergy and official.*

b. *The church to disinfect and allow for a 2 hours cooling off period before service.*

c. *Provision of sanitary products including disfenctios, microphone, offertory baskets not be mobile and promote cash transactions.*

18. ***THAT*** *I believe that there are issues to be tried, I believe that the council has no lawful authority suspend the gathering of any church. I also believe that the government have no authority to enforce closure or suspend church gathering. I*

believe the Court need to determine whether the Act gives the council or any authority to close the church or the government in the circumstances.

19. ***THAT*** *I therefore pray for an order that the council or any authority should not close or suspend the gathering of the churches.*

20. ***THAT*** *the church and the Attorney General has nothing to lose at all since it is not against the policy if the churches are still operating provided they are following the measures put in place.*

21. ***THAT*** *it will be proper and just for the Court to stop the defendant and restrain us or churches from gathering in light with the measures in place. If this is implemented, will suffer grave injustice.*

22. ***THAT*** *we will suffer inconvenience if the injunction is refused because the lockdown will likely take long period, it is most likely to be extended. There won't be remedy reparable. The council of church nor the Government will not be in a position to remedy the damages suffered.*

23. ***THAT*** *the defendants will not suffer any inconvenience at all if the order of injunction is granted because the order of lockdown is to be implemented*

24. ***THAT*** *even if the lockdown is not implemented it will be very unfair if the churches are suspended.*

Undertaking Clause

25. ***THAT*** *the applicant undertakes to comply with the directives that the Court may give in relation to this order and should the Court later be of the view that this order was wrongly granted, and the defendants suffered damages thereby which ought to pay I agree to pay such damages.*

26. ***WHEREFORE*** *I pray to this Honourable Court to consider grant the order of Interlocutory Injunction, restraining the Defendant by itself, its servants or agents or any person whosoever, howsoever appointed from suspending or implementing the complete closure of religious gatherings against the claimant or any church in Malawi until the hearing and determination of this matter or till a further order of the Court."*

The 2nd Application for Interlocutory Injunction was also accompanied by skeleton arguments.

Having considered the application Justice Tembo noted the following:

"1. That these matters are similar, though this is focusing on religious gathering economic and associated rights,

2. That both cases arise out of the same transaction.

3. That both relate to the common question of law."

Having formed the said view, and acting pursuant to Order 6, rule 11, of CPR, Justice Tembo ordered the case of **Prophet David F. Mbewe v. Malawi Council of Churches and Attorney General,** HC/PR Civil Cause No. 112 of 2020, to be consolidated with the proceeding herein.

Following the consolidation, I ordered and directed as follows:

*"1. **THAT** the 5th Claimant shall serve on the other parties to this case all documents filed by him, including the originating process and the application for an interlocutory injunction, not later than 23rd April 2020*

*2. **THAT** 1st Claimant, 2nd Claimant, 3rd Claimant and the 4th Claimant and all the Defendants shall each file with the Court, and serve on the 5th Claimant, all documents that he, she or it intends to rely on in this case, not later than 23rd April 2020*

*3. **THAT** each party should prepare and file with the Court, not later than 23rd April 2020, written submissions on the question whether or not the matters raised by this case fall within the ambit of section 9(2) of the Courts Act*

*4. **THAT**, for the avoidance of doubt and in the interest of clarity, this Order is supplementary to, and NOT in substitution of, the Order made by this Court on the 17th day of April 2020."*

Notice of Withdrawal

On 23rd April 2020, there was filed with the Court the following Notice:

"NOTICE OF WITHDRAWAL
(Under the Court's Inherent Jurisdiction)

TAKE NOTICE

That the Defendants, having carefully considered their position, and no longer being desirous to argue an application to vacate the interlocutory injunction or to be heard in relation thereto;

AND no longer being desirous to contest the permission to move for judicial review DO HEREBY wholly withdraw their court processes filed on 21st April, 2020.

For the record, the said court processes and supporting documentation comprise the following:

1. The Application to Discharge Permission for Judicial Review;

2. *The Sworn Statement of Neverson Chisiza in support of an Application to Discharge Permission for Judicial Review;*

3. *The Sworn Statement of Dan Namarika in Opposition to an Application for an Interlocutory Injunction; and*

4. *The Skeleton Arguments in Response to the Application for Interlocutory Injunction and Application for an Order Discharging Permission for Judicial Review.*

Dated this 23rd day of April 2020

ATTORNEY GENERAL'S CHAMBERS" – Emphasis by underlining supplied

The Notice of Withdrawal, just like the Application to Discharge Permission, raises more questions than answers. Firstly, it will be noted that the Notice of Withdrawal purports to invoke the Court's inherent jurisdiction.

