

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

MISC. CIVIL CAUSE NO. 315 OF 2005

BETWEEN

THE STATE

AND

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST
RESPONDENT**

AND

**THE LILONGWE CHIEF RESIDENT MAGISTRATE'S
COURT.....2ND RESPONDENT**

EX PARTE DR CASSIM CHILUMPHA.....APPLICANT

JUSTICE DR JANE ANSAH

Viva Nyimba; of Counsel for the Applicant

R. Kasambara; Attorney General Counsel for the Respondent

Mrs S.P. Moyo: Official interpreter/Clerk

RULING

On 22nd November 2005, after the full inter-parties hearing, I gave an oral ruling setting aside my order of 16th November which I made in favour of the applicant the Right Honourable Dr Cassim Chilumpha and allowed the application by the Hon. Attorney General to vacate the interim injunction and rescind leave to commence the judicial review. I further informed the parties that I will give my reasons for the ruling later hence this ruling.

THE LAW

The law cited in the application is the Malawi Constitution, sections 15(2), 86(1), 91, 101(2). It is pertinent that the sections be quoted in their entirety:

Section 15(2) reads;

“Any person or group of persons with sufficient interest in the protection and enforcement of rights under this chapter shall be entitled to assistance of courts, the ombudsman, the human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.

Section 86(1) reads;

“The President or First Vice-President shall be removed from office where the President or First Vice-President, as the case may be, has been indicted and convicted by impeachment.”

Section 91.

- (1) **“No person holding the office of President or performing the functions of President may be sued in any civil proceedings but the office of President shall be immune to orders of the courts concerning rights and duties under this constitution.”**

- (2) **“No person holding the office of President shall be charged with any criminal offence in any court during his [her] term of office, except where he or she has been charged with an offence on impeachment.”**

Section 99(2) reads;

“The Director of Public Prosecutions shall have power in any criminal case in which he [she] considers it desirable so to do-

- (a) **to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;**

- (b) **to take over and to continue any criminal proceedings which have been instituted or undertaken by any other person or authority;**

and

(c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or herself or any other person or authority.”

(3) Subject to section 101(2), the powers conferred on the Director of Public Prosecutions by subsection (2)(b) and (c) shall be vested in him or her to exclusion of any other person or authority and whenever exercised, reasons for the exercise shall be provided to the Legal Affairs Committee or Parliament within ten days.”

Section 101(2) reads;

“In the exercise of the powers conferred on him or her by this constitution or any other law, the Director of Public Prosecutions shall be subject to the general and specific directions of the Attorney General but shall otherwise act independent of the decision or control of any other authority or person and in strict accordance with the law.”

FACTUAL BACKGROUND

The background to the inter-parties hearing is as follows:

The applicant in this matter, the Right Hon. Dr Cassim Chilumpha, the Vice-President of the Republic of Malawi, is applying for leave to commence judicial review proceedings and an interlocutory injunction against the Respondent, the

Hon. Attorney General for the decisions of the Director of Public Prosecutions (DPP) to take out summons for committal proceedings against the Vice-President and the Chief Resident Magistrate Sitting at Lilongwe for issuing a criminal summons against the Vice-President. The applicant wants to restrain the Director of Public Prosecutions from instituting criminal proceedings, against him, being a person holding the office of the Vice-President of the Republic of Malawi, and also to restrain the Chief Resident Magistrate sitting at Lilongwe from summoning him to court while he is holding the office of the Vice-President of Malawi. The application is supported by an affidavit sworn by the applicant himself.

Initially, on 16th November 2005, the Applicant appeared before me with an *ex-parte* application for leave to commence Judicial Review proceedings and an application for an interlocutory injunction. When I looked at the nature and complexity of the matter, I perceived that the best way to deal with the application would have been by way of an inter-parties hearing. Nevertheless, the circumstances surrounding the whole case persuaded me to entertain the *ex-parte* application and I granted an *ex-parte* order. I ruled that there be an interim injunction valid for 4 days, during which period an inter-parties application should be filed. I also granted leave for the commencement of judicial review proceedings. However, before the applicant filed an inter-parties application for the continuation of the interim injunction, the Hon. Attorney General on 18th November 2005 filed Summons to vacate the interim injunction and to discharge leave for judicial review which was set down for hearing on 21st November, but was adjourned to 22nd November 2005 and was heard on that day. After a full hearing I orally granted the orders prayed for by the Hon. Attorney General and now I proceed to give my reasons.

