

IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA MISCELLANEOUS CIVIL APPLICATION NO. 28 OF 2023

[Being Judicial Review Case Number 11 Of 2023 At The High Court of Malawi,
Principal Registry, Blantyre]

BETWEEN

THE STATE[ON THE APPLICATION OF RIAZ

JAKHURA]

APPLICANT

AND

INSPECTOR GENERAL OF POLICE

RESPONDENT

MOHSIN NATHVANI

1st INTERESTED PARTY

JAVID ALAM

2nd INTERESTED PARTY

CORAM: HON. JUSTICE L P CHIKOPA SC JA

Gondwe/Kalampa, of Counsel for The Applicant/interested parties

Manda, Senior State Advocate for The Respondent

Minikwa [Mr.], Clerk

RULING/ORDER

The Applicant and the Interested Parties appeared in the court below seeking on the one hand permission to apply for judicial review and on the other suspension of

the Respondent's decision to arrest and prosecute them on various charges until the determination of the judicial review.

Affidavits were sworn to show that the Respondent's decision to arrest and prosecute were palpably frivolous, vexatious, absolutely groundless and equal to total harassment and intimidation. The prosecution was in fact alleged to be an abuse of prosecutorial discretion at the behest of a private person seeking to settle private scores with the Applicant.

When the parties appeared before the court below it transpired that the Respondent's affidavit in opposition to the Applicant's was defective. It was not commissioned. The anomaly was brought to the Respondent's attention. It was however never rectified. The court below, correctly in our view, therefore proceeded on the basis that there was no affidavit in opposition to that of the Applicant.

The above notwithstanding the court below refused to grant the Applicant permission to mount judicial review proceedings herein. It also declined to grant the interim relief, i.e. an order restraining the Respondent from arresting and prosecuting the Applicant/Interested parties, prayed for. The Applicant and Interested Parties then decided to approach this court to make fresh applications for permission for judicial review and interim relief as set out above.

We will not belabor the issues. Where a party is denied permission to mount judicial review they can approach this court for the same. See our decision in **The State**[On the Application of Flatland Timbers Ltd] v **Department of Forestry**[Director of Forestry] MSCA Civil Case Number 25 of 2021[unreported]. In doing so this court proceeds principally on the same material that was before the court below.

It is then up to this court to decide whether or not to grant the permission. Or, as is the case in the instant matter, the interim relief. Where it does not it is the end of the road for the litigant. Where this court grants the leave however the matter is then remitted to the court below for the hearing of the judicial review proceedings. The remittal is because this is not a court of first instance and also to

preserve the parties' right to appeal which would effectively be extinguished if the judicial review proceedings were had in this court.

Coming back to the matter before us the first question is whether the Respondent's decision is judicially reviewable. The second is whether in the instant case permission should be granted to review the same. Lastly whether the interim relief should be granted.

Our view has always been that every exercise of public authority should be subject to review. It explains, in our further view, why our Republican Constitution is the ultimate basis of all exercise of public authority. Why government and all are bound by its provisions and ultimately why any act or law that is inconsistent with the Constitution is invalid to the extent of such inconsistency. See sections *inter alia* 4, 5 and 10 of the Constitution. That scheme means that any exercise of public authority is always tested/testable for propriety against the Constitution and is in that regard always amenable to review by the courts[courtesy of section 9 of the Constitution] for compliance with the Constitution.

Applying the above to the instant case and answering the question whether or not permission should be granted for judicial review our answer is in the positive. We understand the concerns raised by the court below. That, *inter alia*, the Applicant and the Interested Parties have alternative remedies in the impending criminal trial[s]. We, with respect, have to disagree. Proceeding in the manner the court below did is, in our view, to take an unduly restrictive view of an application for permission to commence judicial review. Firstly, in the criminal court the issues are the guilt/innocence of the applicant. Those are not the issues presently. It is the propriety of the very decision to arrest and prosecute that is in issue. The Applicant/Interested Parties allege, on facts that the Respondent has chosen not to dispute, that the decision is the product of a flawed exercise of discretion. Secondly it is our most considered view that the court below in hearing and determining the application for permission for judicial review proceeded as if it was hearing and determining the substantive application for judicial review. It, with respect, erred. Its duty was only to determine whether there were *prima facie* grounds for holding that a judicial review was necessary. Not to determine

whether the application for judicial review itself was well founded. See our discussion of the above in the **Flatland Timbers** case.

When all is considered and had the court below approached the application for permission in the fashion we have espoused above we have no doubt that it would have come to the conclusion, like we have done above, that this is a proper case in which permission to commence judicial review proceedings should be granted. It would have noticed for instance that in the absence of an opposing affidavit from the Respondent the Applicant's/Interested Parties' story stood alone. Uncontroverted. And while we will not go so far as to say that such stories should be taken as the gospel truth there is also no denying the fact that the Respondent could have put their story before the court below if they had chosen to. That questions might now be asked whether their side of the story is adverse to their case hence the choice to keep it away from judicial scrutiny. Whichever way we look at it, it makes greater sense we think, to grant the Applicant and the Interested Parties a chance, as we hereby do, to show that their arrest and intended prosecution was indeed an abuse of discretion at the instance of a third party bent on settling scores.

Accordingly, this matter will be remitted to the court below the same to be placed before a different Judge for purposes of hearing and determining the judicial review proceedings.

Coming to the interim reliefs again we will endeavor not to belabor the issues. In the case of **Norman Paulosi Chisale v The State MSCA Criminal Appeal Number 33 of 2020**[unreported] we expressed our reluctance to interfere with the law enforcement's powers to arrest and prosecute unless the facts and circumstances of the case leave us with no choice. We are still of the same view. We do understand that in the instant case there is no opposing affidavit. We are however alive to the fact that the contents of the affidavit in support of the application before us also contain the deponent's understanding/interpretation thereof. To that extent we do not think that this is a proper case in which to grant interim relief of the kind prayed for by the Applicant and the Interested Parties. The reasons therefor are the same as the ones we advanced in the **Norman Paulosi Chisale** case in that if it does turn out that the arrest and prosecution of the

Applicant/Interested Parties was in disregard of the law then compensation/damages would be the better way of redressing those wrongs than an order generally preventing their arrest/prosecution.

We do note from the record that the first Interested Party had his passport confiscated in the context of this matter. The same should be returned to him. There are sufficient undertakings by him in the circumstances of this case that make such confiscation unnecessary.

On costs they will follow the event at the conclusion of the judicial review proceedings.

We order accordingly.

Dated at Blantyre this 8th day of June, 2023.

L P CHIKOPA SC

JUSTICE OF APPEAL