The doctrine of inherent jurisdiction helps the Court to achieve justice where it would not have been possible to do so: See **Grobbelaar v. News Group News Papers Ltd [2002] WLR 3024** wherein the House of Lords adopted the definition by Jacob in his article "The Inherent Jurisdiction of the Court (1970) 23 CLP 23" which state as follows:

> **"***The inherent jurisdiction of the court may be defined as being the reserve or fund of power, residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.*"

Another way of putting it is that inherent jurisdiction remains the means by which Courts deal with circumstances not proscribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of an action.

Inherent jurisdiction should be exercised in conformity with statutes and well established rules of practice: see the Canadian case of **College Housing Co-operative Ltd. v. Baxter Student Housing Ltd. [1976] 2 S.C.R. 475** where the Supreme Court of Canada observed thus:

> *"Inherent jurisdiction cannot, of course, be exercised so as to conflict with statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case."*

Three principles emerge from the foregoing, namely, the so called inherent jurisdiction (a) is equitable in nature, (b) is solely intended to ensure justice, and (c) has to be exercised with restraint and discretion. This means that a prayer based on the Court's inherent jurisdiction cannot be granted as a matter of right. The Court has to take into account all the circumstances of the case, including submissions by all concerned parties. As such, it is not enough for a party seeking to invoke the court's inherent jurisdiction to simply file a notice to that effect without having to come to court during the hearing of the matter so that he or she can address the submissions by the other parties and. In appropriate cases, questions by the Court.

In short, it was wrong for the Defendants to think that their duty to the Court finished with filing the Notice of Withdrawal. No! It was necessary for them to leave the comfort of their respective offices and appear before the Court. By the way, I know of no principle of law which states that a party that is so dead sure of the strength of his or her case does not have to come to court to plead his or her case. With due respect, I do not think we will ever have such a principle: it is preposterous!

The second issue regarding the Notice of Withdrawal has to do with the number of parties thereto. This is relevant because it goes without saying that an application can only be withdrawn by the party who made or filed it in the first place.

It will be recalled that the Court has already narrated the great difficulties that it had to identify the number of parties to the Application to Discharge Permission. As it is, there being no clarification on the issue, the question regarding the competence of the 1st, 2nd, 3rd, 4th and 6th Defendants respectively to be party to the withdrawal of the Application to Discharge Permission will linger on.

Analysis and Determination

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined. Order 10, r. 27, of the CPR provides that the Court may grant an injunction by an interlocutory order when it appears to the Court that (a) there is a serious question to be tried, (b) damages may not be an adequate remedy and (c) it shall be just to do so.

Having carefully read and considered the sworn statements and the submissions by Counsel, it is very clear to me that there are serious questions in this matter to be tried which cannot simply be disposed of at this stage.

Firstly, the Claimants asserts that the decision by the 2nd Defendant to declare a lockdown amounts to a *defacto* state of emergency. They contend that (a) the lockdown abrogates from the rights contained in Chapter IV of the Constitution and (b) the decision is illegal and unconstitutional in light of the dictates of sections 44 and 45 of the Constitution. In this regard, the issue is whether the 2nd Defendant can declare a lockdown without the attendant declaration of state of emergency being declared?

Secondly, there is the question whether or not the 2nd Defendant can promulgate subsidiary legislation under section 31 of the Public Health Act and implement them without parliamentary oversight? The Claimants argue that the 2nd Defendant acted contrary to the dictates of section 58(2) of the Constitution by implementing the Convid- 19 Rules before Parliament could review them. The Claimants also state that section 31 of the Public Health Act does not allow the Minister to make subsidiary legislation which in are in essence outside the scope of the Public Health Act. Additionally, the Claimants contend that the decision to make the Convid- 19 Rules violates not only section 31 of the Public Health Act but also section 58(1) of the Constitution. These matters raise the question whether or not the 2rd Defendant can promulgate and implement rules purportedly made under section 31 of the Public Health Act where the rules expressly state that they authorise the taking of measures which are outside the scope of Public Health Act?

Thirdly, the Claimants hold the view that the promulgation and implementation of the lockdown would derogate from rights contained in Chapter IV of the Constitution without following the dictates of sections 44 and 45 of the Constitution.