THE ISSUE TO BE DETERMINED

The main issue to be determined in the inter-parties application is whether or not the order of an interlocutory injunction and leave to commence judicial review proceedings which was made on 16th November 2005 should be vacated and discharged respectively.

CHRONOLOGY OF EVENTS

It may be helpful to set out the chronology of the events. On 15th November 2005 at about 5.00 pm, the applicant was served with summons to appear before the Chief Resident Magistrate Court sitting at Lilongwe on 16th November 2005, at 9.00 o'clock in the forenoon for committal proceedings on charges attached to the summons, which are exhibited as 'DR CC1'. Being the incumbent Vice-President of the Republic of Malawi, the applicant contends that in accordance with section 91 of the Malawi Constitution, he is immune to both criminal and civil proceedings of any nature whilst he holds the office of the Vice President save only by way of impeachment.

The application is highly contentious as evidenced by the affidavits in support and in opposition sworn by the parties, the long and detailed skeleton arguments, additional skeleton arguments filed by the parties and the voluminous cited authorities. I am indeed highly indebted to both Counsels for their thorough research which has assisted me greatly although it has kept me awake for a few nights.

SUBMISSIONS AND DISCUSSION

Both lawyers have addressed this court at length. I propose not to examine the lengthy arguments in detail as that will pre-empt the examination of the substantive issues that are not in issue at this juncture. Further, the questions to be determined in this application are straightforward.

1. Respondents' application

The Hon. Attorney General on behalf of the respondent made his submission first. He first dealt with his application to vacate the *ex-parte* injunction and later dealt with the question of the discharge of leave for judicial review on the following grounds:-

- 1.0 that the Respondent is a wrong party to these proceedings;
- 2.0 that there is no serious issue to be tried as to warrant interlocutory injunction and grant of leave for judicial review;
- 3.0 that the balance of convenience is against the grant of injunction.

The Hon. Attorney General began with the adoption of his affidavit in support of the application and the adoption of his filed skeleton arguments. He first dealt with the question of his being a wrong party to the proceedings. Citing the case of *Tembo and Kainja vs Attorney General*¹ he avers that for a court to deal with issues before it, the correct parties must always be before the court, otherwise the claim or issue before it should be dismissed or where an injunction was granted, it should be vacated. The Hon. Attorney General argued further that judicial review proceedings are not a suit but a process whereby the decision of a public official is

¹ MSCA Civil Appeal No. 1 of 2003 unreported.

challenged and calls for a review of the decision. Thus, he submits that since judicial review is not a civil suit where the Attorney General is a party, the public body or public official exercising statutory powers is the proper party to the proceedings². He cited the case of ***Kool Temp. Co. v The Comptroller of Customs and Excise and the Attorney General***³ where the learned Justice Warner said that: ***“I am also satisfied that the Attorney General is not a proper defendant in Judicial Review Proceedings”***

The Constitution in sections 99, 100 and 101 assigns the power to prosecute to the Director of Public Prosecutions who is largely independent of all bodies, persons and institutions and it appears the DPP pursuant to his powers under those provisions has decided to summon the Vice President to court for the purposes of committal proceedings. The Hon. Attorney General therefore, submits that in the present application, the proper party to these proceedings is the DPP who is the public authority and not the Attorney General. Thus, he prays that the AG is a wrong party to these judicial review proceedings therefore, he should be removed as a party in this application.

The Hon. Attorney General citing many authorities has made a lengthy submission on the principles relating to the grant or refusal of the grant of an interlocutory injunction which arguments are not examined in detail at this juncture. However, among other things, the Hon. Attorney General submits that the application for judicial review on the basis of the Vice-President’s immunity has been brought prematurely since the Vice-President has only been summoned to appear in the

²See ***State v Speaker of Parliament ex-parte Mpinganjira, The Junior Doctors Association and The Central Executive of Junior Doctors Association v Attorney General of Jamaica*** Motion No. 21/20000 and suit no. E127/2000, the court of Appeal of Jamaica. See also another Jamaican case decided by the Privy Council ***Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Anor***, Claim no. 2004/Hcv 01386.

