IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CIVIL CAUSE NO. 55 OF 2001

BETWEEN:

ESTHER DZIMBIRI PHIRI.....1ST APPLICANT

and

MARY MBEKWANI.....2ND APPLICANT

and

CATHERINE V. CHITIMBE.....3RD APPLICANT

and

JUDICIAL SERVICE COMMISSION.....RESPONDENT

CORAM: HON. JUSTICE A.C. CHIPETA

Mr Nyimba, of Counsel for the Applicants

Respondent/Counsel, Absent

Mrs Chingana, Official Interpreter

RULING

On 6th April, 2001 Miscellaneous Civil Cause No. 55 of 2001 between Esther Dzimbiri Phiri and the Judicial Service Commission was filed in court. The Originating document was an ex-parte Summons for leave for Judicial Review taken under Order 53 rule 3 of the Rules of Supreme Court. The subject proposed for the review sought after was indicated to be the Respondent's decision in its Minute No. 42/00 not to appoint the Applicant to the position of Magistrate on the ground of alleged dishonesty through cheating during examinations. A number of reliefs were listed as also sought on basis of the decision intended to be complained against and these were followed by the grounds on which the reliefs were said to be based. The Hon. Justice Mwaungulu granted the leave sought that very day.

Following the leave, on 10th April, 2001 the Applicant in that matter filed a Notice of Motion, supported by an affidavit with exhibits annexed. This was accompanied by the formal order for leave for Judicial Review and the papers that had constituted the ex-parte application for leave. It was so done by virtue of Order 53 rule 5 of the Rules of Supreme Court. The Notice of Motion was made returnable on 1st May, 2001. These followed after

this in that cause an affidavit of service apparently sworn on 17th April, 2001 referring to a postage of the Notice of Motion to the Respondent by Coachline Mail of 12th April, 2001. It is not clear when this affidavit of service landed on the court file as it does not appear to have been filed with the court.

Before the date for hearing in this matter could come to pass, on 27th April, 2001 two other applications for leave for Judicial Review were filed with the court. These were respectively in the names of the Applicants Mary Mbekwani and Catherine V. Chitimbe, which were respectively registered as Miscellaneous Civil Causes Nos. 58 and 59 of 2001. The Respondent in these two matters, like in the initial matter, was also the Judicial Service Commission. Here too the two Applicants were seeking a review of the Respondent's decision No. 42/00 not to appoint the two Applicants to the positions of Magistrate on grounds of alleged dishonesty through cheating during examinations.

Again in these two matters the Hon. Mwaungulu, J. granted leave on the very day they were filed for the said matters to proceed to Judicial Review. Formal Orders for leave were drawn and filed that same day in both those files. An examination of these two records does not, however, disclose what further steps, if any, the Applicants hereafter took in them. There are no copies to show whether any Notices of Motion were taken out following the leave and/or affidavits of service subsequent to the orders relating to the leave that was granted in them.

Going back to the first of these applications, to wit, the matter in which Notice of Motion had issued, i.e. the Esther Dzimbiri Phiri file, there is no record as to what transpired on the first day appointed for the hearing. I however take judicial notice of the fact that 1st May, 2001, which was the material day, was a public holiday under the style "Labour Day." Again there is no indication what communication, if any, took place between the Applicant and the Respondent as regards this mishap concerning the unfortunate selection of the date of hearing. The record however reveals that this matter was called before Hon. Justice Tembo, but this was on 3rd May, 2001 a date not endorsed on the Notice of Motion.

Mr Nyimba, appearing on behalf of the Applicant, Esther Dzimbiri Phiri, is on record as moving the court to proceed with the hearing on the basis that there was due service and that there was no word why the Respondent was not present. In this address there was no reference to the shift in dates from 1st to 3rd May, 2001 and there was also no explanation whether the Respondent had been alerted of this change. The court however adjourned the matter on observation that service was apparently effected during the Easter holidays according to the details in the affidavit of service. The date next set down for the hearing of this another was 11th May, 2001.

