IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT LILONGWE
MSCA CIVIL APPEAL NO. 24 OF 2017

[Being High Court, Lilongwe Registry, JR Cause Number 152 of 2016]

BETWEEN

THE STATE

AND

THE OMBUDSMAN	**APPELLANT**
EX PARTE	
THE PRINCIPAL SECRETARY FOR FINANCE	**1ST RESPONDENT**
THE PRINCIPAL SECRETARY FOR AGRICULTURE	**2ND RESPONDENT**
THE NATIONAL ASSEMBLY	**3RD RESPONDENT**

CORAM: **THE HON. JUSTICE E B TWEA SC JA**

THE HON. JUSTICE L P CHIKOPA SC JA

THE HON JUSTICE A D KAMANGA SC JA

M R M Msisha SC[Mr.]/M. Chizuma-Mwangonde[Mrs.] of Counsel for the Appellant

A Itimu Ms., Senior State Advocate for the 1st, 2nd and 3rd Respondents

Minikwa Mr. Court Clerk

Mthunzi Mrs Court Reporter

JUDGMENT

Chikopa SC, JA[Twea SC JA, Kamanga SC JA concurring]

BACKGROUND

The Ombudsman received a complaint regarding the manner in which the Executive and the National Assembly procured and dealt with tractors bought using a USD50,000,000.00 line of credit from an Indian Bank. At the conclusion of her dealing with the complaint the Ombudsman directed *inter alia* the following remedies:

1. 'that a*ll loan authorisation bills should not be subjected to the waiver of notice without vigilant deliberations on the justifications given;*
2. *That Loan Authorisation Bills should be specific on details;*
3. *That the Principal Secretaries of the Ministry of Finance and Ministry of Agriculture should apologise to Malawians for buying equipment with archaic technology'.*

The Respondents were not best pleased with the above orders/directions. They therefore approached the High Court, Lilongwe Registry seeking various reliefs in the form of orders and declarations chief of which were[and we quote]:

1. *' A declaration that the Respondent's decision issuing a remedial order that all loan authorisation bills should not be subjected to the waiver notice without vigilant deliberations on the justifications given and that loan authorisation bills to be specific on details is unlawful as she had no jurisdiction to make them the same being legislative action and not administrative action issues;*
2. *A declaration that the Respondent's decision ordering that all loan authorisation bills should not be subjected to waiver notice without vigilant deliberations on the justifications given as per standing orders is ultra vires as Parliament regulates its own procedure as per the Constitution and the Respondent has no authority to do so;*

3. *A declaration that the Respondent's decision ordering that all loan authorisation bills be specific on details is ultra vires as only Parliament can determine the contents of a bill following a vote in the National Assembly;*

4. *A declaration that the Respondent's order that the Principal Secretaries of the Ministry of Finance and Ministry of Agriculture do offer an apology to Malawians for buying equipment with archaic technology is 'Wednesbury Unreasonable' and not practical as the same is directly inconsistent with the requirement in her determination that the Green Belt Initiative [GBI] must prepare reports on poor performance and until those reports conclude that the equipment was defective, an apology is not justified;*

5. *A declaration that the directive for an apology is not an 'effective' remedial measure and hence its proposition is merely meant to embarrass the Principal Secretaries and not effectively correct a wrong. It has therefore been made in bad faith; and*

6. *A like order to certiorari quashing the Respondent's three orders itemised above'.*

The High Court dealt with this matter from two perspectives. First was whether the Ombudsman had jurisdiction to deal with the complaint. Second was the propriety of the remedies ordered by the Ombudsman. At the conclusion of the proceedings the said Court concluded that the Ombudsman had no jurisdiction to deal with the complaints before her. It was of the view that there were reasonably available to the Complainants alternative or other practicable remedies. The Ombudsman's remedies were consequently all set aside.

Not satisfied with the High Court's determination the Ombudsman appealed to this Court. She filed ten grounds of appeal. They are in the following terms:

1. *The High Court erred in holding that the Ombudsman had no jurisdiction to undertake the investigation following receipt of the complaints from the Complainants and in quashing the remedial orders and action on that basis;*

2. *The High Court erred in adopting a construction of section 123 of the Constitution which renders the office of the Ombudsman redundant;*

3. *The High Court erred in construing section 123 of the Constitution by failing to recognise and uphold the discretion of the Ombudsman to determine whether there is a 'remedy reasonably available' to a Complainant in deciding if an investigation should be undertaken;*

4. *The High Court erred in construing reviewable in section 123(2) as authorising the quashing of the findings of the Ombudsman's Report;*

5. *The High Court erred in failing to find and uphold the determination of the Ombudsman that there was in fact no other remedy reasonably available to the Complainants as demonstrated by the contents of the report by the Ombudsman headed 'The Present Toiling, the Future Overburdened';*

6. *The High Court erred in law by failing to appreciate the distinctive mandate of the Office of the Ombudsman which is to investigate and inquire as compared to the adjudicative mandate of the courts. As a consequence, the Court failed to appreciate the nature of the remedial action in the context of the totality of the report by the Ombudsman entitled 'The Present Toiling, the Future Overburdened';*

7. *The High Court erred in holding that the question of adequacy or sufficiency of remedy was not to be debated in the Ombudsman's determining whether or not there was a remedy reasonably available, and whether or not to undertake an investigation;*

8. *The High Court erred in law and on the facts in holding that in fact there was a remedy reasonably available to the Complainants and therefore the Ombudsman had no jurisdiction to have undertaken the investigation;*

9. *The High Court erred in construing any 'remedy reasonably available' by way of proceedings in a court to mean that a remote possibility of any futile filing in Court would exclude the jurisdiction of the Ombudsman; and*

