



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTION CASE NO. 1 OF 2008**

BETWEEN:

JAMES PHIRI.....PLAINTIFF

- AND -

**DR. BAKILI MULUZI.....DEFENDANT
ATTORNEY GENERALINTERESTED PARTY**

**CORAM: THE HONOURABLE MR JUSTICE E. B. TWEA
THE HONOURABLE MR JUSTICE H. S. B. POTANI
THE HONOURABLE MR JUSTICE J. S. MANYUNGWA
Mr Chiphwanya, of Counsel for the plaintiff**

Mr R. Z. Kasambala, of Counsel for the Defendant
appearing with
Mr V. Nyimba, of Counsel
Mr G. Mwakhwawa of Counsel
Mr Kanyenda of Counsel
Mr J. Banda of Counsel
Mr Chimkango of Counsel

Dr. J. Ansah, Attorney General for Interested Party
Mr A. D. Kamanga Solicitor General for Interested Party
Appearing with
Mrs R. Kanyunka of Counsel
Mr P. Kayira of Counsel
Miss Z. Ntaba of Counsel
Mr Nyamilandu of Counsel
Manda – Official Interpreter

RULING

Twea, J

The plaintiff in this case, one Mr James Phiri, in his capacity as a patriotic citizen and a member of the United Democratic Front Party; the UDF,

brought this Originating Summons against the defendant, Dr Bakili Muluzi, the National Chairman of the UDF. He sought the following:-

- a) A declaration that the defendant is not eligible to stand as a presidential candidate in the forthcoming 2009 General Elections.
- b) A declaration that the campaigning by the defendant and the ruling by the National Organising Committee that he is eligible to stand as a candidate for the post of the UDF party presidential candidate for 2009 General Elections is in violation of the party's constitution and convention.
- c) An order that the defendant is not promoting, ensuring and protecting people's political rights as enshrined in Section 40 of the Constitution by holding out that he is eligible and/or that he is going to stand as a presidential candidate in the forthcoming 2009 General elections
- d) Any order that the court deems to be fit in the circumstances
- e) Costs.

On 2nd July, 2008 the Attorney General applied to be added as an interested party. The order adding the Attorney General was granted on 4th July.

It is important to point out that the Originating Summons was filed on 5th November, 2007. It was, then anticipated that the UDF Party would be holding a National party Convention. This Court takes judicial notice of the fact that the UDF Party held its National Party Convention on 24th April, 2008. Further, that the defendant was elected, the party's presidential candidate for the 2009 General Elections. This was acknowledged by the plaintiff, the defendant and the Attorney General in their submissions.

This case was called for hearing on 15th July 2008. The Court, having noted that the UDF Party had held its National Party convention and had elected the defendant as its party's Presidential Candidate for the 2009 General Elections, called on the plaintiff's counsel to enlighten it on what remained for the Court to decide.

In his address, Mr Chipwanyanya of Counsel, for plaintiff, told the Court that the plaintiff seeks to move the Court to find that the defendant is ineligible to stand as Presidential Candidate for the forth coming 2009 General Elections under the Republican Constitution. Following that, that since the UDF Party Constitution requires that a candidate for presidential post contest, if the defendant is found to be ineligible, then he cannot contest the elections. He informed the Court that the other issues had been overtaken by the events: the holding of the National Party Convention and election of the defendant as the UDF Party Presidential Candidate.

This Court then made a ruling. It was observed that the plaintiff brought to the fore the divergence of opinion in the interpretation of Section 83(3) of the Republican Constitution, hereinafter referred to as the Constitution, in the UDF Party. Clearly, those of a different view from the plaintiff had caused the election of the defendant as the party's Presidential Candidate.

The plaintiff, notwithstanding the due election of the defendant, maintains that the defendant would be ineligible under Section 83(3) of the Constitution, to run as a Presidential Candidate in the 2009 General Elections.

This court was of the view that the controversy, this far, is internal to the UDF as a Party. It directed the parties to address it on "how and when does a citizen become a Presidential Candidate under the Constitution, Parliamentary and Presidential Elections Act and other relevant Laws" Further; the Court took issue with the certification of a Constitutional matter having been had by consent in this case.

The Court heard all the parties on these issues and we now proceed to give our ruling.

Section 9 of the Court Act was amended by Courts (Amendment) Act, 2003 to read as follows:

- "9(2) Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges".
- (3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact".

