IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CIVIL CAUSE NO. 78 OF 2002

BETWEEN:

THE MALAWI LAW SOCIETY, EPISCOPAL.....APPLICANTS
CONFERENCE OF MALAWI,

MALAWI COUNCIL OF CHURCHES

- VS -

THE STATE AND THE PRESIDENT OF.....RESPONDENTS
MALAWI,
THE MINISTER OF HOME AFFAIRS

THE INSPECTOR GENERAL OF POLICE,

ARMY COMMANDER

CORAM: TWEA, J

Ngwira, of Counsel for the Plaintiff

Kaphale, of Counsel for the Defendant

Mrs Mbewe, Official Interpreter

C. Jere, Recording Officer

JUDGMENT

On 3rd June, 2002 the applicants obtained leave to move for judicial review against the respondents. The applicants are the Malawi Law Society, a Statutory Corporation, the Episcopal Conference of Malawi, a Consortium of the Dioceses of the Roman Catholic Churches in Malawi, the Malawi Council of Churches, a Consortium of Protestant Churches in Malawi, the Civil Liberties Committee, a human rights non-governmental organization, Messrs. Humphrey Mundwalo and Msawiya Mwambokera who are citizens of the Republic of Malawi. The respondents are the President of the Republic of Malawi, the Minister of Home Affairs, the Inspector General of Police and the Army Commander. The orders against which judicial review is sought are two directives that were made by the President, the first respondent, on 28th May, 2002 banning all forms of demonstration in relation to the constitutional amendment sought to allow the President of the Republic of Malawi to serve unlimited terms in office, and further that the second, third and forth respondents must deal with anyone who violated such directive. The applicants seek a like order **certiorari** quashing the directive or decision, prohibiting the 2nd, 3rd and 4th respondents from carrying out the aforesaid order, a declaration that the President ban is unconstitutional, illegal and unlawful, a like order to mandamus requiring 2nd, 3rd and 4th respondents to maintain law and order and protect public safety life and property and a like order to mandamus requiring the respondents to abide by the Constitution. Both parties appeared on the substantive review and argued their case with great passion.

The background to the case is that there were rumours that the National Assembly will be presented with a bill seeking to amend S.83(3) of the Constitution. This section reads as follows:

"The President, the First Vice President and the Second Vice President may serve in their respective capacities a maximum of two consecutive terms....."

Naturally this sparked a debate among the general populace in this country. Some supported the envisaged amendment and others did not. On 28th May, 2002, the first respondent, while conducting a rally directed that there should be no demonstrations for or against the envisaged constitutional amendment dealing with presidential term limit, and further directed the 2nd, 3rd and 4th respondents to deal with anyone violating his directive on the ban. I must mention at the outset that the exact text of the President's directives at the rally was not provided although it is admitted that the said directives were made and made at a rally.

The applicants have argued that the directives had the effect of fettering the constitutional rights to freedom of association, assembly and demonstration, expression conscious and opinion and rights to political rights as enshrined in Sections 32, 33, 34, 35, 38 and 40 of the Constitution. They argued further that the directives were unconstitutional and unreasonable that they warrant the intervention of the court.

On 4th October, 2002, the parties appeared in Chambers and among other things, this court directed that they file supplementary arguments on the definition of the word "demonstration." Both parties settled for the definition espoused by Mann L J in the case of **British Airports Authority vs Ashton** (1983) All E.R. 6. The learned Judge adopted the "Shorter Oxford Dictionary (3rd Ed)" definition wherein the seventh variant of the said word means **"a public manifestation of feeling: often taking the form of a procession and mass meetings."** This definition has largely influenced the respondents interpretation of the Presidential directives: that the ban only affected public processions or mass meetings. It should be noted that the above definition gives examples of the forms that public manifestion of feelings may take: that is, processions or mass meeting. It must be appreciated that the said case concerned industrial action of picketting at the airport in the face of a regulation that prohibited "public" assembly or demonstration or procession likely to obstruct or interfere with the proper use of acrodoomes". The Court in that case concerned itself much with the word "public", and I am mindful that this word had much bearing on the preference of the definition proferred by the learned Judge. In the present case, again, I must stress that the exact text of the President's directives was not provided, thee is no mention whatsoever that the President was referring to public demonstrations. What came out was simply "demonstrations". The applicants contended that this referred to all forms of demonstrations.