10. *The judgment of the High Court was against the weight of the evidence.*

The Respondents cross appealed. They filed five grounds of appeal. We reproduce them in full:

1. *That the learned Judge erred in law in not issuing a declaration that the Appellant had no jurisdiction to issue a remedial order that all loan authorisation bills should not be subjected to the waiver notice without vigilant deliberation on the justifications given and that loan authorisation bills should be specific on details is unlawful as she had no jurisdiction to make them, the same being legislative action and not administrative issues;*

2. *That the learned Judge erred in law in not issuing a declaration that the Appellant's decision ordering that all loan authorisation bills should not be subjected to the waiver notice without vigilant deliberation on the justifications given as per standing orders is ultra vires as Parliament regulates its own procedure as per the Constitution and the Appellant has no authority to do so;*

3. *That the learned Judge erred in law in not issuing a declaration that the Appellant's decision ordering that all loan authorisation bills should be specific on details is ultra vires as only Parliament can determine the contents of a bill following a vote in the National Assembly;*

4. *That the learned Judge erred in law and in fact in not issuing a declaration that the remedial action issued by the Appellant to Principal Secretaries of the Ministry of Agriculture and Ministry of Finance to offer an apology to Malawians for buying equipment with archaic technology is 'Wednesbury Unreasonable' and not practical as the same is directly inconsistent with the requirement in her determination that the Green Belt Initiative must prepare reports on poor performance and until those reports conclude that the equipment was defective, an apology is not justified;*

5. *That the learned Judge erred in law and in fact in not issuing a declaration that the directive for an apology is not an 'effective' remedial measure and hence its proposition is merely meant to embarrass the Principal Secretaries and not effectively correct a wrong.*

THE LAW

In the course of hearing this appeal we were referred to various case law and legislation. We would be remiss if we did not sincerely thank the Bar for their industry.

At the outset we wish to reiterate that we will, within the context/confines of the grounds of appeal, proceed with this matter by way of rehearing. We will, in other words, ask ourselves the question whether on a re-examination of the material before the High Court we would have come to the very conclusion that it did. If the answer be in the positive the appeal will have failed. If however we come to a different conclusion the appeal will have succeeded to the extent of the difference. See **Namata v Republic** MSCA Criminal Appeal Case Number 13 of 2015[unreported]. See also **Billiat Gadabwali v The State** Miscellaneous Criminal Appeal Number 2 of 2013[unreported] where Chipeta SC JA said:

> *'of necessity therefore, this entails that I treat this matter as if it were coming for the first time. This means allowing myself to look at the very material the Honourable Judge looked at in the court below before he came to the decision, and asking myself ... whether I could have come to a different conclusion'.*

THE ISSUES

Looking at the papers before the High Court it appears to us that the Respondents had issues only with the Ombudsman's remedial orders. What, in terms of sections 126 and 8 of the Constitution and of the Ombudsman Act respectively are called remedies. This, in our view, is clear from the reliefs sought column of Form 86A that accompanied the application for judicial review in the Court below which is quoted above. The question that immediately arises is whether the respondents had, in the Court below and now in this Court, any complaint against the Ombudsman's assumption of jurisdiction in the matter. Strictly speaking, the answer should be in the negative.

On the other hand, and as we have said above, the Court below determined one question only namely whether or not the Ombudsman had jurisdiction to

investigate the complaint. Once it concluded that the Ombudsman had no jurisdiction it proceeded to quash the Ombudsman's 'remedial orders and actions'. Meaning, in our understanding that the remedial orders and actions fell not necessarily for want of merit but because of the Ombudsman's lack of jurisdiction. A case, if ever there was one, of the remedies having no leg to stand on. Which raises the question whether the cross appeal was at all necessary in view of the Court below's conclusion that the Ombudsman had no jurisdiction. Speaking for ourselves a want of jurisdiction meant there was never an inquiry/investigation. That the remedial orders and actions complained of were never at all made. The Respondents, in our humble view, had nothing to [cross]appeal against.

However looking at this matter in its totality especially its constitutional context, the High Court's conclusions on the Ombudsman's jurisdiction, the grounds of appeal and the arguments in this Court it is clear that there are two broad issues requiring this Court's consideration. On the one hand is the matter of the Ombudsman's jurisdiction. The question being whether or not the Ombudsman had jurisdiction to investigate the complaints before her. Depending largely on the answer to this question the next issue is the propriety of the remedies directed/recommended by the Ombudsman. If we confirm the Court below's conclusion that the Ombudsman had no jurisdiction there will be no real need for us to consider the propriety of the remedies. The cross appeal will therefore be a nonissue. If, however, we find that the Ombudsman had jurisdiction we shall be obliged to also look at the propriety of the remedies. And therefore the cross appeal.

THE OMBUDSMAN'S JURISDICTION

The Arguments

We will look at the Court below's, the respondents' and the appellant's.

The Court Below's

In finding that the Ombudsman had no jurisdiction in this matter the High Court opined that the complainants had a reasonably available/practicable alternative remedy to their complaints. They could have approached the Courts to judicially

review the Respondents' actions. About the Complainants' alleged lack of financial wherewithal the Court below was of the view that the Complainants could have approached the Legal Aid Bureau for assistance in that regard. And when it was suggested that the Complainants were out of time and could not therefore approach the Courts with the complaint herein the Court below thought that could have been cured by an application to file the judicial review out of time.