³ High Court of Trinidad and Tobago, [1992] TLR 523.

magistrate's court for committal proceedings so that he can be committed to the High Court where he will be charged with a criminal offence. He argues that it is at the High court where the Vice-President should plead immunity or indeed the constitutionality of the charge. The Attorney General further avers that contrary to the applicant's form 86A where it was stated that there is no alternative remedy since the applicant cannot appeal to any other body or court, the Hon. Attorney General avers that there is an alternative way in a criminal case. The proper way to deal with the question of immunity is to plead it in the High court and not to challenge it by way of judicial review as was held in the case of *State v Silatolu*⁴ where the Fijian High court held that the court should be slow in allowing judicial review where there is an alternative mode or avenue of dealing with the issue. He submits further that save in the most exceptional circumstances the jurisdiction to exercise judicial review will not be exercised where other remedies are available and have not been used⁵. He concludes with a prayer that there are no triable issues in view of the fact that there is an alternative remedy and that the matter was brought to court pre-maturely, therefore the interim injunction that was granted be vacated and the leave for the commencement of judicial review be struck out.

The applicant is represented by Mr. Nyimba and Mr. Mwanhkwawa. Both lawyers have made submissions to the court on behalf of their client and in response to the Hon. Attorney General's submission.

To begin with, Mr. Nyimba asserts that the application for judicial review raises triable issues which fall into two categories and these are;

1. matters that have to be considered in judicial review under Order 53, and;
2. matters to be considered by the Constitutional court.

⁴[2002] FJHC 71.

⁵See the case of *R. v Epping and Harlow General Commissioners, ex parte Goldstraw*, [1983] All ER 257.

Citing the case of *R v Secretary of State for Home Department*, he submits that the High court should grant leave if it is clear that there is a point to be fully investigated on an inter-parties basis. Mr. Nyimba submitted that there is an arguable case as indicated in form 86A, the criminal proceedings that have given rise to this application are not new. They were raised in earlier proceedings 2001 and the DPP could not give his consent then. Why has the same office revived the proceedings now? Mr Nyimba also called upon the court to take judicial notice of the fact that both parties that is the President and the VP were sponsored by the same party and this goes to prove that the DPP has exercised his powers under section 99 of the Constitution in bad faith. With respect to Mr. Nyimba, some of his arguments are of a political nature which are not helpful since they are not legal arguments necessary and helpful in deciding whether an interim relief be granted and leave for judicial review be upheld.

On the question of the necessity of the commencement of judicial review proceedings, on the one hand Mr. Nyimba argues that the Vice President right now is in office and the question as to whether he can be charged with a criminal offence while in office has to be decided through the interpretation of section 91(2) which appears to be contradictory to section 86(1) of the constitution. On the plain reading of section 91(2), criminal immunity avails only to the President and not the Vice President. This has been conceded by Mwankhwawa who making a submission on behalf of the applicant prays that the High court sitting in a constitutional matter should have the opportunity to look at the whole constitution and give an interpretation on the obvious silence of the criminal immunities of the Vice President in section 91(2). On the other hand, the Hon. Attorney General vehemently argued that there are no triable issues in this case since section 91(2)

included the Vice President in civil immunity and purposely excludes the Vice President from enjoying the same criminal immunity as the president. He gave the analogy that the President can never commit the criminal offence of treason whilst the Vice President can. In that case it would be absurd to wait for the Vice President's impeachment before he can be tried with the criminal offence of treason. Looking at the submissions of the parties, it is clear that they agree that the *prima facie* reading of section 91(2) reveals that there is no criminal immunity for the Vice President. However, it is the applicant's prayer that the Vice President has criminal immunity through interpretation of the sections in question. It is clear therefore that the matter which is in issue is interpretation of section 91(2) in view of the whole constitution and not necessarily the review of the decision of the DPP.