Fourthly, the Claimants assert that since the lockdown will effectively deprive most Malawians of their means and sources of income, any reasonable Minister should have provided for things like social cash transfer, food parcels and stimulus packages to small businesses in order to mitigate the economic fall out of the extreme measures taken. The constitutional order, so the Claimants posited, supports this position under section 13, as read with section 30(2), of the Constitution. This means that the Court has to consider the question of whether or not the 2nd Defendant can implement a lockdown without providing for social security interventions to marginalised groups in our society.

Fifthly, it was also strongly argued by the Claimants (particularly by the 5th Claimant) that the actions by the Defendants pose a great risk of negatively affecting the Claimants' constitutional rights to property, religion and even to freely associate with any group or association of one's choice, which are some of the benchmarks of living in a democratic society.

We now turn to the question whether or not damages may or may not be an adequate remedy. The Claimants strenuously argued that that damages would not be an adequate remedy because (a) the decision to effect a lockdown over all districts in Malawi infringes on the Claimants' constitutional rights contained in Chapter IV of the Constitution and (b) the Convid-19 Rules are an affront to rule of law as they are not in compliance with sections 44, 45, 58, 56(2) of the Constitution.

As the subject of the present case relates to the alleged violation of human rights, there is really little for the Court to say on the matter. It is trite that damages would be inadequate in such circumstances: see **The State v. The Attorney General (Inspector General of Police, Commissioner of Police (central), Misc. Civil case no. 49 of 2008**, (unreported) where Mzikamanda J, (as he was then) emphatically stated thus:

> "*As to whether damages can be adequate remedy for the alleged violation of human rights, I hasten to say that damages may not be an adequate remedy. Enjoyment of human rights cannot be quantified in monetary terms, and yet the enjoyment of those rights is a very fundamental aspect of our democracy"*

In view of the foregoing, it is my finding, and I so hold, that damages would be an inadequate remedy in the application before me. I am fortified in my holding by the decision of the Supreme Court of Appeal in the case of **Malawi Savings Bank v. Sabreta Enterprises Limited, MSCA Civil Appeal No. 44 of 2015 (unreported)** wherein the Court made the following pertinent observations:

> *"On the matter of adequacy of damages we think each case must be considered on its own facts. There is nothing like one principle fits all scenarios. We think it is a little simplistic not to grant an injunction against an appellant just because it has deeper pockets. Just because it can afford to pay damages in case the injunction was erroneously granted. There will be instances, and we have a feeling this could be one of them, where damages will never suffice the fact that they can be afforded notwithstanding. <u>This case does not, in our judgment, seem to be about damages</u>."* – Emphasis by underlining supplied

As regards the balance of justice, sometimes it is best to grant an injunction so as to maintain the <u>status quo</u> until the trial and at other times, it is best not to impose any restraint on the respondent: see **Hubbard v. Vosper [1972] 2 Q.B. 84**.

In the present case, the Claimants submit that justice would be best served by the Court ordering the continuation of the order of interlocutory injunction that was granted on the 17th of April, 2020. It might not be out of order to quote the relevant part of the Skeletal Arguments:

"3.10 Much as there are competing public interests, the rule of law demands that the law should at all times be respected.

*3.11 In **the Estate of Mutharika** **In the Matter of the State and Commissioner General of the Malawi Revenue Authority, ex parte the Estate of Mutharika, HC/PR Miscellaneous Civil Cause No. 3 of 2013 (unreported)** Justice Mwaungulu issued a clarion call to all public officers "to act legally within our powers where they exist and not to act where there are no such powers"*

*3.12. The case of **The State (on the application of Lin Xiaoxiao & Others) v. Attorney General** Judicial Review Cause No.19 of 2020 is perhaps more succinct wherein Justice Nyirenda stated:*

> *"With reference to the particular matter under consideration, the rule of law requires that emergency measures should be taken only in accordance with the law and that their legality, including their conformity with international law, should be capable of being tested in the High Court: see sections 45(4)(c) and 45(6) of the Constitution."*

3.13 The gist of this application revolves around the exercise of emergency powers by the Minister firstly by enacting the COVID 19 rules and secondly by implementing the said rules. Serious human rights violations that may be committed and irreparable damage may be occasioned if the said rules are implemented and the exercise of power under the said rules is unchecked. Therefore, it is just in the circumstances to order the continuation of the order of interlocutory injunction until the said issues are duly examined by the court."

I cannot agree more with the Claimants. I am satisfied that the balance of justice lies in favour of maintaining the status quo. In this regard, the validity of the Court Orders granted herein on 17th March 2020 and 24th April 2020 respectively shall continue until the determination of the substantive judicial review proceedings or until a further order of this Court.