The Respondents'

The Respondents are much of the High Court's mind in so far as jurisdiction is concerned. They are convinced that the Complainants had a reasonably available/practicable alternative remedy. Instead of going to the Ombudsman they could, with the assistance of the Legal Aid Bureau have gone to court to seek judicial review of the respondents' actions. About the complaint being out of time in so far as litigation is concerned the Respondents, like the Court below, contended that an application to review out of time should have been resorted to.

The Respondents also argued that the complaint being about matters that had been or were before the National Assembly the same cannot be the subject of the Ombudsman's jurisdiction. They are instead the subject of the National Assembly's procedure as constitutionally determined under its Standing Orders[SOs]. If therefore there be or was any dispute about the SOs, their extent or application a remedy must be found within the Chamber in accordance with the SOs and/or the Constitution. The Ombudsman therefore had no jurisdiction over the complaints. Neither did she have the power to direct/recommend the resultant remedies. The matters before her were according to the respondents the National Assembly's business as guided/regulated by the SOs and the Constitution.

The Appellant's

The Appellant contends that the High Court misapprehended the Ombudsman's jurisdiction. In her view her jurisdiction is discretionary. She, and no other, decides whether or not to investigate any complaint placed before her. And whether she will investigate or not depends on whether there is reasonably available an alternative remedy by way of court proceedings or appeal from a court or other practicable remedy. In the circumstances of this case the Appellant

contends that she exercised her discretion faultlessly. The Complainants had no reasonably available alternative or other practicable remedy. She therefore correctly assumed jurisdiction.

It was also her view that except for complaints about judicial decisions all institutions and complaints are amenable to the Ombudsman's jurisdiction. The only limitation is the reasonable availability of an alternative remedy by way of court proceedings or appeal or of other practicable remedy. The Respondents herein, including the National Assembly, could and were therefore properly the subject of an Ombudsman investigation the fact that the National Assembly is empowered to regulate its own procedure notwithstanding.

On whether the Complainants had reasonably available alternative and/or other practicable remedies the Ombudsman maintains there were none available. True the Complainants could have sued. But such suit was at best illusory. It could not have secured the effective remedy, if successful, envisaged in section 43(1) of the Constitution. There was, in other words, no effective alternative remedy available to the Complainants. A point borne out by the fact that not even the High Court itself pointed to one.

More than that the Ombudsman felt that there were, apart from finances, always going to be practical difficulties about any suit against the Respondents in relation to the complaints herein. The complaint was essentially about a falling below expected standards in public service delivery. Central to proof of such allegations was information. The Ombudsman has no doubt that it would have been literally impossible for the Complainants to collect the information necessary to prove their complaint. Suing the Respondents would, in her opinion, while always a possibility remain, in the circumstances, not a reasonably available alternative and/or practicable remedy. She was and remains convinced that she was always the best placed to do deal with the complaint. She has the coercive powers, the human and financial resources necessary not just to receive and deal with the complaint as received but also, if need be, to get more information about it and ultimately decide on its merits. In the instant case it was because of her access to such wherewithal that the complaint was resolved.

THE OMBUDSMAN'S REMEDIES

The Respondents think them untenable. They touch on matters about the National Assembly's internal procedures which are already covered by the SOs and the Constitution. The remedies are also generally not compliant with section 126 of the Constitution and section 8 of the Ombudsman Act. They are, in the words of the Respondents Wednesbury unreasonable i.e. so unreasonable no reasonable Ombudsman could have directed them, ineffective, made in bad faith and only calculated to embarrass the Principal Secretaries of Agriculture and Finance. They should therefore be expunged.

The Ombudsman on her part denies her directed/recommended remedies flout sections 126 and 8 abovementioned as alleged or at all. Contending that remedies depend on the complaint she in the instant case saw nothing wrong with an apology being ordered in relation to a misprocurement. Nor with requiring the National Assembly to comply with the SOs in so far as waivers for loan authorisation bills are concerned.

The parties also referred us to some cases. We comment on, in our view, the most relevant.

First is in **Re Board of Police Commissioners for the City of Saskatoon et al and Tickell** [1979] Sask. QB 425 cited by the Appellant in which the Saskatchewan Queen's Bench opined that Ombudsman legislation must be given a non-restrictive interpretation.

Second is the case of **British Columbia Development Corporation v Friedman & the Attorney General for the Province of British Columbia** [1984] 2 SCR 447. Also from the Appellant. The Court said not just that Ombudsman legislation should be afforded a broad and purposive interpretation but also that the Ombudsman can deal with all manner of complaints including those against corporations and animates.

Then there are Malawian cases involving the Ombudsman, Air Malawi Ltd and Malawi Broadcasting Corporation. Both parties referred to them.

The first and second is **The Ombudsman v Malawi Broadcasting Corporation** Misc Civil Cause Number 52 of 1999 delivered on October 6, 2000 and an appeal therein being MSCA Civil Appeal Number 23 of 1999. The High Court and this Court was of the view *inter alia* that the Ombudsman had no jurisdiction over labour related matters. The Courts thought such complainants had an alternative remedy to them namely suing in the Courts.

Third and fourth is **Air Malawi v Ombudsman** Misc Civil Cause Number 88 of 1999[decided on December 24, 1999] and an appeal therein being MSCA Civil App Number 23 of 1999. The question was also the Ombudsman's jurisdiction specifically whether the Ombudsman had jurisdiction to determine labour related issues. The High Court after making reference to sections 5 and 123 abovementioned, said on the one hand that the Ombudsman had jurisdiction to investigate '*any case*' and on the other that '*the court must be very slow to read in limitations*' into section 123 except for the exceptions specifically mentioned therein namely the appearance of a reasonably available alternative remedy via the courts or some other practicable remedy. The High Court opined that the Ombudsman can hear even a labour related issue as long as the criteria in sections 5 and 123 is met. This Court was also of the same view.

