

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CAUSE NO. 35 OF 1999 (TITLE IN ACTION)

IN THE MATTER OF ELECTIONS; and
IN THE MATTER OF ACCESS TO STATE CONTROLLED
MEDIA FOR ELECTRAL COMPETATORS; and
IN THE MATTER OF THE PRESIDENTIAL
PALIAMENTARY ELECTIONS ACT; and
IN THE MATTER OF THE ELECTORAL COMMISSION
ACT; and
IN THE MATTER OF THE CONSTITUTION OF MALAWI

BETWEEN:

DR CHARLES KAFUMBA.....1ST PLAINTIFF

LUKA BANDA.....2ND PLAINTIFF

LAURENT KAMULETE.....3RD PLAINTIFF

AND

THE ELECTORAL
COMMISSION.....1ST DEFENDANT

THE MALAWI BROADCASTING
COPORATION2ND DEFENDANT

CORUM: MKANDAWIRE, J

Kasambara, Of Counsel for the Plaintiff

Mtawali, of Counsel for the Ist Defendant

Kamphale, of Counsel for the 2nd Defendant

Mrs. Tembo, Official Interpreter

JUDGMENT

The plaintiff are requesting the Court to determine the following questions:

1. That the Ist defendant has a duty in law to ensure that the electoral process is free and fair;
2. That equal access to the media for all competitors in the electoral process is an integral part aspect of the holding of free and fair democratic elections;
3. That equal coverage of the electoral activities and propaganda of all the competitors in the electoral process is an integral part of the holding of free and fair democratic elections;
4. That the Iast defendant has failed to ensure for all competitors equal and fair access to the state media;
5. That the 2nd defendant is under an obligation to accord equal and or free and fair access to its facilities to all competitors in the electoral process;
6. That the 2nd defendant has accorded preferential treatment and access to its facilities to the United Democratic Front and its president and other candidates;
7. That the 2nd defendant has in violation of its legal obligations to the nation and all other competitors in the, electoral process failed to accord such competitors equal

and fair access to its broadcast facilities.

The court do give the following or such declarations and directions as may be just and expedient in the circumstances:

(a) That the 1st defendants be ordered to take steps to ensure that free and fair elections are held in the country as required by law.

(b) That the 1st defendant be directed to take concrete steps to ensure that all competitors in the electoral process have equal and or and fair access to all state controlled media and in particular the Malawi Broadcasting Corporation.

(c) That the 1st defendant be directed to take concrete steps to ensure that all state controlled media and in particular the Malawi Broadcasting Corporation take concrete steps to accord equal and or fair access to their facilities to the all competitors in the electoral process political compliance by all state organs and the Malawi Broadcasting Corporation in particular with the provisions of the Presidential and Parliamentary elections Act, the electoral Commission Act and the Constitution of Malawi internationally recognized in democracies and in regard to the process of managing the electoral process.

(d) That the 2nd defendant be directed to comply with the Presidential and Parliamentary Act, the Electoral Commission Act and the Constitution of Malawi and internationally recognized practice in democracies and to or equal and or fair access to its facilities to all competitors in Malawi Electoral process for the 1999 General Elections."

On 18th May, 1999 I dismissed a similar application on the basis that this Court did not have original jurisdiction to hear the matter. I stated that in terms of section 76 (2) of the Constitution, the plaintiff, could not commence the action in the High Court before complaining in writing to the Electoral Commission. On that very day, the 18th May, 1999 the plaintiffs sent a written complaint to the Electoral commission. The complaint is in the following terms: -

"RE: COMPLAINANTS OVER BIASED REPORTING AND LIVE VOVERAGE BY MALAWI BROADCASTING CORPORATION

we have been consulted by Dr Kafumba Mr Luka Banda and Mr Laurent Kamulete (our clients) with instructions to apply to you to ensure that the public broadcaster, Malawi Broadcasting Corporation (MBC) complies with the electoral law and Communications Act.