It is important I think for record purposes to point out here that assuring, per the affidavit of service, that dispatch of the Notice of Motion was indeed on 12th April, 2001, the next day, i.e. 13th April, 2001, was Good Friday and 16th April, 2001 was Easter Monday. Besides it is a fact that from 12th to 27th April, 2001 this court was on Easter vacation

under Order 64 of the Rules of Supreme Court which also coincided with a Government Mandatory leave affecting the Respondent, ruling from 13th April to 1st May, 2001. Further even if it were not for this, I apprehend that there was another hitch in store against the hearing of the Applicant thereby arising from the new mode of service the Applicant appears to have experimented with. Service by Coachline Mail which was referred to in the affidavit of service is, to my knowledge, not yet a recognized mode of service under our laws and so the difficulty would have been to select a date on which service could be deemed to have been effected.

On 11th May, 2001 when Miscellaneous Civil Cause No. 55 of 2001 was called again for hearing, I was the Judge responsible for Motions for the material week and so it was called before me.

I was on the occasion presented with what I will for lack of a better expression, a combined affidavit of service. This affidavit was entitled in three cause numbers including the cause numbers of the two Judicial Review matters that were commenced on 27th April, 2001. It was also entitled in the names of all three Applicants in the three applications in existence then. The deposition contained in this combined affidavit was to the effect that Notices of Motion and all necessary accompanying documents in all three matters had been personally served on the Secretary for the Judicial Service Commission in Lilongwe on 4th May, 2001.

I accepted this affidavit of service although it was not filed. This was on the strength of information that the High Court Accounts office was that day not manned. In fact in like manner and on basis of like information I accepted another unfiled affidavit of service in Bankruptcy Cause No. 2001 Re Alex Tchongwe, ex-parte Finance Bank of Malawi Limited, which I also heard that same day.

It was then moved by Counsel for the Applicant Esther Dzimbiri Phiri, that I hear the Applicant's case on the premise that according to this affidavit due service had been effected on the Respondent. It was my observation that if the relevant Notice of Motion and supporting papers was served personally on 4th May, 2001 then, inclusive of the day of service, eight days had elapsed since service. The matter was in fact called at 10.30 a.m. that day and there being no explanation why the Respondent was not present either through an official or through Counsel I allowed Counsel to proceed with the presentation of the Applicant's case.

Before hearing could actually start an application was then made that the case called be consolidated with the two Judicial Review cases commenced on 27th April, 2001. The effect of the prayer was that, if granted, the cases of Mary Mbekwani (Miscellaneous Civil Cause No. 59 of 2001) would become part and parcel of the case of Esther Dzimbiri Phiri (Miscellaneous Civil Cause No. 55 of 2001) which had just been permitted to commence. The reasons offered for the proposed move were that these three cases are founded on the same facts, that they are based on the same grounds, and that the Applicants in all of them are in pursuit of the same reliefs, the cause list in fact showed that all three matters were coming before me that very day.

The application made and the reasons behind it made perfect sense to me and so I allowed that the consolidation take place. This is how the Applicants, Mary Mbekwani and Catherine V. Chitimbe, have become part of this case, with the initial three separate cases now proceeding as one case under the number Misc. Civ. 55 of 2001. Hence Esther Dzimbiri Phiri who has retained her original cause number is now the 1st Applicant, and Mary Mbekwani and Catherine V. Chitimbe who have joined her cause are respectively second and third Applicants.

There is, I must say, one catch which escaped my attention in this consolidation exercise. The combined affidavit of service bearing depositions to the effect that in respect of each separate Applicant's matter Notice of Motion and accompanying documents had been personally served, it at this point into time wholly skipped my mind that in fact in respect of the two joining Applicants there was nothing in their files to show that anything else had been done after obtaining leave to start Judicial Review proceedings. This was a factor which was easily going to be detected if each file had, as previously arranged, proceeded on its own and had been called separately and independently from the others. The consolidation therefore apart from its pronounced purposes also served to camouflage the fact that the two matters, which were in fact not ready for hearing, were now taking a ride on the back of the Esther Dzimbiri Phiri matter in which Notice of Motion was duly taken out and served.