I have had recourse to "Black's Law Dictionary (sixth edition)" and the word "demonstration" among other things means a "show or display of attitudes towards a person, cause or issue:" This definition is much wider that the definition in the Ashton's case (supra). Having regard to S.38 of our Constitution which provides that:-

"Every person shall have the right to assemble and demonstrate with others peacefully and unarmed"

It is my view that the element of procession or mass rally is not a necessary ingredient at all. The "Blacks" definition is wide enough to catch any manifestation of attitudes or feeling towards a person, cause or issue. This would include shouting slogans and displaying placards to mention a few of the forms alluded to in the arguments by the parties.

Bearing this in mind one can see that the directive is too wide, and, as was admitted, shouting of slogans and display of placards is done at the President's own rallies, would be impossible to enforce. If enforced at all, it would completely take away the rights enshrined in S.32, 33, 34, 35, 38 and 40, as anyone who shows or displays an attitude towards the subject would be dealt with.

This Court also looked at the second limb of the directive: that the other three

respondents should “deal” with anyone violating the directive. The parties proffered no arguments on the meaning of the directive or the word “deal”. What did the President intend when he directed the Minister, the Inspector General and the Army Commander to “deal” with anyone violating the directive. All sorts of things come up in ones mind as to what he may have intended. As I said I did not have the benefit of any arguments on this point however, all I can say, as of now, is that in the context of this directive, the word “deal” is dangerously vague and brings to mind very negative connotations. The President must be explicit in his directives.

I will now look at the constitutional position.

The parties agree that the Constitution guarantees the rights

under S. 32, 33, 34, 35, 38 and 40. Further, both agree that these rights are not absolute and can be limited. Lastly, both agree that under S.12 of the Constitution, which sets out the fundamental principles on which the Constitution is founded, paragraph (v) provides that:-

“As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society”.

therefore human rights, or such of them that can be lawful limited, may be limited in order to ensure peaceful human interaction. In my view there is a meeting of minds between the parties as to the essence of this constitutional principle.

This marks as far as the agreements go on to the constitutional position. The Point of departure came when considering the limitation on rights under S.44 of the Constitution. Section 44(2) of the Constitution provides as follows:-

“Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society”.

The State relied on the case of**R vs Oakes** (1986) 26 DLR (4th) 200 also in 19 C.R.R. at 308. This case was basically on the constitutionality of a S.4(2) of the Canadian Narcotic Control Act, in which under S.8 it provided that an accused found in possession of narcotic had to establish that he or she did not so possess it for purposes of trafficking. The argument was whether this reverse onus provision limited the right to be presumed innocent under the Canadian Charter of rights. In my view the position taken by the

State, relying on the case of **R vs Oakes** (supra), is tenable except to the extent of whether there was prescription by law. The State avoided this argument, but the applicants clearly and strongly contented that there was no prescription by law. They further argued that as long as there was no law, then the rest of the tests as to reasonableness, recognition by international human rights standards and necessity in an open and democratic society do not apply.

As I said earlier, the directive notwithstanding that the exact text is not available, was made at a rally. The status of the rally too is not clear. The parties

did not advance any argument on this issue.

To decide the question whether there was law, let me examine the Presidency. S.72 of the Constitution provides as follows:

"There shall be a President who shall be Head of State and Government and the Commander-In-Chief of the Defence Forces of Malawi".

The Constitution therefore, clearly separates and recognises the President as Head of State and Head of Government. The Constitution further provides in S.4 that:

"This Constitution shall bind all Executive, Legislative and Judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it."

The organs of the State are clearly separated into Executive, Legislative and Judicial. The functions of these organs of the State are set out in Sections 7, 8 and 9 respectively. Section 7 reads:

"The Executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution".

For completeness this section should be read together with S.88(1) and (2) of the Constitution which provide as follows:

"(1) The President shall be responsible for the observance of the provisions of this Constitution by the Executive and shall, as Head of State, defend and uphold the

Constitution as the Supreme law of the Republic.

