

IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 55 OF 2019

[Being High Court, Lilongwe Registry, Civil Cause Number 566 of 2019]

BETWEEN

THE ATTORNEY GENERAL

APPLICANT/APPELLANT

AND

GIFT TRAPENCE

1ST RESPONDENT

TIMOTHY MTAMBO

2ND RESPONDENT

MALAWI HUMAN RIGHTS DEFENDERS

COALITION

3RD RESPONDENT

CORAM: THE HON. JUSTICE L P CHIKOPA SC JA

Michongwe/Chisiza of Counsel for the Applicant/Appellant

Mchizi/Kaombe of Counsel for the Respondents

Minikwa Mr., Clerk

RULING/ORDER

This case has a chequered history. It is stated in our ruling of August 27, 2019. We therefore see no reason in repeating it here. Except to remind each other that the Attorney General, on behalf of the Inspector General, brought an action in the Court below against the Respondents. They were sued in their capacity as organizers/conveners of demonstrators. He sought two declarations and an injunction. The first declaration is to the effect that the demonstration are illegal for being *sub judice*[*Sic*]. Second that the Respondents should not be allowed to hold any further demonstrations until they have financially compensated those who have suffered damage to person or property during the demonstrations

convened/organized so far by them. Thirdly the Attorney General sought an injunction '*restraining the Respondents from holding any demonstrations in Malawi calling for the resignation of the Chairperson of MEC until the matter brought against them is heard and determined*'.

Contemporaneous with the above suit the Attorney General filed an application for interim relief. He sought an injunction restraining the Respondents from '*holding or convening any demonstrations anywhere in Malawi seeking the resignation of the Chairperson of MEC*' on the ground that '*the same is sub judice and prejudicial to the conduct and determination of the case dealing with the 2019 presidential election and also that further demonstrations will lead to further damage of property*'[Sic].

The Court below did not grant the interim relief. The Attorney General appealed to this Court against the refusal to grant interim relief. Contemporaneous with the appeal was an application, initially brought *ex parte*, seeking interim relief identical to the one sought and denied in the Court below. We ended up hearing the application *inter parties*.

In our ruling referred to above of August 27, 2019 we allowed the parties to explore an out of court settlement of the issues herein. We also ordered the Respondents to, for fourteen days following our above ruling, desist from organizing demonstrations. The parties were asked to report back to this Court following such meetings.

The parties held two meetings in the above regard. We have had a look at the minutes of such meetings. We have looked at the list of attendees. It, in our humble opinion, vindicates our conviction that the parties are actually not too far apart on the issues herein. In point of fact they treated both these proceedings and the resultant discussions with seriousness.

The immediately notwithstanding it is however a fact that as of this date there is no agreement between the parties on that which brought them to this Court. It means therefore that this Court must determine the issues put before us by the parties especially the Attorney General. If we must therefore remind ourselves this case

revolves around three points. First is the Attorney General's appeal against the decision by the Court below refusing to grant him interim relief. Second is a derivative of the appeal where following interactions with the Respondents the Attorney General is asking this Court for an injunction, the same to subsist until the issues of violence and criminality surrounding the demonstrations are resolved, restraining the Respondents from organizing/holding demonstrations. Third is an application lodged with this Court on September 16, 2019 wherein the Attorney General was asking for an order restraining the Respondents from holding/organizing demonstrations from September 18 to 20, 2019.

Submitting in favor of the applications the Attorney General told us that he is not in principle against the demonstrations. That in fact he is not in this Court or the one below asking for a ban on demonstrations. His only concern is the violence and criminality that accompanies them. He would therefore be happy to allow the Respondents and their kind organize/hold demonstrations if a way acceptable to all was found ensuring that the demonstrations would proceed without violence or criminality. And that because there is at present no way of ensuring nonviolent, peaceful and unarmed demonstrations the same should be stopped until such a time as such a way has been found. Or until the Court has decided on the appeal.

The Attorney General also urged us to remember the fact that the right to demonstrate peacefully and without arms is but one of many rights in our Constitution. A situation must never in his view be allowed to develop where the right to peacefully and nonviolently demonstrate takes precedence over our citizens' enjoyment of all other rights. There must not be, as is the case now, an overemphasis on the right to demonstrate at the expense of all other rights. In that regard the Attorney General asked this Court not to place undue emphasis on the right to demonstrate but to instead do a balancing act that would see people exercise all other rights including the rights to economic development and freedom of movement while at the same time enjoying the right to demonstrate peacefully and unarmed. Something they cannot now do in view of the violent and criminal nature of the demonstrations.

The Attorney General therefore prayed that the interim relief be granted.