I am mindful that the purpose of Judicial Review is the court's control of executive action and is based on three grounds. The first ground is that the public authority concerned has exceeded its powers; if that is the case then the authority has acted *ultra vires*.⁶ The second is that the power has been exercised in an unreasonable manner as to open the door for a review by the court.⁷ The third ground is that the action is not procedurally proper.⁸ The nomenclature given to each of the grounds are "illegality", "irrationality" and "procedural impropriety".⁹ The questions that one asks in the matter at hand are; what is it that the applicant wants the court to do in respect of the DPP's decision? Is the applicant questioning as to whether the DPP in exercising his powers under section 99 of the constitution did so *intra vires* or did he act *ultra vires*? Or, is the applicant questioning the procedure followed by the DPP in reaching his decision or in summoning the Vice President to court or is

⁶See *Felix Mchawe v Minister of Education Misc. case no. 82 of 1997*.

⁷See *Felix Mchawe v Minister of Education Misc. case no. 82 of 1997*.

⁸*Viola and two others v The AG, Case no. 34/98*,

⁹ Per Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service [1985] AC, 374*.

the applicant questioning the reasonableness of the decision? On close examination of the grounds on which relief is sought as contained in the applicant's form 86A, it is clear that the applicant is not asking the court to test the DPP's decision against the three grounds of reviewing a decision of a public body or authority in a judicial review matter. What the applicant is asking the court to do is to interpret section 91(2) of the Constitution. In the case of *Hon. J.Z.U. Tembo and Hon. Kate Kainja*,¹⁰ the Supreme court at page 6 said;

“It is correct that in judicial review proceedings the court is concerned with the decision making process and not the merits of decision under review. It could therefore be argued that the issue of construction of a statute, constitutional provision or document which was dealt with in the decision under review would not be a subject of judicial review.”

It follows therefore that this matter is not a judicial review matter, rather it is a matter that should come under Presidential referral, plea of criminal immunity or under section 15 of the constitution. This means that so far as judicial review is concerned, there are no triable issues to warrant the grant of leave to commence judicial review proceedings.

The other issue that also exercised my mind is whether the applicant has no alternative remedy as indicated in form 86's paragraph 3.0 that the applicant cannot appeal to any other body other than the High court. In criminal matters where a person has been charged with a criminal offence, the person so charged is at liberty during the plea taking time to plead immunity among other pleas such as *autrefois acquit* and *autrefois convict* or pardon, then the court takes up the matter to deal with the preliminary issues before the substantive hearing. This alternative is open

¹⁰ MSCA Civil Appeal No. 1 of 2003 unreported.

to the applicant in this matter. For the avoidance of doubt, the applicant's filed form 86A, states as follows;

The Applicant	<p>Name: Dr Cassim Chilumpha</p> <p>Address: Office of the Vice President, Mudi House, Blantyre</p> <p>Description: The Vice President of the Republic of Malawi</p>
Judgment, order, decision, or other proceedings in respect of which relief is sought	<ol style="list-style-type: none"> 1. The decision of the Director Public Prosecutions in instituting criminal proceedings against the Person holding the office of, and/or Vice President of the Republic of Malawi 2. The decision of the Chief Resident Magistrate sitting at Lilongwe in issuing criminal summons against the person holding the office of, and/or Vice President of the Republic of Malawi
Relief Sought	<ol style="list-style-type: none"> 1. A declaration that the decision of the Director of Public Prosecution in instituting criminal proceedings against the person holding the office of, and/or Vice President of the Republic of Malawi is unconstitutional and unlawful and

	<p>is therefore void.</p> <ol style="list-style-type: none">2. A declaration that the decision of the Chief Resident Magistrate sitting at Lilongwe in issuing criminal summons against the person holding the office of, and/or Vice President of the Republic of Malawi is unconstitutional and unlawful and is therefore void.3. A like order to certiorari quashing the decision of the Director of Public Prosecution in instituting criminal proceedings against the person holding the office of, and/or Vice President of the Republic of Malawi4. A like order to certiorari quashing the decision of the Chief Resident Magistrate sitting at Lilongwe to summon the person holding the office of, and/or Vice President of the Republic of Malawi5. If leave to apply is granted an injunction and/or order staying the decisions of<ol style="list-style-type: none">a. The Director of Public Prosecution
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	<p>in instituting criminal proceedings against the person holding the office of, and/or Vice President of the Republic of Malawi</p> <p>b. Chief Resident Magistrate sitting at Lilongwe to summon the person holding the office of, and/or Vice President of the Republic of Malawi</p>
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1. **FOUNDATIONS ON WHICH RELIEF IS SOUGHT**

1.1 **THE ISSUES**

1.1.1 The first issue is whether the office of the Vice President is also an office of the Presidency in line with section 91 of the Constitution.