Our instructions are that the MBC is carrying out live coverage and rebroadcast of President Bakili Muluzi's campaign messages. The other presidential and parliamentary candidates are denied similar opportunities; and indeed a right of reply to whatever he says concerning them.

A case in point was the President's campaign message in Mulanje on May 16th, 1999 in which he attacked the MCP and Independent Candidates. The same applies to live air coverage of the first campaign rally by UDF and the unveiling of UDF manifesto.

The concept of free and fair elections entails that all contestants be given equal time by a public broadcaster. What the MBC is doing is perpetuation of violation of electoral law.

We request the electoral Commission to redress this irregularity by granting the other contestants air time on the MBC.

Should you fail to take steps to regularise the above within 5 days of the date hereof we shall proceed to apply for relief in the High Court."

On 20th May, 1999 the Electoral Commission sent a reply in the following terms: -

"RE: COMPLAINTS OVER BIASED REPORTING AND LIVE COVERAGE BY MALAWI BROADCASTING CORPORATION

I am most grateful for your letter dated May 18th, 1999 in which you submitted to the Commission the above mentioned complaints on behalf of your clients.

Your concerns will be tabled before the next Commission's meeting which will be held within a week and you will be informed of the out come in due course."

Eleven days later, on 31st May, 1999 to be precise, the plaintiffs commenced these proceedings. Although the proceedings have been commenced by summons, I take it that the matter is coming to this Court "by way of appeal in terms of section 76 (3) of the Constitutions. Mr Kasambara explained that he decided to take the matter to this court because the 5 days specified in the summons and the one week given in the Electoral Commission's reply had expired. He cited the case of **Rolf Patel v Electoral Commission** Misc. Civil Cause No. 84 of 1996. I believe that the plaintiffs rushed to this court considering that campaign period will be over within a few days.

Although a number of issues are raised in the summons, I shall restrict myself to the complaint that was sent on the Electoral Commission. As I see it the complaint is about live coverage and re-broadcast of president Bakili Muluzi's campaign messages. As to this it is said that the Electoral Commission and the Malawi Broadcasting Corporation are in breach of section 45(1) (b) (c) and (f) of the Communications Act in that political parties and election candidates are not given equitable treatment. It is argued and this cannot be denied that the radio is a very powerful media. It is only the radio that can reach the remotest part of Malawi. Section 45 spells out the Broadcasting policy. It provides as follows: -

- 45 (1) The Authority shall regulate the provision of
broadcasting in Malawi in the manner which it
considers is best suited
- (b) to ensure the provision of regular news services and programmes on matters of public interest in Malawi;
- (c) to provide for the broadcast of programmes to support the democratic process through civic education;
- (a) to ensure equitable treatment of political parties and election candidates by all broadcasting licensees during any election period.

In so far as these proceedings are concerned it is section 45 (1) (f) which is more pertinent. In my understanding this means that no political party is to be discriminated against. During election period, and, we are now in election period, all political parties and election candidates must be given equitable treatment. In my view what it means is that if campaign messages of one political party or of election candidates of one political party are broadcast live on MBC, then that must apply to all political parties and all election candidates. Failure to do that would mean giving preferential treatment to one political party or some election candidates. However it is clear from this section, that is section 45 of the Communications Act, that it is the Malawi Communications Regulatory Authority that is to regulate the conduct of broadcasting licensees.

Closely related to section 45 (1) (f) of the Communications Act is section 58 of the Parliamentary and Presidential Elections Act which provides as follows:-

"Every public officer and public entity or authority shall give and be seen to give equal

treatment to all political parties to enable each political party to conduct its campaign freely."

It is abundantly clear that giving live coverage of campaign message of one political party to the exclusion of others violates this provision. Apart from receiving equal treatment every political party must enjoy equal rights as provided in section 59 of the Parliamentary and Presidential Elections Act.