It is now at the stage of determining the matter that this hidden effect of the consolidation is clearly coming to the surface and teasing my mind. I am presently positively wondering how the combined affidavit of service could suggest that on 4th May, 2001 the Notices of Motion in the hitherto separate and independent cases of Mary Mbekwani and Catherine V. Chitimbe were personally served on the Respondent when on those files there is no sign of issue or filing of any Notices of Motion following the Orders of leave of 27th April, 2001.

Certainly if on 4th May, 2001 only the Notice of Motion in respect of the Original Esther Dzimbiri Phiri file was issued and available, and if it is the one that was personally served on the Respondent, that single service could not have amounted to effective service on all three matters which were then still separate from each other. In my view even swearing a combined affidavit representing that apart from Esther Dzimbiri Phiri's matter effective service had also been achieved in the two other matters was meaningless if the allegedly served Notices of Motion were in fact non-existent on those other files. I equally take the view that consolidation of these three matters on 11th May, 2001 could not remedy the falsehood projected in the deposition to the effect that there had been effective service in all three matters on 4th May, 2001.

In my understanding of the law it is only after the consolidation on 11th May, 2001, and not before, that service of due document in the title of the consolidated cause would be acceptable as effective service for the whole new case as it now stands and effectively cover all three Applicants. I accordingly find myself compelled in the circumstances to

hold, which I do, that as per Order 2 rule 1(1) of the Rules of Supreme Court we have a gross irregularity at our hands in this case. Whereas by my Order of 11th May, 2001 the three Applicants herein were brought together under umbrella of one cause number, the anomaly that the stood hidden was that the case was only ready for hearing in regard to the first Applicant and it was not ready for hearing regarding the added second and third Applicants. The fact that consolidation of the cases was allowed did not mean that the 2nd and 3rd Applicants were suddenly advanced to the stage of being ready to be heard, as the combined affidavit of service had lied when at represented that their Notices of Motion had been served too.

Proceeding therefore to hear the applications of all three Applicants as if all their causes had been duly notified to the Respondent through effective service of Notices of Motion was, in so far as the 2nd and 3rd Applicant's positions of this case are concerned, quite a prejudicial step vis-a-vis the Respondent who was not aware that these two too had commenced proceedings against it and that they were being heard that day. I am amply satisfied that the prejudice suffered by the Respondent in this respect is the direct consequence of the tabling of an affidavit before this court vouching for effective service when the files of the two Applicants bear no sign of any issue of process, and in particular no sign of issue of Notice of Motion beyond obtaining the O 53 rule 3 Rules of Supreme Court leave on 27th April, 2001.

The hearing in respect of the second and third Applicants having been an irregular one, now that I have discovered it, I cannot honestly proceed to make any determination in respect of it. To hear a party in the absence of his/her named opponent on the basis that the opponent was served with relevant notification of proceedings when the proof of service proffered to the court is in fact a sham, in my view, amounts to such a fundamental defect in procedure as render such a hearing a nullity. I accordingly feel that this hearing of the second and third Applicants in this case in the absence of the Respondent amounts to such a step in these proceedings as deserves not to be accorded any effect.

I note that Order 2 rule 1(2) of the Rules of Supreme Court gives this court wide powers as regards what it can do when faced with a situation like the present. Having evaluated the defect as I have done above I find it only fair that of my own motion I wholly set aside that portion of the hearing which I hereby do, and that I stop short of proceedings to any adjudication on it so as not to compound the irregularity. I definitely believe that the Respondent is entitled to this setting aside of that hearing in these proceedings ex-debito justitiae and does not have to be put to the trouble of having to apply to set it aside at a later stage now that the defect is glaringly obvious.