1.1.2 The second issue is whether a person holding the office of Vice President is immune to be charged with any criminal offence in any court during his or her term of office in accordance with Section 91 (2) of the Constitution.

1.1.3 The third issue is whether the Right Honourable Cassim Chilumpha being incumbent Vice President of the Republic of Malawi is immune from criminal proceedings.

1.1.4 The fourth issue is whether the decision of the Director of Public Prosecution to institute criminal proceedings against the Vice President and the actual prosecution of the Vice President is not tantamount to censuring the Vice President which duty of censure is only endowed on National Assembly pursuant to section 86 of the Constitution.

2.0 LOCUS STANDI

2.1 The applicant has sufficient interest as the incumbent Vice President of the Republic of Malawi.

2.2 The applicant is directly affected by the decision of the Director of Public Prosecution in instating criminal proceedings against the applicant

2.3 The applicant is directly affected by the decision made by the Chief

Resident Magistrate sitting at Lilongwe summoning the applicant to attend proceedings for summary committal trial.

3.0 ALTERNATIVE REMEDY

The applicant has no alternative remedy. The applicant cannot appeal to any other body other than the High Court.”

On the question of the Attorney General being a wrong party, Mr. Nyimba, in response submits that according to section 101(2) of the Constitution, the Hon. Attorney General supervises the DPP. The office of the DPP in Malawi is not completely independent office. Therefore, the position and duties of the Attorney General in Malawi can be distinguished from the position and duties of other AGs in other jurisdictions from where the Attorney General has taken the numerous cases which he has cited in support of his assertion that he is a wrong party to these proceedings. Mr. Nyimba therefore submits that the Hon. Attorney General under the Malawi Constitution is a proper party to these proceedings. This assertion is contravened by the Hon. AG who argues that the power of supervision under section 99(2) is with regard to discontinuance and not in a case where the DPP makes a decision to prosecute. He ably demonstrated that the directions referred to in this section are only with respect directions given where the DPP is acting in pursuant to section 99(2)(b) and 99(2)(c). This is where the DPP wants to take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority or where the DPP wants to discontinue a criminal case at any stage before judgement. Upon examination of section 99 of the

Constitution, it is clear that the Attorney General's directions do not extend to the decisions taken by the DPP in pursuant to section 99(2)(a) where he makes the decision to institute criminal proceedings against any person before any court. This application is in respect of the DPP's decision to institute criminal proceedings against the Hon. Vice-President. It follows therefore, that the DPP and not the Attorney General is the appropriate party to these proceedings.

It is indeed trite law that judicial review is not a suit but a process to review a decision taken by a public body or official in exercise of a statutory powers or duty. In such situations, indeed the correct party should and is the authority that actually exercised the statutory duty or powers. In this case, the DPP should be and is the right party notwithstanding the fact that section 101(2) gives the Attorney General the responsibility to give general or special directions.

As indicated above, the Hon. Attorney General has nothing to do with the decision to institute criminal charges against the Hon. Vice-President. Consequently he cannot be a party to the present proceedings where the applicant is seeking to challenge by judicial review the DPP's decision if any with a hope that if it gets to the hearing stage, and is successful, obtain orders directed against the DPP. Obviously the Hon. Attorney General being an incorrect party the application for the commencement of judicial review also fails. Further, as demonstrated above, the issue of interpretation is not a judicial review matter. In the circumstances, I vacate the order made on 16th November 2005 for an interim injunction and I also discharge leave to commence judicial review.

Made in Chambers this 22nd November 2005.

Dr Jane Mayemu Ansah
JUDGE