The functions and powers of the Electoral Commission are provided in section 8 of the Electoral Commission Act as follows:

8(1) In addition to the broad functions and powers conferred on the Commission by the Constitution and subject to the Constitution, the Commission shall exercise general direction and supervision over the conduct of every election and without prejudice to the generality of such functions and powers it shall have the following further functions:

(j) to promote public awareness of electoral matters through the media and other appropriate and effective means and to conduct civic and voter education on such matters;

(m) to take measures and to do such other things as are necessary for conducting free and fair elections.

In one of their prayers the plaintiffs are requesting the court to order the Electoral Commission where the 1st defendants:

"to take steps to ensure that free and fair elections are held in the country as required by law."

I cannot make such an order because there is no basis for it. I am fully satisfied from the affidavits of Roosevelt Gondwe, the Chief Elections Officer and Flora Chetu Chirwa that the Electoral Commission is aware that its primary function is to ensure that the country holds free and fair elections. In his affidavit Mr Gondwe has said that under section 63 of the Parliamentary and Presidential Elections Act the Commission has a duty to ensure that every substance of the campaign propaganda of every party is reported to the 2nd defendant. On their radio news broadcasts and this it has one. He also said that in compliance with section 63 (2) of the Parliamentary and Presidential Elections Act the Commission has arranged with the 2nd defendant that every political party contesting in the General Elections be given equal time of 5 minutes to air their campaign messages.

Finally Mr Gondwe said that the Commission is enforcing its mandate as far as coverage of the electoral issues on Malawi Broadcasting Corporation are concerned. This is only in compliance of section 63 of Parliamentary and Presidential Elections as there is no code of conduct governing the relationship between the two defendants. In other words there is no enforcement mechanism.

In her affidavit Mrs Chirwa says that the Electoral Commission convened a meeting with MBC at which the latter was instructed to accord equal access to all competitors in the forthcoming general elections. In this respect she exhibited a letter addressed to all political parties advising them of arrangements that had been made with the 2nd defendant. She has said further that the commission has ensured that all competitors in the General Elections have equal air access to Malawi Broadcasting Corporation. She has supported this by a number of exhibits. In this judgment I can only refer to a Press Release of 22nd March 1999 which reads.

"The Electoral Commission wishes to invite all registered political parties whose candidates intend to contest in the May 25, 1999 Parliamentary and Presidential Elections to identify their spokesman who could be in position to explain their party's manifesto in both English and Chichewa for a recording at Malawi Broadcasting Corporation tomorrow Tuesday, March 23 at 5.00 pm.

The subject to be dealt with tomorrow is food security. The following will also be subjects to be dealt with in the forthcoming weeks. Security and Human rights, Health care, Education, Economy, Land Distribution, Employment and Industrialisation, Foreign Policy and Regional Integration, Infrastructure and Environment. Every party is free to come with enough information for a number of programmes as it wishes."

All these programmes are funded by the Electoral Commission. In order to facilitate a smooth running of the programmes the two defendants have formed a task force. There is even put in place a media committee for the promotion of free and fair elections. Mr Mtawali told the court in his submissions that to ensure that all goes well the Election Commission supplied Malawi Broadcasting Corporation with three vehicles and tape recorders to assist the latter in covering the contestants. It is Mr Mtawali's submission that the 1st defendant has done all that is there to be done for it to comply with the relevant laws. He said that to go beyond what they have done would be taking over the management of Malawi Broadcasting Corporation. I am inclined to agree with Mr Mtawali. It appears to me that the Commission has done everything under their mandate. Certainly the Commission cannot take over running of Malawi Broadcasting Corporation. Mr Kasambara made several references to the Communications Act. He also referred to the third schedule to the Act. This schedule provides a code of conduct for broadcasting services. Let me observe that Section 3 establishes the Malawi Communications Regulatory Authority, which is charged with overseeing compliance with this Act. The Code of Conduct I have referred to can only be enforced by the Authority. Section 55 (2)

of the Communications Act for example provides that complaints regarding the code of conduct be lodged with the Authority.