There now therefore only remains the hearing in respect of the 1st Applicant for consideration. With the weight of the irregularity just discovered, which was effectively concealed by the exercise of consolidation, in respect of the second and third Applicants still very fresh on my mind, I am solely tempted to as well revaluate the foundations on which I sanctioned the hearing of the 1st Applicant's matter. To me at the time the matter was called, i.e. before consolidation I was satisfied that the matter having been

specifically adjourned to that day and personal service, per affidavit, having been effected eight days prior to the date of hearing, inclusive of the day of service, that hearing could proceed if the Respondent did not bother to react to the notification.

Now with benefit of revisiting and reassessing the scenario on the date of hearing, it transpires that what is normal and acceptable notice of proceedings in our day to day hearings of civil causes (usually seven days) is not necessary normal notice in the case of Judicial Review proceedings. The notice the 1st Applicant effected on the Respondent and on basis of which I directed that her matter could proceed to hearing thus for re-examination, if only for me to be fully satisfied that the hearing done stands on solid and sound foundation before I proceed to the determination of her complaint. The fact that the second and third Applicants managed to present their cases, which procedurally were not yet ripe for hearing, through the back-door by, as it were, hitch-hiking on the back of this served Notice of Motion, makes it imperative that the service of the material motion itself be re-tested for its own soundness.

The beginning point in this exercise is O53 rule 5(4) of the Rules of Supreme Court which provides that:-

"Unless the court granting leave has otherwise directed, there must be at least 10 days between the service of the Notice of Motion or summons and the hearing."

It is moot point in this case that from the date the affidavit indicates Esther Dzimbiri Phiri's Notice of Motion was served, i.e. 4th May, 2001, and the date of hearing, i.e. 11th May, 2001 there did not elapse a minimum of 10 days. I have already held above that even counting the date of service the days that elapsed only come to eight in number. The question that consequently behooves the mind is whether it is open in the circumstances to hold that the court that granted leave herein directed otherwise in the spring of the provision and that thus it abridged the time of service to less than the 10 days normally required.

As mentioned at the outset, leave in the case of the 1st Applicant was granted by Hon. Mwaungulu, J. on 6th April, 2001. Looking at the Order he made and at the ex-parte application before him, there was neither a prayer for nor an Order abridging or extending the 10 days gap prescribed by Order 53 rule 5(4) herein between service of Notice of Motion and hearing. If we were to go by the Order of Mwaungulu, J. therefore as against the material provision, the correct conclusion would be that 10 clear days' notice was essential and unavoidable in this case.

It will also be recalled, however, that this matter was, subsequent to the grant of leave, on 3rd May, 2001 just called before Hon. Tembo, J. who adjourned it to 11th May, 2001. The service of Notice of Motion now under scrutiny which was effected the following day was done in obedience to this Order of adjournment. There was, however in this Order, no specific reference to the minimum period to be satisfied for the achievement of effective service, but it can be implied, I believe, that the judge fixed the date 11th May on 3rd May taking it that he was allowing enough room for the Applicant to effectively

serve her Notice of Motion this time round after the abortive or doubtful Easter time service. This in consequence brings in the uncertainty that since the period between 3rd and 11th May was already less than 10 days in duration, whether it can be assumed from this that by implication this adjournment was in effect abridging the 10 days clear notice requirement covered in the rule. If it can be so assumed, then service for eight days may have been legitimate to bless the hearing that followed. If however, it cannot be so assumed, then that service too fell short of legal requirements and that would end up colouring the hearing that followed as an irregular hearing also.

A point worth digesting here is that Order 53 rule 5(4) of Rules of Supreme Court refers to "...the court granting leave..." as the one having power to alter the 10 clear days' notice requirement. If the provision were rather warded "...the Judge granting leave..." it would have been very clearly understood in this case to refer to Hon. Justice Mwaungulu. As we have found that that Judge did not at all interfere with the requirements of the above rule, this point would have been easily settled. Since, however, the provision uses the word "the court" depending on whether it is simply meant to meant "High Court" then regardless of whether it was Hon. Justice Mwaungulu, or Hon. Justice Tembo sitting, it would in any such event be the High Court that sat. One may therefore wonder whether when reference is made to the court that granted leave making an otherwise Order it could simply and correctly just mean "the High Court" without need of identifying the individual Judge who constituted the court at any material time. Should this be the case then there would have been room for the said court, regardless of which Judge sat on 3rd May, 2001, to make an otherwise Order under O53 rule 5(4) changing the 10 clear days notice requirement to such other duration of time as it thought fit in the circumstances of this case.

