



REPUBLIC OF MALAWI

MALAWI JUDICIARY

**IN THE HIGH COURT OF MALAWI**

**MZUZU REGISTRY**

*MISCELLANEOUS CIVIL CAUSE NO. 17 OF 2016*

BETWEEN

**THE STATE**

**-AND-**

**MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION..... 2<sup>ND</sup> RESPONDENT**

**THE MALAWI POLICE SERVICE.....3<sup>RD</sup> RESPONDENT.**

**EX-PARTE:**

**CHRISTOPHER KAMMASAMBA.....1<sup>ST</sup> APPLICANT**

**REV PATRICK BANDA.....2<sup>ND</sup> APPLICANT**

**PASTOR TUSALIFYE MBEYE.....3<sup>RD</sup> APPLICANT**

**Coram. Mr. Justice D. Madise**

Mr. G. Kadzipatike for the Applicants

Hon Kalekeni Kaphale AG for the Respondents

Mr. Mhone Clerk of Court

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**Madise, J**

## **RULING**

### **1.0 Introduction.**

**1.1** On 9<sup>th</sup> February, 2016 the Applicants in this matter sought leave ex-parte on application for leave to move for judicial review and for an injunctory relief under order 53 RSC. On the same day I granted leave, on condition that the Applicants should within 7 days file inter-partes summons for continuation of the order of injunction

**1.2** The effect of the order was to suspend the moratorium that Government had issued which suspended the operation of laws which criminalise gay and lesbian sexual practices. The Applicants' argument was that only Parliament had the legal mandate to suspend or repeal laws in Malawi. On 15<sup>th</sup> February 2016 the Applicants did file a notice of originally motion for judicial review, an affidavit verifying facts relied upon in the application, a statement of facts and form 86A. The inter-partes summons was filed on 16<sup>th</sup> February, 2016.

**1.3** On same day 16<sup>th</sup> February 2016 two non governmental organizations to wit CEDEP (Center for the Development of People) and CHRR ( Center for Human Rights and Rehabilitation) filed summons to join the case a friends (Amicus Curial) on the basis that they wanted to assist the Court in arriving at a proper and just

decision as human rights champions. The Applicants opposed the application by CEDEP and CHRR to join the case as friends of the court.

**1.4** On 23<sup>rd</sup> February, 2016 the Respondents in this matter filed inter-partes summons to discharge the grant of leave for judicial and the same was supported by an affidavit of Elton Kalekeni Kaphale the current sitting Attorney general. The Attorney General was of the strong view that the 2 and 3 Applicants were members of the Clergy and like the 1<sup>st</sup> Applicant did not suffer any injury, loss or harm through the alleged moratorium on gay laws. The Applicants opposed this application stating that the Applicants had interest as their rights to equality before the law has been threatened as they are now not at par with gay people in as far as the Penal Code is concerned

**1.5** Lastly on 25<sup>th</sup> April, 2016 the Applications filed a notice of motion for reference of the matter to the Hon the Chief Justice for certification as a constitutional matter under Section 9(2) of the Courts Act as read with Order 8 of the High Court (procedure on the interpretation or Application of the constitution) rules. This motion has not been opposed by the Respondents.

## **2.0 The Findings.**

### **2.1 Whether the injunction should be sustained**

**2.1.1** The Applicants did file inter-partes summons for continuation of the injunction suspending the moratorium that Government had issued which froze the operation of laws which criminalise gay and lesbian sexual practices. The summons was supported by an affidavit deposed by the Applicants.

**2.1.2** The Respondents did not file any affidavit in opposition. Instead they filed inter-partes summons to discharge leave on the premises that the Applicants

lacked sufficient interest. The same was opposed by the Applicants. Having gone through the summons and the affidavit evidence I'm of the strong view that the interest of justice tilt towards sustaining the order of injunction until final determination of the matter or any other order of the Court. I therefore grant the prayer to sustain the order of injunction.