For avoidance of doubt and in the interest of clarity, both the 1st Application for Interlocutory Injunction and the 2nd Application for Interlocutory Injunction have been granted. Accordingly, it is ordered as follows:

(a) the Defendants, either through themselves or through their servants, agents, subordinates, employees, or whomsoever on the Respondents' behalf, are hereby restrained from effecting and or otherwise enforcing the lockdown declared by the 2nd Respondent until the final determination of the substantive judicial review herein or a further order of the Court; and

(b) the Defendants, either through themselves or through their servants, agents, subordinates, employees, or whomsoever on the Respondents' behalf, are hereby restrained from suspending or implementing the complete closure of religious gatherings against the 5th Claimant or any church in Malawi until the final determination of the substantive judicial review herein or a further order of the Court.

Conduct of the Office of the Attorney General questioned

Counsel Mwafulirwa, speaking on behalf of the team of lawyers appearing on behalf of the Claimants, stated that it would be amiss of him if he did not comment on the conduct of the Attorney General Chambers in handling the present proceedings. It might not be out of order to quote the exact words used by Counsel Mwafulirwa:

> *"The Applicants are not amused at all by the way the Attorney General's office has handled the whole matter. We are concerned by the approach of our learned friends in the Attorney General's Chambers. We have to call a spade a spade. The Attorney General and/or his subordinates were supposed to be in this Court. They should have been here to indicate their stand.*
>
> *The Court must be respected. It is wrong for the Attorney General to address the Court through newspapers. The Attorney General must be censured. He must not forget that the Attorney General's Chambers are not a private firm. He represents over 18 million Malawians and not just a select few."*

Counsel Mwafulirwa was referring to news items that appeared in the two daily newspapers, that is, *"The Nation"* and *"The Daily Times"* of Friday, 24th April 2020. The news item in the *"The Nation"* is on the front page and it is headed "**Court holds key to lockdown – Kaphale**". It reads as follows:

> *"Attorney General (AG) Kalekeni Kaphale says the Judiciary, which last Friday granted a seven-day injunction stopping implementation of a national lockdown to manage coronavirus (Covid- 19) pandemic, holds the key to the future of the precautionary measure.*
>
> *In an interview yesterday after the AG's Chambers formally expressed its intention not to contest or vacate the injunction granted to Human Rights Defenders Coalition (HRDC). He said government already performed its duty by announcing the lockdown.*
>
> *Said Kaphale: "The hearing [today] is a defining moment in the fight against the virus. We believe all the information needed to make the right decision is in the public domain. The virus is not out there playing games.*
>
> *He said currently government has nothing to do but wait from the courts because it already announced a lockdown from midnight April 18 to midnight May 9 and published the rules for the same before HRDC, Church and Society Programme of CCAP Livingstonia Synod, legislator Kezzie Msukwa and a Kathumba obtained the court order.*

On whether the government's decision to withdraw emanates from the observations by the Malawi Law Society that there were some legal irregularities in the implementation of the some Covid- 19 measures, the AG said he was not in a position to comment on the observations because they have come after the injunction.

In a separate interview, presidential press secretary Mgeme Kalilani said the future of the lockdown lies in the hands of the Judiciary which needs to rule to help Malawians.

He said neither the President nor government is abrogating its responsibility as it was stopped by the courts and HRDC from discharging its duty and responsibility.

HRDC national chairperson Gift Trapence refused to comment on the matter, saying it is in court.

The court will proceed to hear the matter today, according to the Judiciary." – Emphasis by underlining supplied

The news item in the "*The Daily Times*" is also on the front page, with the headline "**LOCKDOWN CASE ON MINUS GOVT**" and it is couched in the following terms:

"Hearing of the lockdown injunction case and judicial review will still continue today as ordered by Lilongwe High Court Judge Kenyatta Nyirenda despite the government's decision to withdraw its decision to challenge the injunction.

Last week Judge Nyirenda granted an injunction to Human Rights Defenders Coalition stopping the government from implementing the lockdown as one of the measures to control the spread of Covid- 19.

Two days after filing the intention to challenge the injunction, Attorney General Kalekeni Kaphale decided to withdraw from the case but the court says everything will continue as planned despite the government's absence.

…

A legal expert who did not want to be named said the matter will go uncontested in terms of hearing of the inter-partes injunction.

….

In a telephone interview yesterday, Kaphale said that they believe with the information in the public domain regarding the progress of the outbreak under the no-lockdown situation, the court will do the right thing.