It is unfortunate that under Order 1 rule 4(2) of Rules of Supreme Court the definition of "Court" is so open that it does not quite help us for purposes of resolving this issue. The word as per that definition means the High Court or any one or more judges thereof and even extends to Masters Registrars. Be this as it may, however, whether "the Court" in this provision refers to the particular judge that granted leave or to the High Court generally, what is significant is that both the Orders of Justices Mwaungulu and Tembo made no reference to Order 53 rule 5(4) of the Rules of Supreme Court. Justice Mwaungulu simply granted leave and stopped there and so he did not affect the operation of the rule. Justice Tembo, moved about the service alleged to have been effected over the Easter holidays, merely selected a date a little more than a week ahead and set down the case for 11th May, 2001. An honest assessment of this situation leads me to the irresistible conclusion that neither of these Honourable Judges meant to affect nor in fact did affect the application of O53 rule 5(4). Therefore for service on the Respondent to be deemed effective, there was need for at least 10 days to elapse between the date of service of the first Applicant's Notice of Motion and the date of its hearing. On the adjournment that was granted between 3rd and 11th May, 2001, achieving this minimum standard was practically impossible even if the 1st Applicant had endeavoured and succeeded to effect service on the very 3rd May, 2001.

This therefore takes us back to Order 2 of the Rules of Supreme Court which is on the subject of non-compliance with the Rules. In the case of the 1st Applicant, rule 1 of that Order would render irregular the hearing held on 11th May, 2001 after lapse of only 8 days from date of service instead of the same taking place after 10 clear days from the date of service. It is now obvious to me that both Mr Nyimba, of Counsel for the 1st Applicant, and we did not pay the attention we should have paid to O53 rule 5(4) on 11th May, 2001. Focusing on the standard time of service in civil cases, which is normally 7 days, when Mr Nyimba proved of service of 8 days age, I had no difficulties with agreeing that he could present his client's case as per his prayer, noting that the Respondent was absent and had not sent in any excuse for the non-attendance. As the rules stand, however, the Respondent did not have to attend. Equally the Respondent did not have to send in an excuse for non-attendance because under the particular rule governing service of Notice so Motion in Judicial Review Proceedings the Respondent was not yet deemed to have been served by that day, and so it was under no obligation to react to the notice.

Order 2 rule 1(2) of the Rules of Supreme Court, as earlier seen, confers on the court wide powers as to what to do in event of non-compliance with rules leading to an irregularity like the present one. At the highest level the court can set aside the proceedings or any step in them affected by the non-compliance and at the lowest level it can made such order dealing with the proceedings generally as it thinks fit.

I must hasten here to point out that the fault attending the 1st Applicant notification of her cause to the Respondent is much lighter than that which attended the notification of the causes of the 2nd and 3rd Applicants to the Respondent as already discussed above. Whereas in the situation of the other two Applicants their very files bore no indication of issue of the Notices sworn to have been served, in this case the file itself bears witness to the issue of the documents sworn to have been served and the only shortfall is on the number of days that should have elapsed before hearing could take place. Effort in this case was made by the Applicant to effect service except it was legally inadequate effort in point of time.

The next question for consideration in the circumstances is one concerning the effect of this irregularity. An irregular step or Order in any proceedings does not change its status merely by leaving it uncorrected. (See Note 2/1/1 under Order 2 rule 1 R.S.C.). Having discovered and acknowledged that it was irregular to hear the 1st Applicant's case before the Respondent had 10 clear days' notice of her case, even though the shortfall was in respect of only a few days, the situation will not be cured by merely turning a blind eye to the fault and proceeding as if there is no irregularity.

At this point it is worthwhile to recall to mind the initial steps the rules have laid down for Judicial Review Proceedings. In a normal Judicial Review case the initial process is an ex-parte application for leave to commence such proceedings. By its nature this application is handled by the court in the absence of the prospective Respondent. Thus whether leave is granted or refused, at that stage the intended Respondent is ignorant and possibly even unsuspecting of what is going on.

With this at the back of the mind the importance of the first notification to the Respondent absent the Judicial Review to come through Notice of Motion, which is the next step in line, cannot be overemphasized. Looked at in this way it makes sense that the rules had to depart from the usual period of service and allow for at least 10 clear days before hearing. Obviously the rationale behind this must be that not only should the Respondent know that a case has been opened against him, but that he should prepare for the hearing that by this time has already been set down. As seen in this case, the first attempted notification of the 1st Applicant's cause on the Respondent over the Easter holidays was doubted by the Hon. Justice Tembo. I have to that added the further discreding factor that the attempted service was via Couchline Mail which has no governing rates under our law, in which case we cannot be certain, if at all, if the documents sent did ever reach the Respondent. The service on the Respondent on 4th May, 2001 thus in reality after discounting the Easter attempt, became the first notification.

To blame the Respondent for not attending and to proceed to hear the 1st Applicant in its absence, as happened in this case, when in fact the law still entitled the Respondent to a few more days of digesting the case raised against it before effective service could be deemed was to take an irregular step in the proceedings. If Counsel was aware of this shortfall on effectiveness of this service but deliberately urged me to hear the case then he was guilty of misleading the court. I suspect however that both he and me were applying the standard period of service we apply to notices of hearing and in the course of that, through oversight, neglected to take into account the O53 rule 5(4) above - cited which was directly and peculiarly applicable in this case.

All in all the net result is that as at the time the 1st Applicant presented her case, although the papers disclosing the case she had lodged with the court against the Respondent had by then no doubt reached the said Respondent, legally the notice was insufficient on account of the time set down in the rules. Due to this the 1st Applicant was not that day entitled to be heard, let alone to be heard in the absence of the Respondent. I am thus of the view that proceeding to a determination of her application therefore will rather compound than cure the irregularity committed in this matter.

Much therefore as I have described this present irregularity as lighter than the one first discussed in respect of the other two Applicants, I must say, however, that as this was strictly speaking supposed to be the first notification of the case on the Respondent, the imperfection in service turns the hearing that followed into a defective step of fundamental weight. Thus like in the case of the other although the irregularities have different weights, two Appellants, I believe it would be grossly wrong for me to proceed to a determination of the 1st Applicant's cause, well knowing now that the non-attendance of that party on 11th May, 2001 cannot legally be held against it. In consequence I must, I think, of my own motion set aside the hearing I held in respect of the 1st Applicant's application on grounds of irregularity under Order 2 rule 1(2) of the Rules of Supreme Court. Indeed as was the case when I set aside the hearings of the

applications of the 2nd and 3rd Applicants, again in this case I am convinced that the Respondent is entitled to this relief ex-debito justitiae.

For the avoidance of doubt what this ruling amounts to in a nutshell is that there has been no hearing of the three Applicants' applicantions for Judicial Review now consolidated in this one case. Such hearing as took place on 11th May, 2001 was bad for irregularity and has accordingly been set aside by the court of its own motion. The Applicants, if minded to launch a proper hearing of their matter, my well opt to reflect on the shortfalls highlighted in this ruling. The Respondent not having attended court on 11th May, 2001 and not having done anything before or on that date in purported obedience of or reaction to the Notice of Motion herein, the question of costs does not, as I see it, arise. I accordingly make no order in that regard.

Made in Chambers this 11th day of June, 2001 at Blantyre.

A.C. Chipeta

JUDGE