All the parties in their submissions placed great and grave emphasis on the phrase "**conclusive evidence of that fact**" in the subsection. In our view, that was rightly so. The import of subsection (3) is clear; once the Chief Justice certifies the matter as Constitutional, none of the parties is at liberty to challenge it. Consequently, the High court will have to sit, at least, three judges. This places a high onus on the Honourable the Chief Justice to satisfy himself or herself, that the matter "**expressly or substantively relates to or concerns the interpretations or application of the provisions of the Constitution**". Mere citing of the provisions of the Constitution would not, of itself, bring the proceedings within the ambit of subsection (2). Further this Court takes cognisance of the fact that the Certification by the Chief Justice does not, of itself, create a Constitutional dispute. The dispute must, in fact, "**relate to or concern the interpretations or application of the**

provisions of the Constitution". This Court cannot be called upon to interpret the provisions of Constitution simply because there is a certification. This was pointed out in the case of Maziko Charles Sauti – Phiri Vs Privatization Commission and the Attorney General, Const. Cause No 13 of 2005, where the Court said:

"We think it necessary to point out in this judgment that we had trouble appreciating that it was necessary to bring this matter to this court. In our judgment, and this is despite protestations from the plaintiff, we were of unanimous view that the issues raised herein were not Constitutional in nature. They could have been dealt with by a judge sitting alone. So serious were our foregoing sentiments we even explored the possibility of decertifying this matter. As it turned out it was also our view that once duly certified as a matter fit for the Constitutional court by the Honourable the Chief Justice a matter can only be decertified by his high office as well. We thought we should take this opportunity however, to respectfully suggest that perhaps greater care should be taken in certifying matters for the Constitutional Court lest its list be clogged by matters, like the instant one, that should really be handled elsewhere".

With this in mind we are of the view that it should not be left to the parties to decree a matter as "relating to or concerning the interpretation or application of the provisions of the Constitution". In this respect "orders by consent" should never be an option. We therefore, agree with the view by our brother judges in Maziko Charles Sauti – Phiri case (supra).

We now come back to the substantive issues.

After hearing submissions on behalf of the plaintiff we accept that a person is qualified to run for elections as president if he or she satisfies the requirements of Section 80(6) and (7) of the Constitution. It was however, not clear whether the plaintiff, himself, wished to run for the office in 2009, and therefore seeks party sponsorship and political leverage of his political party; the UDF Party. However, it was submitted that he is bound by the Constitution of UDF Party, and that he seeks to have it protected together with the National Constitution. It became clear however, during reply, when the plaintiff joined issues with the defendant, that the controversy in the Party surrounding the interpretation of Section 83(3) of the Constitution would best be resolved now. They both submitted that it is right and proper that the defendant, the Party and the people; in this respect, we assume that these are members of the UDF Party, would want to know whether or not the defendant is eligible to run for the office of President during the 2009 General Elections. It was submitted by Mr Kaphale of Counsel, for the defendant, that even if it were to be conceded that the controversy, this far, is

an internal matter of the UDF Party, it is clear that there are two identifiable disputants and therefore, there cannot be a consensus on how and when one becomes a Presidential Candidate. It is incumbent for the Court, in this respect, therefore, to resolve the controversy now than later; at the time for nominations for the 2009 General Elections. This he contended, would bring certainty, promote freedom of choice and allow the party to make alternative arrangements. The plaintiff in reply, as we noted earlier, adopted this view. It was submitted that this should be done now in order to avoid chaos if the determination were to be made at the time of nominations.

The view of the Attorney General was that for one to be a Presidential Candidate one has to comply with, not only the provisions of Section 80 of the Constitution, more particularly subsections (6) and (7), but also with the provisions of the Parliamentary and Presidential Elections Act, particularly Sections 48 to 51. It was contended that the elections of the defendant as Presidential Candidate for the UDF Party, was internal, it cannot be said to have affected the Constitution and the Parliamentary and Presidential Elections Act. It was submitted that, while the sentiments of the plaintiff and the defendant that the issue of eligibility should be settled now through a Constitutional sitting of the High Court are understandable, it would be premature to adjudicate on it now, in terms of the Constitution.

To determine whether this case is justiciable as a matter relating to or concerning the interpretation or applications of the provisions of the Constitution, we have to consider whether the Constitution has been infringed.