(2) The President shall provide Executive leadership in the interest of national unity in accordance with this Constitution and the laws of the Republic".

The tenets of the Constitution therefore place the President in the executive realm. He heads the executive and, as Head of State, must defend and uphold the Constitution.

Be this as it may, S.78 of the Constitution provides that the President is also Head of Government. According to our political dispensation, the party in majority in Parliament forms the Government. The Ministers and Deputy Ministers are appointed by the President under S.94. They are responsible to the President for the day to day running of the Government: S.93, and S.97 of the Constitution. It is therefore trite to observe, that the term Government refers to the Executive arm or organ of the State whose functions are defined in S.7 of the Constitution. The different capacities of the President: as Head of State and Head of Government must, therefore, always be borne in mind.

In considering this issue let me take judicial notice of the fact that the incumbent President is also the President of the Party which forms the Government of the day. I also take judicial notice of the fact that party presidents, so too the incumbent in this case, go about the Country addressing public rallies. In respect of the incumbent, it is not possible to tell whether he is addressing a rally as Head of State, Head of Government or as Party President. I have already said that the status of the rally on 28th May, 2002 was not disclosed. I therefore cannot tell in what capacity the President was addressing the said rally.

From the evidence before me however, it would appear that after the directives were issued nothing further was done. If the President issued the directive as Head of State, then his decision would subsequently have been tendered in accordance with S.90 of the Constitution i.e. reduced to writing, signed and sealed. If he made the directive as Head of Government, he would subsequently have initiated legislation which would have been passed on to Parliament to become law. In the absence of any evidence to the contrary, at law, it would be that the President made the directives as a politician.

To take this point further, it should be noted that S.48 of the Constitution vests all legislate powers in Parliament and under S.58(2) Parliament is prohibited from delegating legislative powers that substantially and significantly affect the fundamental rights and freedoms recognised by the Constitution. The President under the Constitution therefore, does not have power to make laws.

In considering all this, I have taken into account S.25 of the Police Act which provides, among other things, as follows:-

“25 - (1) Any Officer-in-Charge of Police may issue orders for the purpose of -

(a) -

(b) directing the conduct of assemblies, meeting and processions on public roads or streets or places of public resort and the route which and times at which any procession may pass.

(2) Any person who wishes to convene an assembly, meeting or process on a public road or at any public place shall give notice in writing to the Officer-In-Charge of Police of his intention so to do.

(3) -

(4) Upon receipt of the notice required by subsection (2), the Officer-In-Charge of Police may, if he considers that the assembly, meeting or procession is likely to cause a breach of the peace or disaffection amongst inhabitants of Malawi, or unduly to obstruct or cause inconvenience to the public, by order in writing, prohibit or may impose such conditions in writing relating thereto as he shall deem fit, in order to prevent a breach of peace, disaffection amongst inhabitants of Malawi or obstruction of or inconvinience to the public”.

(5) - “

This section cannot and does not limit the rights in issue; if only regulates how such rights, among other things, can be enjoyed. The position of the law therefore is as was espoused in the case of **Mulundika and Others vs The People, (1996) IBHRC 199 (Supreme Court of Zambia).** The citizen therefore need only give the Police notice of the assembly etc. there is no legal requirement that the Police should grant them permission. Further there is no legal requirement to give notice about who will be addressing or what will be said at the assembly, meeting or procession. According to S.25 of the Police Act, assemblies, meeting or processions at private places do not require Police notice.

Lastly, this Court bears in mind that the Constitution, under S.45 permits derogation from the rights only in accordance with the Constitution, when there has been a declaration of State of Emergency. It cannot be said and it was not argued that we have reached that stage.

After considering the arguments and submissions before me, I find that there is no law prescribed to limit or restrict the right to assembly and demonstration. I find that the directive of the President at a political rally to limit such rights does not amount to law. The argument by and for the respondents in view of the finding in the case of **R v Oakes** (supra) are therefore not tenable. In view of this, I find that there is no need to examine the rest of the tests set out in S.44(2) of the Constitution.