Then there is **Malawi Broadcasting Corporation v The Ombudsman** MSCA Civil Appeal No 47 of 2000 delivered on February 6, 2002. It largely agreed with the Air Malawi/Ombudsman cases in terms of jurisdiction i.e. that the Ombudsman can investigate *any and all cases* except those relating to the National Compensation Tribunal, to the conduct of civil and criminal proceedings, those covered by the Limitation Act Cap 6:02 of the Laws of Malawi, access to cabinet papers and to nongovernmental organisations.

In passing let us state that we are not unaware of the case of **Air Malawi Ltd v The Ombudsman** MSCA Civil Appeal No 1 of 2000 decided on April 17, 2000. We just thought it is not of much relevance in this matter. It is more to do with the question when the Ombudsman should be deemed to have *decided* for purposes of judicial review rather than strictly speaking the Ombudsman's jurisdiction.

Fifth is **R v Local Commissioner for Local Government for North and North East England** Case No QBC of 99/0446/A2 from the Appellant. It seeks to buttress the Appellant's arguments about alternative remedies. The facts are simple enough. A local Ombudsman was authorised to investigate a complaint under section 26 of the Local Government Act 1974 unless the complainant *'has or had a remedy by way of proceedings in a court of law'*. Provided that the Ombudsman may still investigate *'notwithstanding the existence of such a .... remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or to have resorted to it'*.

In deciding whether or not the complainants had an alternative remedy the Ombudsman took the following approach"

> *'had I been advised that judicial review was potentially available to the complainants here, I would have gone on to consider whether I should exercise my discretion under the proviso to section 26(6) to investigate the complaint. It is my belief that in that event I would have exercised discretion in favour of the complainants because I believe in the particular circumstances of this case it would have been unreasonable to expect the complainants to have been required to resort to the remedy of judicial review. This is because I understood the complainants to be a group in modest housing, who would have been unlikely to have had the means to pursue that remedy from their own resources, particularly having regard to the uncertainty of the remedy; it seems to me that it is by no means certain that judicial review would be appropriate for maladministration where it related to a breach of the Code of Conduct. Further I would have particularly had in mind that it would have been very difficult, if not impossible, for the complainants to obtain the necessary evidence to support such an application. Much of the evidence upon which I relied in my report was not available in documentary form, but emerged during interviews with the members concerned. The complainants however do not have the investigatory powers given to the Commissioner by the Act and thus that evidence would have been unobtainable by them.'* **[Sic]**

Lord Justice Henry thought as follows.

'Such allegations could best be investigated by the resources and powers of the Commissioner, with her powers to compel both disclosure of documents, and the giving of assistance to the investigation. The Commissioner was in a position to get to the bottom of a prima facie case of maladministration, and the ratepayers would be unlikely to have reached that goal, having regard to the weaknesses of the coercive fact finding potential of judicial review. As she found, it would be very difficult, if not impossible, for the complainants to obtain necessary evidence in judicial review proceedings. Additionally, the complainants were a group in modest housing, unlikely to have the means to pursue the remedy. The Commissioner was clearly right to use the proviso to continue with her investigation. This case is a good example of a case where the Commissioner's investigation and report can provide the just remedy when judicial review might fail to; and can reach facts which might not emerge under the judicial review process'. **[Sic]**

Chadwick LJ opined as follows *vis a vis* section 26 abovementioned'

'it is clear, therefore, that before commencing to investigate a complaint under section 26 of the Act, a Commissioner ought to address the question whether the complainant(or person aggrieved) has or had some remedy by way of proceedings in any court of law- in particular, ought to consider whether the complaint could be made the subject of proceedings of judicial review. Consideration of that question does not, as it seems to me, involve any exercise of discretion. The existence, or otherwise, of an alternative remedy is a question of law. But, if the Commissioner reaches the conclusion that there is a remedy by way of proceedings in a court of law, then he must go on to consider whether, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort(or to have resorted) to such proceedings. That does involve an exercise of discretion. It is for the Commissioner to decide whether or not he is satisfied that it is not reasonable to expect the person aggrieved to pursue the alternative remedy'. **[Sic]**

Proceeding on the above sentiments the Ombudsman was of the view that whereas it could be that there was an alternative remedy the same was not a reasonably available or other practicable remedy. She therefore was entitled to, at law, assume jurisdiction over the complaints.

THIS COURT'S CONSIDERATION OF THE ISSUES

By way only of reminder there are two broad issues. The Ombudsman's jurisdiction and the propriety of the remedies ordered herein.

THE OMBUDSMAN'S JURISDICTION

It is provided for in section 123 of the Constitution and section 5 of the Ombudsman Act[which we quote in full] as supplemented by what the Courts have over the years said about the Ombudsman's jurisdiction.

Section 123

> *'(1) the Office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy;*
>
> *(2)notwithstanding subsection (1), the powers of the Ombudsman under this section shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined'.*

Section 5

> *'(1) subject to the Constitution, The Ombudsman shall inquire into and investigate in accordance with the provisions of this Act, and take such action or steps as may be prescribed by this Acton any request or complaint in any instance or matter laid before the Ombudsman in accordance with section 7(1) or (2), and concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of*

any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society';

(2) Without derogating from the provisions of subsection (1), any request or complaint in respect of any instance or matter referred to in that subsection may include any instance or matter in respect of which it is alleged -

(a) That any decision or recommendation taken or made by or under the authority of any organ of Government or any act or omission of such organ is unreasonable, unjust or unfair, or is based on any practice which may be deemed as such;

(b) That the powers, duties or functions which vest in any organ of Government are exercised or performed in a manner which is unreasonable, unjust or unfair.