## **2.2 Whether leave should be discharged.**

**2.2.1** The 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are members of the Clergy. The Attorney General has opposed that they should be parties to these proceedings on the premises that they lack sufficient interest as they have not suffered any loss or harm. I should agree with the Respondent on this point. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicants indeed lack interest. The issue before this court is entirely legal and has nothing to do with morality or religion. The issue before this Court is to a large extent, whether the Executive Branch of Government was within its legal mandate when it suspended gays laws. The other questions, ancillary thereto are to do with the human rights of minority groups including gay people and whether gay laws violate the constitution of the Republic. This has nothing to do with religion or morality. I therefore struck off the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant.

**2.2.2** As to the 1<sup>st</sup> Applicant I'm of the view that there are serious triable issues. The questiOn is whether the 1st Applicant has suffered discrimination for being arrested on a charge of obtaining goods by false pretences while people who violate gay laws are allowed to have unnatural sexual interaction without suffering arrest. The 1<sup>st</sup> Applicant argued that equality before the law entails that all laws must be operational and in the alternative all laws must be suspended and not only gay laws. I'm of considered view that there these questions would better be answered at the conclusion of this trial. I therefore find that the 1<sup>st</sup>

Applicant has sufficient interest and is therefore the right party to be an Applicant in this matter.

### **3.0 Joining as Amicus Curiae**

**3.1** Two non governmental organizations CEDEP and CHRR have applied to join as friends of the Court. The two organizations have stated that they are involved in the promotion and protection of human rights especially those rights which affect vulnerable and minority groups. The Applicants have opposed the application on the basis that the two organizations will not add any value to the case.

**3.2** I'm of the considered view that allowing the two organizations to join as friends of the Court will bring immense wealth to the jurisprudence of constitutionalism and human rights in this country. I verily believe that two organizations will be of great assistance to the Court. This Court will benefit from the wealth of knowledge the two organizations have on issues of minority rights and their place in domestic and international space. I therefore allow them to join as such.

### **4.0 Certification**

**4.1** The Applicants pray to this Court to allow the Hon. Chief Justice certify this matter as a constitution matter under Section 9 (2) of Court Act. The Applicants argue the question before this Court are constitution in natural and their interpretation can only be made by a panel of not less than 3 judges. This motion has not been opposed. The questions the Applicant wants the Constitutional Court to answer are in the following terms.

- 1) Whether the Executive Branch of Government or any of the Respondents herein, without the authority of parliament, has the mandate under the Constitution of the Republic to amend, repeal, suspend or otherwise stop applying provisions of a valid Act of Parliament by way of a moratorium.
- 2) Whether the Director of Public Prosecutions is, under the guise of prosecutorial discretion, entitled under the Malawi Constitution, to effect a wholesale suspension of operation of a provision of the Penal Code unilaterally, without involving Parliament, and whether prosecutorial discretion with such latitude could not turn the Director of Public Prosecutions into an unelected law-maker who can strike out Penal Code provisions at will, thereby unconstitutionally replacing and rendering useless, the institution of Parliament, in which the Constitution vests all legislative powers.
- 3) Whether the proclamation of a moratorium by the Minister of Justice and Constitutional Affairs on homosexual offences does not have the effect of usurping the powers of Parliament and defeating the constitutional concept of separation of powers between the Executive Branch of Government and the Legislature
- 4) Whether the moratorium does not deprive the Applicants of their constitutional right to participate in the democratic debate to change or maintain laws, through either personally voting in a referendum that would constitutionally be proclaimed by the President of the Republic or through their Members of parliament who would vote on a legislative debate to amend or maintain the Penal Code on homosexual offences.
- 5) Whether the moratorium and the conduct of the Respondents in relation thereto, do not breach the Applicants right to non-discrimination and equality before the law under the constitution, considering that only gays

and lesbians have been unconstitutionally favoured and authorized by the Executive, to offend valid provisions of the Penal Code, without facing consequences laid down by the Parliament under the law.

**4.2** I have gone through the motion for certification and I'm convinced that this is a suitable case for reference to the Chief Justice for certification. I'm of the view that a panel of not less than 3 judges will be able to adjudicate on all the issues that have been raised in this matter. It is my humble prayer that the certifying authority if he so pleases will consider empanelling 5 judges due to the seriousness and sensitivity of the matter if he sees it fit that this is a proper case for certification.

**I so order.**

Costs are in the cause

**Made** in Chamber on 11 May 2016

Dingiswayo Madise

**Judge**