I will now look at the second limb of the directive: to the Minister of Home Affairs, the Inspector General and the Army Commander. I will begin by looking at the constitutional provisions that vest powers in the above offices. S.93 provides that the Minister will be responsible for the running of Government Departments among other duties, as may be prescribed by the President, subject to the Constitution

S.153 provides that the Malawi Police Force is an independent organ which is there to provide protection of public safety and the rights of persons in Malawi according to the prescriptions of the Constitution. It also vests the political responsibility of the Force in the Minister which responsibility must be exercised according to the Constitution. Be this as it may the Constitution under S.154 provides the Inspector General is the Head of the Malawi Police Force and is responsible to the Minister. This notwithstanding, he is required to be independent from control or direction of any other person or authority other than is prescribed under the Constitution. Further, S.158 of the Constitution, provides for the Political independence of the Malawi Police Force. This section restricts Police Officers to professionalism and constitutionalism failing which they would be subject to disciplinary action.

Under S.160(1), the Defence Forces of Malawi, are required at all times to operate under the directions of the civil authorities in whom the Constitution vests such powers and to uphold and protect the constitutional order. Although the ultimate responsibility for the Defence Forces vests in the President under S.161(1), as the Commander-In-Chief, S.160(2) explicitly provides that no person or authority may direct or deploy the Defence Forces to act in contravention of the Constitution. Be this as it may, the day to day command vests in the Army Commander under S.182 of the Army Act. This notwithstanding the responsibilities conferred on the President and the Army Commander are subject to the recommendation of the Army Council created under S.8 of the Army

Act and the Defence and Security Committee of the National Assembly created under S.162 of the Constitution.

From the above discourse it is clear that the Minister of Home Affairs, the Inspector General and the Army Commander are all subject to the Constitution in the exercise of their power and duties. All the persons who are entrusted with these powers are

reasonable men who are aware that they are subject to the fundamental principles of our Constitution as provided in S.12(ii) of the Constitution that:

"All persons responsible for the exercise of powers of the State do so on trust and shall only exercise such powers to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi."

It has been submitted in this Court that people have shown or displayed attitudes for or against the presidential term limit, even before the very sight and hearing of the President himself. These people have not been dealt with. This Court can only assume that the directees were aware that these people have the right, and freedom to do so. This Court did not receive any evidence nor was it submitted that the 2nd, 3rd and 4th respondents have acted on the directive to the detriment of the peoples rights. The constitutional position therefore holds.

After hearing the parties and considering the evidence and the submission made by Counsel and reading the authorities that Counsel ably researched, it is my judgment that the two directives made by the President were unconstitutional, further banning "**all form of demonstrations**" was unreasonable as such a ban is too wide and not capable of enforcement as events have shown even at the President's own rallies. It should be noted that the Police have powers to regulate assemblies, meeting and processions under S.25 of the Police Act, the State has numerous other laws that regulate assemblies and prevent rioting, and also laws on defamation that regulate freedom of speech and expression. The Police Service would be advised to use these powers properly. Again, as Malawians, the organisers of demonstrations on this issue, or indeed any other issue, for or against must bear in mind public tranquillity. Democracy will always have enemies both within and without the Government. Granted that the Police have, at times, acted in a biased manner, as numerous cases before this Court will show, but we must take heed that confrontation will only result in chaos and disorder which are, in themselves, enemies of democracy. The Rule of Law must be preserved by challenging those we think have wronged us before the Court. The wrong doers too must be heard. I wish us to direct our minds to the words of **Tambala J**, as he was then, in the case of the**National Consultative Council vs The Attorney General** Civil Cause No.958 of 1994, he held that::-

"There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in term of peace, law and order, and national security, are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the Police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the only way they can contribute to the development

of a free State. Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their Constitution."

Every Malawian who is mature enough will remember that for 30 years, eight years ago, this country "enjoyed" peace and quiet, law and order that was devoid of the rights and freedoms and the social justice now enshrined in our Constitution. Taking judicial notice of the cases brought before this Court and the events in our National Assembly, very few Malawians want that kind of peace and quiet, law and order.

It is therefore my judgment that the applicants are entitled to

the reliefs sought and I grant the said reliefs as prayed, with costs to the applicants.

Pronounced in Open Court this 22 day of October, 2002 at Blantyre.

E.B. Twea

JUDGE