The Respondents on the other hand emphasized the points that they only organise violence free and unarmed demonstrations. That they at the onset of all demonstrations stress the importance and meaning of peaceful and unarmed demonstrations. Of the need to refrain from causing damage to property and persons. They were however magnanimous enough to admit that there had in the previous demonstrations indeed been instances of violence and damage/injury to property and persons. Of criminality. They laid the blame on the police for not providing adequate security or at all. And of criminal elements who took advantage of the demonstrations to commit crime. They have no control over these elements and the police's inability to perform at optimum levels. All they can say in response to the Attorney General's applications is that the otherwise peaceful general public should not be denied the exercise of their right to demonstrate peacefully and unarmed due to the police's inability to, for whatever reason but including incompetence, do their work. The way to resolve the issues of violence and criminality in their view is not to stop the demonstrations but to urge the police to up their security game. They therefore prayed that the application for interim relief be dismissed.

On our part firstly it is our view, and the parties agree with us, that this case is not about somebody having banned demonstrations. Rather it is about a request from The Attorney General for some kind of respite until the appeal is heard or until a way is found of dealing with the violence and criminality currently surrounding demonstrations. Of course it might be said that for as long as the effect of the Attorney General's request is the cessation of demonstrations then there is not much difference between the Executive banning the demonstrations and it asking the Judiciary to do it on their behalf.

And it is just as well that this matter is not about somebody having banned or seeking to ban demonstrations. Our understanding of sections 44 and 46 of the Constitution and the case of *ex parte Malawi Law Society And Others* cited above is that banning demonstrations especially by unilateral executive action is most likely legally untenable. The most that anyone can achieve, subject to judicial scrutiny, is

a limitation or derogation of the right to demonstrate peacefully and unarmed courtesy of sections 44 and 45 of the Constitution.

Secondly it is a fact that but for the violence and criminality surrounding the demonstrations the Attorney General would not have found it necessary to file this suit. Or seek the interim relief being sought now. The Respondents would then have freely gone ahead with their demonstrations as by law permitted. The police on their part would have been at peace assured that the demonstrations would bring up no more than the occasional instance of relatively minor crime, violence and damage to property expected from when and where people assemble and which they could deal with without much ado.

Thirdly it is important that we set out as much of the law applicable to demonstrations as we understand it. This we do by first recognizing the fact that since 1994 we have not just a new constitution but a totally new constitutional dispensation. One that prioritizes human rights and constitutional supremacy. Section 5 of the said constitution therefore provides that:

‘any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency be invalid’.

As we understand the above all acts of government and any other law must abide by the standards set by the Constitution. If they do not they are up to the level of such inability invalid and of no effect.

Our Constitution has also set out how it must be applied and interpreted. Accordingly in section 10 it provides that:

(1) *In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority*

(2) *In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.’*

In section 11(2) the Constitution provides as follows:

‘(2) in interpreting the provisions of this Constitution a court of law shall -

- (a) Promote the values which underlie an open and democratic society;*
- (b) Take full account of the provisions of Chapter III and Chapter IV ;*

Chapter III provides for the Constitution’s fundamental principles. Of particular importance for our present purposes is:

Section 12

(d) The inherent dignity and worth of each human being requires that the State and all persons shall recognise and protect human rights and afford the fullest protection to the rights and views of all individuals, groups, and minorities whether or not they are entitled to vote;

(e) 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; and

(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.’

The Constitution has also provided for principles of national policy. They are in section 13. They are directory in nature. Courts are however entitled to have regard to them in interpreting and applying any Constitutional provisions or of any law or in determining the validity of decisions of the Executive. Of interest to this case is paragraph l. It says that the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals *inter alia*:

‘(l) peaceful settlements of disputes

To strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.

(m) administration of justice

To promote law and order and respect for society through civic education, by honest practices in Government, adequate resourcing, and the humane application and enforcement of laws and policing standards'

Section 38 which is our primary occupation in this case provides:

'every person shall have the right to assemble and demonstrate with others peacefully and unarmed.'

Section 44 provides:

(1) *No restrictions or limitations maybe placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and are necessary in an open and democratic society;*

(2) *Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.'*

Section 45 provides:

(1) *No derogation from rights contained in this chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.'*

Section 46 provides:

(1) *Save in so far as maybe authorised to do so by this Constitution, the National Assembly, or any subordinate legislative authority shall not make any law, and the executive and the agencies of government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid'.*

In view of the issues in dispute herein and the parties involved we also think it necessary that we make reference, albeit cursorily, to Chapter XV, specifically section 153, of the Constitution and section 4 and Chapter IX of the Police Act, Cap 13:01 of the Laws of Malawi.

Section 153(2)

‘the Malawi Police Service shall be there to provide for the protection of public safety and the rights of persons in Malawi’

Section 4 of the Police Act lists the Police Service’s powers as *inter alia*:

1. *the preservation of law and order;*
2. *the protection of life, property, fundamental freedoms and rights of individuals;*
3. *the due enforcement of all laws with which the Police are directly charged.*

Chapter IX on the other hand provides for the manner in which demonstrations should be dealt with.