"There are these daily briefings and I am sure our Judiciary is alive to what is happening and I believe our Judiciary has the nation at heart and will make the right decision."

…" - – Emphasis by underlining supplied

The office of the Attorney General is a creature of the Constitution: section 98 of the Constitution. As the principal legal advisor to the Government, the major tasks of the office of the Attorney General include (a) provision and coordination of legal advice to the Government, (b) ensuring legality of Government policies and acts, (c) promoting, protecting and upholding constitutionalism and the rule of law.

Needless to say, this case raises a host of legal issues of constitutional importance. I, therefore, have great difficulties to understand why the office of the Attorney General would not want to be heard on the application one way or the other. As the holder of the office of the Attorney General is the head of the bar, the office of the Attorney General has to be exemplary in its handling of issues, particularly court proceedings.

It is disheartening to even imagine that a public office entrusted with public power at such an elevated level would opt not to file any court process one way or the other on such a weighty constitutional matter. With due respect, for the office of the Attorney General to sit on the fence on such an important topic involving imposition of a state of disaster or state of emergence is, in my considered view, a dereliction of duty: the office failed to live up to its constitutional responsibilities.

It is very important that holders of the office of the Attorney General should never be deluded into thinking that being a principal legal advisor to the Government means that the objective of the office of the Attorney General must be to win cases at all costs. When the Attorney General appears in a case as a legal practitioner or as a party, his or her role is not that very much different from that of any other legal practitioner or party. They are all there to assist the court in reaching the correct result and thereby help to improve standards in public administration,

The point was lucidly explained in **R v. Lancashire County Council ex p. Huddleston** [1986] 2 All ER 941 by Lord Donaldson MR as follows:

> *"This development [i.e. the remedy of judicial review and the evolution of a specialist administrative or public law court] has created a new relationship between the courts and those who derive their authority from public law, <u>one of partnership based on a common aim, namely the maintenance of the highest standards of public administration</u> ... The analogy is not exact, <u>but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities</u>**. *It is not discreditable to get it wrong. <u>What is discreditable is a reluctance to explain fully what has occurred and why…</u> Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with <u>all the</u>*

> *cards face upwards on the table and the vast majority of the cards will start in the authority's hands".***.**
>
> *This is the approach that should be applied in response to all applications for judicial review, and is required in order to satisfy the requirement of the duty of candour, the obligation upon all public authorities who are parties to applications for judicial review. The duty of candour in judicial review applies from the outset and applies to all information relevant to the issues in the case, not just documents.*

The duty of candour gives rise to a weighty responsibility. When responding to an application for judicial review and interlocutory applications related thereto, public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue: see **Secretary of State for Commonwealth Affairs v. Quark Fishing Ltd [2002] EWCA Civ1409**. The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge: see **R v**. **Barnsley Metropolitan Borough Council ex p. Hook [1976] 1 WLR 1052.**

In short, there is a very high duty placed on the office of the Attorney General and all Government Ministries/Departments to assist the Court with full and accurate explanations of all the facts relevant to the issue that the Court must decide. Actually, the duty of candour continues to apply throughout the proceedings. For example, if after the service of evidence, further relevant information comes to light, that information must be disclosed to the other parties to the proceedings and put before the Court at the earliest possible opportunity.

The importance or necessity of the office of the Attorney General to appear and give its input in the present case cannot be avoided by trick or device. Being the principal legal advisor to Government, the office of the Attorney General must have been involved in coming up with the Covid- 19 Rules whose constitutionality is being challenged. It was imperative that such information be provided to the Court to help it arrive at a correct decision.

Instead of doing so, the office of the Attorney General decided to snub the hearing. Having done so, the office of the Attorney General then seeks to communicate with the Court through the media by stating, among other matters, that the Court should rely on information in the public domain.

This is bizarre - the sherry effrontery of this kind of approach to handling a court case is quite astounding. Actually, the fact that such statements were made makes me wonder if the office of the Attorney General fully understands its responsibilities as envisaged by the framers of the Constitution. Perhaps it high time consideration

was given to beefing up the provisions of section 98 of the Constitution with a view to elaborate on the functions, duties and powers of the office of the Attorney General through an Act of Parliament. This is the route that other jurisdictions, such as Kenya, have taken.

We will conclude on this issue by reiterating the wise words by Lord Donaldson MR, that is, *"It is not discreditable to get it wrong ... What is discreditable is a reluctance to explain fully what has occurred and why"*

Costs

Counsel Mwafulirwa prayed that the State be condemned to pay costs in this action particularly on account of its conduct in this case.