After reading all the affidavits and exhibits thereto and after listening to learned counsel I am satisfied that the Commission has done all that it can do to ensure that all political parties have free and equal access to Malawi Broadcasting Corporation. The Commission is not in breach of any of the provisions listed by the plaintiffs. As for the holding of Free and Fair elections I find that the Electoral Commission is on the right track towards achieving that goal in so far as arrangements for free and equal access to Malawi Broadcasting Corporation are concerned. I have added this because I am fully aware that free and equal access to the radio is not the only component of free and fair elections. Indeed there are several others.

In the result I find that no case has made out against the 1st defendant and I dismiss the action and I grant them with costs.

I now turn to the 2nd defendant the Malawi Broadcasting Corporation. It was submitted by Mr Kamphale learned Counsel for the 2nd defendant that it is an age old practice in this country to broadcast live all presidential functions. He said that Malawi Broadcasting Corporation is under an obligation to give live coverage of all presidential functions. The plaintiffs are not questioning the live coverage of presidential functions. What they are questioning is the breach of any of the provisions listed by the plaintiffs. As for the holding of Free and Fair elections, I find that the Electoral Commission is on the right track towards the right to achieve that goal in so far as arrangements for free and equal access to Malawi Broadcasting Corporation are concerned.

In the result I find that no case has made out against the 1st defendant with costs.

I now turn to the 2nd defendant the Malawi Broadcasting Corporation. It was submitted by Mr Kamphale learned Counsel for the 2nd defendant that it is an age old practice in this country to broadcast live all presidential functions. He said that Malawi Broadcasting Corporation is under an obligation to give live coverage of all presidential functions. The plaintiffs are not questioning the live coverage of presidential functions. What they are questioning is the live coverage of campaign messages. During those functions Mr Kamphambe pose a question. In the course of a presidential function, campaign messages are made what should Malawi Broadcasting Corporation do shut down the microphone and stop live coverage? No, that would not be the proper thing to do and that is not the plaintiff's case. The plaintiff wants all political parties and election candidates to be treated equally. If in the process of presidential functions campaign messages are covered live then the same should be accorded to all political parties and election candidates. I have already referred to Section 45(l) (f) of the Communications Act and Section 58 of the Parliamentary and Presidential Elections Act. These Sections provide that all political

parties and election candidates be given equitable or equal treatment during election or campaign period. To give live coverage to only one party and its candidates is not only in breach of the above Sections but is also discriminatory. Discrimination is prohibited under Section 20 of the Constitution. Put simply it boils down to this: If campaign messages are broadcast live at a presidential function, then equal treatment means that campaign rallies of other political parties or at least Campaign rallies of other presidential candidates be broadcast live. That would give other political parties or other presidential candidates an opportunity to reply to some of the matters raised. That is what equitable treatment of political parties and elections candidates would entail. I agree with the plaintiffs that equal treatment of all competitors is a component of free and fair elections.

I would also urge the second defendant to co-operate with the Electoral Commission. Under Section 19 of the Electoral Commission Act, Malawi Broadcasting Corporation is under a duty to cooperate with the Commission. I have noted that the Electoral Commission has put up good programmes for free and equal access by all political parties but the MBC chose to go outside that programme. I think it is important that the two institutions co-operate.

Perhaps let me mention one thing before I conclude. In his submissions Mr Kasambara cited a number of international guidelines. I have not referred to any of them in my judgement because I find the points raised by the plaintiffs are well covered by our own laws.

In conclusion I find the second defendant the Malawi Broadcasting Corporation to be in breach of sections 58 and 59 of the Parliamentary and Presidential elections Acts, section 19 of the Electoral Commission Act and section 20 of the Constitution and I direct that the second defendant do comply with those provisions.

The action against the defendant therefore succeeds. Costs to the plaintiffs.

Pronounced in Chambers this 10th day of June, 1999 at Blantyre.

M P MKANDAWIRE

JUDGE

Mr Kamphale : I seek leave to appeal.

Court Leave is granted.

M P MKANDAWIRE

JUDGE

Misc. Cause No. 35/99

Dr Kafumba & Othfrs vs The Electoral Commission & MBC