(3) This section shall not apply in respect of any decision taken in or in connexion with any civil or criminal case by a court of law'

So what exactly is the Ombudsman's jurisdiction?

Ways are many in which the above question might be approached and ultimately answered. We think it crucial to such answer however that the practical context in which the Ombudsman operates is at all times borne in mind. In that regard the Ombudsman receives complaints. She decides which of those complaints she will investigate. The investigations in turn determine which of the complaints have merit. She dismisses those without merit and directs/recommends remedies for the meritorious ones.

Looking at the above in relation to the law and Ombudsman best practice it is obvious that the Ombudsman has no say over what complaints she receives. She gets all. It is in deciding which ones to investigate that she must contend with issues of her jurisdiction.

Under the Constitution the Ombudsman can investigate '*any and all cases*' of alleged injustice. On their face these words suggest that there is no limitation about the kind of complaint or institution that the Ombudsman can investigate. The use however, in section 123, of the words '*and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy*' introduces a limitation on what and therefore who the Ombudsman can and will investigate. So does, in our judgment, the fact that the powers of the Ombudsman in section 126(1) do not oust the jurisdiction of the courts.

Where therefore it appears to the Ombudsman, or would have appeared to any other reasonably competent Ombudsman appraised of the same facts and law that there is a reasonably available alternative remedy via the courts or other practicable remedy the Ombudsman must conclude that she has no jurisdiction over the matter. She should, as a matter of good practice, advise the complainant of the alternative remedy. Similarly if a matter in which the Ombudsman had assumed jurisdiction is subsequently placed before a court the Ombudsman must automatically cease to have jurisdiction. The matter will now have acquired an alternative remedy by way of proceedings in court.

If we may therefore summarise the law under the Constitution as we understand it the Ombudsman will only investigate a matter if:

i. There is an alleged injustice;

ii. It appears to the Ombudsman that there is no reasonably available alternative remedy via court proceedings or an appeal or other practicable remedy; and

iii. A court has not subsequently assumed jurisdiction.

Coming to the Ombudsman Act the first thing one notices is the emphasis on examples of instances which the Ombudsman can investigate. Section 5 talks *inter alia* of *'abuse of power'*, *'unfair treatment'*, *'manifest injustice'* and *'oppressive or unfair conduct'*. More examples are given in section 5(2). This is in contrast to

'*injustice*' as used in the Constitution which leaves the actual instances thereof to the discretion of the Ombudsman.

The next are the limitations the section seeks to impose on the Ombudsman's powers. Under it the Ombudsman seemingly can only investigate '*officials in the employ of an organ of government*' and '*an organ of government*'. This, we think, is an attempt to limit the exercise of the powers of the Ombudsman to the public sector. It appears not in tandem with section 123 which clearly has a wider purport in the sense that it takes Ombudsman investigations beyond the public sector.

Third is the specific exclusion from the Ombudsman's investigations of any decision taken in relation to a civil or criminal case by a court of law. We want to understand this to have been intended to apply to judicial pronouncements. And the thinking is clear enough. Where one is unhappy about a judicial decision the remedy is to appeal. That is an alternative remedy fit to exclude an Ombudsman's powers via section 123 above-mentioned.

Mention should also be made of section 7 of the Ombudsman Act. It implores an Ombudsman not to investigate a matter that is in her opinion '*vexatious or frivolous*'.

Speaking therefore only about the Ombudsman Act it appears to us that the Ombudsman may investigate *inter alia* allegations of abuse of power, unfair treatment, manifest injustice, oppressive and unfair conduct against organs of government or persons employed in organs of government. As long as the complaint is not about a judicial decision, vexatious or frivolous.

Putting the Constitution and the Act side by side it is obvious that there is a disparity between them. The Constitution provides for a more expansive jurisdiction than the Act. We of course appreciate that the Constitution trumps the Act and the easier way out would be to go strictly by the Constitution and forget the Act. We think it possible however to read/apply the two provisions as one and get the best out of both schemes without at the same time compromising the superiority of the constitutional provisions. Proceeding thus it is our considered view that the Ombudsman's jurisdiction is to investigate '***any allegation of injustice including allegations inter alia of abuse of power, unfair treatment,***

manifest injustice, oppressive or unfair conduct if it appears to the Ombudsman that:

i. There is no reasonably available alternative remedy via court proceedings, or an appeal or other practicable remedy; and

ii. A court has not assumed jurisdiction; and

iii. ***The complaint is not frivolous or vexatious'***.

Further and contrary to this Court's view[s] in the **Ombudsman v Malawi Broadcasting Corporation** cases we are of the most considered view that except as set out above there are no cases or institutions which are beyond the Ombudsman's jurisdiction. In practice it will of course be up to the Ombudsman to decide, for good cause, which cases and/or institutions to go after. Or not to.

Then there is the matter of alternative remedies. When exactly is an alternative remedy reasonably available or practicable? In our view and in agreement with the case of **R v Local Commissioner for the North** we do not think that every other remedy qualifies to be *'a reasonably available alternative'* or *'other practicable remedy'*. The Appellant says a remedy will only be such if it affords the complainant an effective remedy as envisaged in section 41 of the Constitution. The Respondents did not come out clean on what exactly is such a remedy. It is obvious however that much like the Court below they think a remedy will be reasonably available or practicable if it is available. Or on offer. We do not think so. And while we will not go as far as the Appellant has we have no doubt in our mind that a remedy will only be reasonably available or practicable if it is one to which the complainant can have recourse without too much expense in terms of treasury, time and convenience. This we say in order to differentiate them from those remedies that might at best be illusory.

So were the remedies on the basis of which the court below dismissed the Ombudsman's case reasonably available or practicable? This is a question left to the Ombudsman's discretion. A discretion which she must obviously exercise judicially. In a manner in which any other reasonable Ombudsman would, in the circumstances, have done.

The Court below and the Respondents answered the above question in the positive. In their view the Complainants could have sought judicial review of the decisions complained of. If the matter was about a lack of means they could have approached the Legal Aid Bureau. If it was about a want of time they could have asked for an extension of time within which to file the review. Or for permission to file out of time.

With respect we are unable to share in the Respondents' and the Court below's positivity. Speaking from a practical perspective of the Ombudsman's and the Courts' powers and functions we have always understood that Courts decide on facts and the law presented to them. In the instant case they would have decided on the merits or otherwise of the Complainants' case on the basis of facts and prescriptions of the law referred to them by the litigants. As long as, of course, the said facts/law are relevant and the complaint is of a judicial nature. See sections 9 and 103(2) of the Constitution.

The Ombudsman on the other hand does more than that. She receives all manner of complaints from all manner of complainants against all manner of respondents. In deciding on the merits of the complaint she is free to proceed on the facts and/or law as provided by the complainants, the respondents or any other person/institution. She is free to receive these facts in any manner she deems fit seeing as she determines the nature and extent of an inquiry/investigation. See section 124 of the Constitution and section 6 of the Ombudsman Act. She is also at liberty to carry out her own investigations in order to get more information about the complaint/complainant.

The instant complaint is in relation to the alleged misuse/abuse of a line of credit as approved by Parliament. It is clear that the complaint was at birth no more than a suspicion based on the facts available to the Complainants. Before the Courts it stood little chance of success on the facts as they were on the date of the complaint. This even if the good services of the Legal Aid Bureau had been roped in because their help would have been more about presentation as opposed to substance.

The Ombudsman on the other hand did more than just proceed on the basis of information provided by the complainants. She did her own investigations. She interfaced with, *inter alia*, the Complainants, the Legislature, the Executive branch of government and the bank from which the line of credit was sourced. It was only after such interactions that she was able to conclude that the complaint had merit. When she was able to direct/recommend remedies. Can it be said, in those circumstances that the courts/judicial review equalled a reasonably available alternative or practicable remedy? Our answer is in the negative. Like we have said above whether or not a remedy is reasonably available or practicable goes beyond it merely being available. It has to be reasonably available or practicable. Reasonableness and/or practicability is, in our judgment, a function of *inter alia* time, treasury and convenience. In this case it is obvious that to make the judicial review worthwhile would have required not just a visit to the Legal Aid Bureau and a request for extension of time but also more facts to support the suspicion/allegation that the line of credit had been abused/misused. More treasury would have been required. More time. And more information. Not the Courts not the Legal Aid Bureau would have been in a position to provide the time, the information and the convenience needed to meaningfully pursue the Complainants' complaint.

The Ombudsman on the other hand could. And in our view did. Why because she has the powers to require role-players to not only appear before her but to also release any other information, including documentation, they may have on the transactions the subsect matter of the complaint. She has the human resource. She also had the finance to facilitate it all. While we might therefore agree that it was possible for the Complainants to approach the Legal Aid Bureau and through it the Courts, we are unable to agree that that Courts and the kind of remedy they offered amounted to a '*reasonably available or other practicable remedy*'[**our emphasis**]. Contrary to what the Court below therefore concluded, but in accordance with the law, the facts and the appeal before us, we are of the view and do find that the Court below erred in not taking sufficient cognizance, or at all, of the facts that the discretion whether or not to investigate is always the Ombudsman's and that the Ombudsman's powers go beyond being merely adjudicative as the courts' clearly are. The Ombudsman is allowed to investigate.

To gather more facts and then decide on the merits. Had the High Court done so it would have concluded, like we hereby do, that while it might be true that the Complainants had available to them an alternative remedy via the courts the same was neither reasonably available nor practicable. It would have concluded, again like we hereby do, that the Ombudsman actually had the requisite jurisdiction to investigate the complaints herein.

THE OMBUDSMAN'S REMEDIES

We earlier on pointed out that the Court below never, strictly speaking, talked about the remedies that the Ombudsman directed herein. This because having found that the Ombudsman had no jurisdiction the remedies fell by themselves. They became an academic issue so to speak.

Now that we have found that the Ombudsman had jurisdiction the remedies should, we feel, be examined for propriety. In doing that we notice that there are two aspects to the appeal against the remedies. First is that the remedies are beyond the Ombudsman. They touch on legislative matters which should be distinguished from administrative matters which is the Ombudsman's primary province; they are about procedure in the National Assembly which is regulated by Standing Orders and the Constitution; and that they are about the contents of a Bill which can only be determined by the National Assembly following debate in the House. For those reasons the Respondents asked that they be declared null and void.

The second refers to the apology. The Respondents argue that the same is void for being Wednesbury unreasonable, not practical, not justified, ineffective, having been made in bad faith and being calculated only to embarrass.

The Ombudsman's remedies are provided for in section 126 of the Constitution and section 8 of the Ombudsman Act. The former *inter alia* provides:

> *'Where the investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall-*
>
> *(a) Direct that appropriate administrative action be taken to redress the grievance;*

(b) *Cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance;*

(c) *Refer a case to the Director of Public Prosecutions with a recommendation for prosecution, and in the event of refusal by the Director of Public Prosecutions to proceed with the case, the Ombudsman shall have the power to require reasons for the refusal'.*

Section 8 on the other hand allows the Ombudsman *inter alia* to:

(a) .....;

(b) Take appropriate action or steps to call for or require the remedying or reversal of the matters or instances specified in section 5 through such means as are fair, proper and effective including by -

i. Negotiation and compromise between the parties concerned;

ii. causing the complaint and the Ombudsman's finding thereon to be reported to the superior of the offending person;

iii. referring the matter to the Attorney General or Director of Public Prosecutions or both as the case may be.

(2) The Ombudsman may, but without derogation from any of the provisions of subsection (1)(b) if he is of the opinion that any instance or matter inquired into or investigated by him under section 5 can be rectified or remedied in any lawful manner, notify the organ of Government his findings and the manner in which the matter can be rectified or remedied'.

At least three things come out of the above legislation. Firstly the law does not prescribe specific remedies for specific instances of injustice. It, instead, leaves that for the discretion of the Ombudsman. Such discretion should again be

exercised judicially. It should, we also think, have in mind *inter alia* the complaint, the complainant and the respondent.

Secondly and proceeding on our above understanding of the Ombudsman's remedies, it appears obvious that an Ombudsman's remedies are greatly influenced by the grievance actually before her. It would, in that regard, be equally obvious that if the grievance found is delay the Ombudsman will most likely order speed. If it is bad advice she will direct better advice. If it is a want of civility we are sure an apology or an appropriate level of civility will be ordered. The Ombudsman is similarly at liberty to, depending on the circumstances, direct steps that will be able to deal with a recurrence of an injustice presently complained of. An attempt, the last part, more about, we think, the establishment and sustenance of a functioning grievance handling system.

Thirdly, it appears on the face of it that section 8 is a tad wider than section 126. The two are, in our view, however capable of being read and applied as one in a manner that while avoiding conflict does not at the same time compromise the superiority of section 126 of the constitution.

Coming back to the present case the question is whether the remedies flout sections 126 and 8 above-mentioned, or are untenable as alleged or at all. The starting point has to be an acceptance of the fact that the National Assembly has, under section 56(1) the Constitution, the power to regulate its own procedure. Next is the fact that the National Assembly has via the Standing Orders actually regulated its procedure.

Accordingly the procedure for passing bills is provided for in Part XXII of the Standing Orders. Of particular relevance for purposes of this case are Standing Orders 125 and 126 the relevant parts of which we quote in full.

> *'Publication of Bills*
>
> *Standing Order 125*
>
> *(1) The Minister in Charge or Member in Charge of a Bill shall deliver to the Clerk a soft copy of the Bill and sufficient hard copies for all Members and, the Clerk shall publish the Bill in the Gazette.*

(2) Upon publication of the Bill, the Clerk shall circulate a copy of the Bill to each Member at least twenty eight days before the Bill is First Read in the National Assembly by post or any other means as may be approved by the Speaker from time to time.

Waiver of Notice

Standing Order 126

(1) *At any time before a Government Bill is first read, the Minister in Charge may move without notice that the number of days required by Rule 155(2) be waived on the grounds of urgency, provided that, the mover of such a motion shall, with particularity, inform the Assembly of the reason for the urgency and the consequences to the nation of not passing the motion, and including the time when the bill should be tabled'.* **[Sic]**

Looking at the above Orders it is obvious that the Loan Authorisation Bills from which the line of credit in issue herein arose should have been published at least twenty eight days before the first reading. This was never done. It was waived apparently pursuant to Standing Order 126.

It is equally clear that any waiver under Standing Order 126 requires the Minister of Finance to move a motion in the National Assembly in respect of the waiver. In it he should give reasons for the waiver. If it is on account of urgency particulars of such urgency should be provided. Equally so sufficient details of any adversity that Malawi might suffer if the Bill is not urgently passed.

Going back to the remedies complained of it cannot, in our judgment, be said that the Ombudsman purported to regulate the National Assembly's procedure. The National Assembly did that already via the Standing Orders. Neither did she seek to determine the contents of any bills including the loan authorisation bills relating to the line of credit in issue in this case. The National Assembly already does that and will, in terms of the said Orders, continue to do that. All she did was to remind the National Assembly and its membership not just of the fact that it had regulated its procedures, or of the contents of Standing Orders 125 and 126 but also of the need

to comply with the said Standing Orders. Of the need therefore to publish the bills for at least twenty eight days before the first reading. Of the further need to comply with the conditions in Standing Order 126 that must be met before a waiver can be effected. The Ombudsman's remedies are not to that extent a case of Ombudsman overreach. The suggestion therefore that the Ombudsman sought to regulate procedure in the National Assembly or determine the contents of Bills is clearly without merit.

There was also the suggestion that the Ombudsman should not have spoken about the specificity of Bills. That she cannot do this because the content of Bills is a legislative as opposed to administrative function. That the former is therefore beyond the Ombudsman's jurisdiction seeing as she only deals with the administrative side of the public service delivery function. With the greatest respect it maybe that the Respondents have misapprehended the Ombudsman's powers and functions and therefore the remedies she can direct/recommend. The Ombudsman has power to investigate '*any allegation of injustice including allegations inter alia of abuse of power, unfair treatment, manifest injustice, oppressive or unfair conduct*'.

The only limitation is where:

i. '*there is no reasonably available alternative remedy via court proceedings, or an appeal or other practicable remedy;*

ii. *a court has assumed jurisdiction;*

iii. *the complaint is frivolous and vexatious*'.

The Respondents cannot in this case therefore be heard to say that the Ombudsman should/could not have investigated or directed a remedy in the instant case merely because the matter touched on the legislature or is legislative. They should have been speaking of the reasonable availability of an alternative or other practicable remedy if their intention was to limit the Ombudsman's jurisdiction. Otherwise accepting their above argument would be to accept the legally untenable namely that there are some institutions that are beyond the Ombudsman's jurisdiction or introducing limitations on the Ombudsman's

jurisdiction beyond those that are provided for in sections 123, 5 and 7 abovementioned.

Regarding the assertion that Ombudsman's directed remedies including the apology are Wednesbury unreasonable, calculated only to embarrass the Respondents, made in bad faith and contrary to sections 8 and 126 abovementioned our view is that the Respondents' arguments are without merit. Going through the Ombudsman's report it is clear that the Respondents conducted themselves in a fashion that fell below the standards expected of reasonably competent public servants/officers. We do not see how in those circumstances it can be said that an apology was not practical, not effective, an act of bad faith, calculated only to embarrass, Wednesbury unreasonable or generally against the spirit and intendment of sections 8 and 126. Of course we appreciate that the project concept that gave rise to the line of credit would have greatly benefited the Malawian citizenry. It is however clear that procurement in relation thereto was poorly managed/implemented. So was, in our view, the scheme devised to mitigate wastage and costs when officialdom realised that that the equipment procured was not fit for purposes of the project.

More than the above and perhaps more importantly it is important to appreciate that there is a difference between alleging and proving an allegation. In the instant case the Respondents do not seem to have gone beyond alleging bad faith, calculated embarrassment, Wednesbury unreasonableness, inefficacy, impracticability and conflict with sections 8 and 126. In our view the Respondents should have gone further to lay before us facts showing on a balance of probabilities that the remedies directed/recommended by the Ombudsman were indeed made in bad faith, calculated only to embarrass, Wednesbury unreasonable, impracticable and in conflict with section 126 and 8 above-mentioned.

Speaking specifically about the Ombudsman's request for a report from the Green Belt Initiative and the Respondents' claim that it was an instance of Wednesbury unreasonableness and bad faith in that the Ombudsman directed remedies before such report was at hand it is our view that the Respondents clearly misunderstood the request and its purport. The report was not so that the Ombudsman can use it

to determine the merit or otherwise of the complaint. Or to decide on what kind of remedy to direct/recommend. It was intended and was clearly meant to be one of the remedies. The Respondents cannot therefore argue that the Ombudsman erred in directing/recommending remedies before the said report had been tendered.

The Respondents' arguments are also untenable from a rule of law perspective. As we have said above the National Assembly set out, in tandem with the Constitution, procedures on how bills, including loan authorisation bills, should be handled. The House should be the first to abide by such procedures. Where they do not they should in our view be reminded and brought onto the narrow path. It should not matter, and they should not be allowed to so argue, like they clearly sought to in this matter, that the reminder came from the Ombudsman whom they now want to accuse of interfering in their internal affairs. The Ombudsman's interest, like we think everyone else's, is ensuring that the National Assembly like all Malawi Government agencies abides by the law. And for that, maybe the Respondents ought to be grateful.

Much the above also applies to the first and second Respondents. We therefore thought that they would be more interested in righting the wrongs pointed out by the Ombudsman's report about the manner in which the line of credit was handled rather than seeking to pursue technicalities. Or indeed trying to hide behind them.

On our part we consider it the Court's duty to adopt an interpretation of the law that best enhances the rule of law and constitutionality. And it is in keeping with such duty that we find the Respondents' challenges against the Ombudsman's directed/recommended remedies unsustainable.

DETERMINATION/CONCLUSION

In conclusion we find that the Court below erred in finding that the Ombudsman had no jurisdiction herein. She had. We are also of the view and find that the remedies complained of in the cross appeal are in tandem with sections 126 and 8 of the Constitution and the Ombudsman Act respectively. They are not Wednesbury unreasonable, impracticable, not made in bad faith or calculated only to embarrass the Principal Secretaries for Finance and Agriculture. The appeal by the

Ombudsman succeeds in its entirety. That of the Respondents fails equally in its entirety. And the Ombudsman's appeal having succeeded and the Respondents' having failed the Respondents are obliged to comply with the Ombudsman's directed remedies.

Accordingly an order is hereby made requiring the National Assembly to take such reasonable measures as will enable it comply with Standing Orders 125 and 126. Such measures should in any event be effective before the expiry of 10 calendar months from this date. An order is also hereby made requiring the first and second Respondents to publish the apology ordered by the Ombudsman the same to be done before the expiry of 60 calendar days from the date hereof.

COSTS

This case is all about public law. The Ombudsman is as much a beneficiary of this litigation as is the Attorney General and most importantly the Malawian citizenry. In matters like the instant costs should, in our view, only be awarded against parties who conduct themselves in a clearly inappropriate or unreasonable fashion. There were serious differences of opinion in this case. The parties robustly canvassed their positions. We do not however think that the Respondents were thereby guilty of conducting themselves in a manner that can be characterised as inappropriate or unreasonable. The opposite might actually be true. They should, in a way, perhaps be lauded for seeking clarity in this area of the law. Much as therefore we agree that costs must follow the event this case should, we think, be an exception. Each party will therefore pay its own costs both in this Court and the one below. We so order.

Delivered at Lilongwe this 11th day of February, 2019.

E B TWEA SC,

JUSTICE OF APPEAL

L P CHIKOPA SC

JUSTICE OF APPEAL

A D MAMANGA SC

JUSTICE OF APPEAL