In considering the issue of costs, the Court has to examine the effect, if any, of the Notice of Withdrawal on the status of the 1st, 2nd, 3rd, 4th and 5th Defendants as parties to these proceedings.

It is common place that a person does not cease to be a party to a case by the mere fact that (a) the person wholly withdraws an application it has made in the case or (b) the person chooses not to appear during the hearing of an application it has made in the case.

Order 6 of CPR governs the issue of parties to a case and the relevant part provides as follows:

> *"1. Subject to rule 15, a person is a party to a proceeding if he is named proceeding as a claimant or as a defendant.*
>
> *2. There may be more than one claimant, and more than one defendant to proceeding in the same proceeding.*
>
> *3. Each party to a proceeding shall be named separately.*
>
> *4. A person may be added as a party without the permission of the Court before the summons has been served by endorsing that person's name on copies of the summons.*
>
> *5. The Court may, on an application by a party, order that a person with permission becomes a claimant in a proceeding where the person's addition as a party is necessary to enable the Court to make a decision fairly and effectively in the proceeding.*

> *6. A person may be added as a claimant in a proceeding with his consent and where the person does not consent to be added as a claimant, he shall be added as a defendant.*
>
> *7. A person affected by a proceeding may apply to the Court for an order that he should be added as a party in the proceeding.*
>
> *8. The Court may, on an application by a party, order that a party in a proceeding is no longer a party where-*
>
> *(a) the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding; or*
>
> *(b) there is no good and sufficient reason for the person to continue being a party.*
>
> *...*
>
> *15. Where a defendant claims a contribution, indemnity or other remedy against a person who is not a party to the proceeding, the defendant shall file and serve a notice (a 'third party notice') on that person stating that-*
>
> *(a) he claims the contribution, indemnity or other remedy; and*
>
> *(b) the person shall be a party to the proceeding from the date of service."*

It is clear from the foregoing that the 1st, 2nd, 3rd, 4th and 5th Defendants are, and were at all material times, parties to this case. The fact that they opted not to prosecute the Application to Discharge Permission is neither here nor there. Actually, if the decision to withdraw the Application to Discharge Permission was meant to escape from being condemned to pay costs, it was an exercise in futility. With due respect, the office of the Attorney General goofed big time.

In the first place, as it has already been discussed hereinbefore, it is highly debatable that the 1st, 2nd, 3rd, 4th and 5th Defendants were all parties to the Application to Discharge Permission. Consequently, their competence to withdraw the said Application has to be greatly doubted.

Secondly, and perhaps more importantly, the Notice to Withdraw was made late in the day. It will be recalled that the Application to Discharge Permission was filed with the Court and served on the other parties on 21st April 2020 and the Notice of Withdrawal was filed with the Court very late in the afternoon of 23rd April 2020, that is, less than 18 hours to the set time for the hearing of the two inter-partes

applications, that is, the inter-partes application for continuation of the interlocutory injunction and the Application to Discharge Permission. In short, by the time the Notice of Withdrawal was being filed with the Court, the Claimants had already spent considerable time and energy in perusing the Application to Discharge Permission and preparing the necessary response thereto.

It is commonplace that costs follow the event. An instructive authority is Order 31, rule 3, of CPR which provides that *"where the Court decides to make an order about costs, the unsuccessful party shall be ordered to pay the costs to the successful party"*.

The Claimants having succeeded in in the present application, the 1st, 2nd, 3rd, 4th and 5th Defendants are condemned to pay cost of and incidental to these proceedings. It is so ordered.

Way Forward

In view of the nature of the triable issues that this matter raises, I determine, pursuant to Order 19, rule 2, of CPR, that a matter on the interpretation or application of the Constitution has arisen in these proceedings that requires that I submit the matter for the certification of the Honourable the Chief Justice under section 9 (3) of the Courts Act, and for the ensuing process thereunder.

This Court will, therefore, proceed to refer the matter to the Honourable the Chief Justice for certification under section 9(3) of the Courts Act, in accordance with the applicable procedure.

In view of the foregoing, these proceedings, save for the order of costs awarded to the Claimants, are hereby stayed pending the decision on certification by the Honourable the Chief Justice, and should he so certify, the proceedings shall remain so stayed pending the determination of the constitutional issues by the High Court panel to be constituted under section 9(3) of the Courts Act.

Pronounced in Court this 28th day of April 2020 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE