

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 78 OF 2002

BETWEEN:

THE STATE

and

The President of Malawi 1st Respondent
The Minister of Home Affairs 2nd Respondent
Inspector General Police 3rd Respondent
Army Commander 4th Respondent

EX-PARTE

The Malawi Law Society 1st Applicant
Episcopal Conference of Malawi 2nd Applicant
Malawi Council of Churches 3rd Applicant
Civil Liberties Committee 4th Applicant
Humphrey Mundwalo 5th Applicant
Msawiya Mwambokera 6th Applicant

CORAM: Tembo, J.

Phoya, Hon. Attorney General, for the Respondent

Kaundama, Senior Court Clerk

RULING

TEMBO, J. This is an ex-parte application of the respondents to have the Order for Injunction and Notification of Judge's decision made by Justice Mwaungulu on the 3rd day of June, 2002, discharged on the ground of irregularity. The application is supported by an affidavit of the Hon. the Attorney General. The following facts emerged from the affidavit: that on 4th June, 2002, the Attorney General's Chambers were served with an Order for the Injunction and the Notification of the Judge's decision in respect of an application for judicial review by the applicants. That Order had been made by Justice Mwaungulu after he had heard applicant's counsel. That earlier on that day the applicants' counsel had first presented their application before Justice Tembo, who was Motion Judge then, and who had in fact considered and determined the application. Justice Tembo's Orders on the application are materially different from the Orders made by Justice Mwaungulu. The Order of Justice Tembo was to the effect that—

“Leave prayed for is hereby granted, however, without—

(1) an order that there be a stay of the enforcement of the presidential ban, as sought in para 6 of reliefs sought;

(2) an order of injunction restraining the respondents from enforcing the presidential ban, as sought in para 7 of reliefs sought,

but otherwise in the terms and to the extent set out in the application.”.

In the view of the Hon. the Attorney General, the manner in which the applicants' counsel had conducted themselves was highly irregular and was an abuse of court process in that the applicants' counsel had appeared before two separate Judges on the same day in relation to the same application for judicial review. That if the applicants were

dissatisfied with the first orders made by Justice Tembo, the correct procedure would have been to appeal against the judge's ruling or seek a further order from the same judge. In the circumstances, it is contended by the respondents that the order for injunction served on the Attorney General's Chambers was obtained irregularly and the same cannot be sustained. In that respect it is the further submission of the Attorney General that if the applicants' counsels conduct is upheld by the court, to have been regular, that would be tantamount to setting out a chaotic and dangerous precedent whereby the practice of the law before this court would be by way of hide and seek. By so doing, the tendency for judge shopping, on the part of counsel, would be retrenched.

To begin with I should hasten to state that the sequence of events respecting what took place at the High Court concerning the ex-parte application in question was as has been outlined above. It is also correct that there was an Order which I made, as set out above, in which leave to apply for judicial review had been granted whilst the prayer for injunction had been refused.

It is important to note that this was a mere ex-parte application for leave to apply for judicial review. In accordance with O.53r.3 of Rules of the Supreme Court no application for judicial Review can be made except where the applicant has first obtained leave of the court for him or her to do so. The application for leave to apply for judicial review ought to be made ex-parte and the judge may determine the application without a hearing unless a hearing is requested in the Notice of Application.

In the instant case when the application was first presented for hearing, on that day, the court had determined it without a hearing as there was no notice therefor in the application. Upon considering the effect of granting the reliefs sought in paragraphs 6 and 7, that is the granting of the injunction restraining the respondents from enforcing the presidential ban, the court was of the view that granting such a relief then would have amounted to an attempt at deciding the substantive claim of the applicants on the basis of affidavit evidence at that stage, without of course giving the respondents the opportunity to be heard on the matter.

With that earlier Order of the Court in place, counsel for the applicants went ahead to obtain another order which is now under review. In that regard the court is in complete agreement with the submission of the Attorney General that the manner in which the applicants' counsel had conducted themselves was highly irregular and was an abuse of the court process. In the circumstances it is adjudged that the Order under review ought to be discharged for irregularity as prayed by the Hon. the Attorney General. The effect of this decision will be, and is, to restore the Order which was first made on that day: that is, leave to apply for judicial review, on the part of the applicants, is granted without a stay of the enforcement of the presidential ban and further without an Order of Injunction restraining the respondents from enforcing the presidential ban.

MADE in Chambers this 5th June, 2002, at Blantyre.

A.K. Tembo
JUDGE