To begin with it is accepted that the plaintiff and the defendant are, according to the affidavits, members of the UDF Party. The former as an ordinary patriotic member, and the latter, at its National Chairman. It is further agreed that the UDF Party has a constitution. It was submitted for the plaintiff that he is bound by the party constitution. The UDF party constitution provides for election of the National Presidential candidates in Article 39. This Article, in part, reads as follows:

“(c) The NEC shall propose to the National Conference: persons it recommends as the party’s candidate for the National Presidential Elections. Any such persons selected or recommended will be deemed to be and shall be nominated as candidates proposed by the NEC as Party’s Presidential candidate and running mate in the National presidential Elections

(d) Any other person wishing to contest the office of the Party Presidential Candidate in the National elections on behalf of the party shall notify the NEC through the

Secretary General of his or her intention to contest the position at least twenty one working days before the National Conference. The NEC shall convene and consider such candidates and thereafter may include such names for presentation to the National Conference”.

It should further be mentioned that paragraphs (e) and (f) of the said Article set out qualifications and disqualification for nomination, which are, in most respects, similar to section 80(6) and (7) of the Constitution. It is important to note at the outset however, that article 39(f) does not include a disqualifier equivalent to section 83(3) of the Constitution. To put it in the common language, the UDF Party Constitution does not bar a former president, First vice president or the Second Vice president from contesting nomination or elections to run for the National Presidential elections. The Defendant and the UDF party therefore, did not breach the party's Constitution. If the party Constitution was respected, what then is the Plaintiff complaining about?

It is further important to note that although the Plaintiff hinted at being able to run for office without legal barriers, it was never suggested that he put up his name to the NEC for consideration at the National Conference. Clearly the plaintiff has no legal basis for attacking the Defendant's nomination or the National Organising Committee in respect of the UDF Party Constitution.

Be this as it may, did the conduct of the UDF Party and the nomination or elections of the Defendant infringe the Constitution?

We agree with the submission of the Attorney General, which were anticipated by the defendant and accepted by the plaintiff in reply that the party's nomination, on its own, did not breach the Constitution or the Parliamentary and Presidential Elections Act. It is clear, to our minds, that such an act is but an intention by the party. Indeed any individual who wants to run as a n independent may profess such intentions.

By this as it may when any such candidates take steps to comply with the Parliamentary and Presidential Elections Act, as per Sections 48 to 51, then the qualifiers and disqualifiers under the Constitution and the said Act will come into play. The parties, fortunately, agreed that this can only be triggered when the nominations are being presented in terms of the Parliamentary and Presidential Elections Act. It is our finding therefore, that the issue of the eligibility of the defendant under the Constitution has not arisen yet.

We carefully considered the request by the plaintiff and the defendant that, notwithstanding the legal position; in the present circumstances, it would be better that the controversy in the UDF Party be resolved now. We respectively decline, much as it is understandable to do so. This court said in the *Maziko Charles Sauti-Phiri* case (supra):

“...secondly it is not in courts to give gratuitous legal opinions. This, we think is for practitioners to do. Practitioners must not and should not therefore be encouraged to come to court to seek opinions which they will then pass on to their clients. Thirdly, and following on the foregoing we think we must also emphasise the point that courts should be allowed to decided real disputes/issues.”

We do agree that the controversy in the party over the interpretation of section 83(3) of the Constitution is a big political risk. However, we stand firm that it is not the duty of the court to give legal advice save, in respect of the presidential referrals under section 89(1) (h) of the Constitution. The party therefore cannot invoke the aid of the constitutional sitting of the High Court. The party’s legal advisors must rise to the occasion to separate the law from politics or vice versa. This, preferably, should be done before the nominations for the 2009 General Elections, as properly articulated by the plaintiff and the defendant.

It is our finding therefore that the nomination or election of the defendant and the conduct of the National Organising Committee of the UDF Party do not raise constitutional issues at this point in time. There is therefore, no constitutional matter for decision before this case.

Further, following the certification, we have considered other issues in respect of the UDF Party Constitution. We, again find that the nomination or election of the defendant and the conduct of the National Organising Committee of the UDF Party was within the mandate of the constitution. Mr James Phiri, as a member, albeit, a patriotic member, did not put up his name for consideration for the candidature. He may not like the constitution of the UDF Party and its imports, but he has no cause for claiming that what happened was unconstitutional. We find that there is no cause of action disclosed in this respect.

We, accordingly, dismiss the summons with costs to the Defendant and the interested party.

Pronounced in open court this 25th day of July 2008 at Blantyre.

E B Twea J.....

H S B Potani J.....

J S Manyungwa J