In addition to the above provisions we feel obliged to refer to the cases of **The State v The President of Malawi, The Minister of Home Affairs And Another ex parte The Malawi Law Society And 5 Others** Miscellaneous Civil Cause Number 78 of 2002, High Court of Malawi, Principal Registry[unrep], **Wallace Chiume & 3 Others v AFORD & 2 Others** Civil Cause High Court of Malawi Mzuzu Registry Number 108 of 2005[unrep] **Hassan Ajinga v UDF** High Court of Malawi, Principal Registry Civil Cause Number 2466 of 2008[unrep] and the Court below’s opinion in this very case. They are High Court decisions. They however say a lot of correct things about the law applicable to circumstances akin to the ones before us. The Ajinga case particularly opined that courts are not best placed to decide on especially matters political. Political matters are more amenable to political solutions. Not juridical ones. The thinking is simple enough in our view. It unnecessarily politicizes the judiciary.

For those therefore that wish to exercise their right to demonstrate all they have to do is give a notice of between 48 hours and 14 days to the relevant authorities usually the District Commissioner. See section 96 of the Police Act. They need not ask for and be given permission to demonstrate. Similarly the reason for demonstrating need not be acceptable to the notice recipients. It is also important to note on the one hand that one can demonstrate for or against a position and on the other that the

law has not specifically provided for a manner of demonstrating/assembling except to say that the same must be done peacefully and unarmed. Meaning in our view that any other demonstrations are by law prohibited. What however amounts to peaceful and unarmed demonstrations are in our judgment up in the air. To be determined depending on a particular set of facts and circumstances.

The immediately foregoing paragraph notwithstanding we think it would be folly to look at the notice provision literally. Without taking into consideration the practical context in which demonstrations/assemblies are organized and held. Accordingly we do not think that the notice is merely for purposes of informing the powers that be that a demonstration will be held on a particular day, date and place. It goes beyond. It requires the recipients to take certain actions to facilitate the demonstration. Thus the fact that the notice is availed to the police should oblige them police authorities to provide security. And because the notice in section 96 obliges the demonstrators to indicate *inter alia* the place, places or route where/which the demonstrations will take place the notice recipient will invariably have to check and confirm that such places/routes are indeed available.

Speaking about security we have a slightly different perspective from that of the Respondents. True the duty to protect people and property is primarily that of the police. We are also of the view however that demonstrators, individually and collectively, have a duty to ensure that there is no violence during demonstrations. That demonstrators demonstrate unarmed. In that regard they are obliged to ensure that as individuals they are demonstrating peacefully and unarmed. Secondly it in our opinion behoves a good citizen and responsible demonstrator to ensure that their neighbor is also demonstrating peacefully and unarmed and to that extent inform the powers that be if such is not the case.

The Police Act in section 98 also provides for consultations, negotiations and compromise in cases where there are disagreements about dates, places/routes and health and safety. This will be done during the notice period which raises the question whether or not the notice period provided for in section 96 is sufficient to deal with all concerns that may arise following the issuance of a notice to demonstrate. Be that as it maybe it is important to note that the process in section

98 allows the notice recipient to decide whether the demonstration should be held as notified or with such changes and on such conditions as he/she may consider necessary following consultations and negotiations held with the demonstration conveners and other stakeholders. The notice recipient may also decide for good cause in writing to prohibit a demonstration. In either case i.e. where conditions are given for the demonstration or it is stopped altogether the convener has the right to appeal to the High Court against such decision.

So on the facts before us and as the law stands should the Attorney General's application be granted? There are two sides to it. First is the application filed on September 16th in respect of the demonstrations of September 18th to 20th. The application is now superfluous. So are any concerns the Respondents had about the affidavit of Deputy Commissioner Chaima. They are an irrelevance in view of the superfluity referred to above.

Then there is the injunction pending appeal or pending the resolution of the criminality/violence surrounding the demonstrations. We will also not grant them. Not because there has not been violence or criminality. Not because there is no possibility of criminality or violence. But because there are in so far as the applications are premised on possible violence and criminality better ways of dealing with the violence and criminality. For instance and about the police's alleged lack of resources the solution is not to stop demonstrations. It is to resource the police adequately. Otherwise we would be allowing them to benefit from their own inefficiencies. But more than that we think the Inspector General could have done more to prove a lack of resources. It is not enough in our view to just stand up and claim a lack of resources. We think anybody can do that. Even more than the Inspector General should have gone on to show that such want of resources was through no fault of the police service and that they up to this point done all they could to retrieve the situation to no avail.

It also seems to us that the Applicants did not make much use, if at all, of section 98 of the Police Act. The issues being raised here could have been raised before District Commissioners or anyone acting on their behalf. They could have granted the same reliefs that are being sought from us. In case of not having been satisfied

with the reliefs granted or not granted resort could have been had to the High Court on appeal and eventually to this Court. The fact that the Inspector General does not make reference to any meetings or discussions under section 98 means that there were never any such interactions.

Lastly we feel obliged to comment on the question whether the respondents should have organized demonstrations from 18th to 23rd September 2019? Before the parties reported to us on the discussion held after our ruling of August 27th. We will not sit here and interpret our ruling. All we can say is that whether or not it was proper to hold demonstrations before reporting to us is a matter best left to the individual consciences of the parties.

The application is dismissed.

Costs shall be in the cause.

Dated at Blantyre this 30th day of September, 2019.

L P CHIKOPA SC

JUSTICE OF APPEAL