IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CIVIL CAUSE NUMBER 225 OF 2007

BETWEEN:

THE STATE

- and -

SPEAKER OF THE NATIONAL ASSEMBLY .....1ST RESPONDENT
ALL MEMBERS OF THE NATIONAL ASSEMBLY .....2ND RESPONDENT
ATTORNEY GENERAL .....3RD RESPONDENT

EX-PARTE: TITUS DIVALA
(Suing on his own behalf and in his capacity as
President of the University of
Malawi Students' Union (UMSU) .....APPLICANT

CORAM: POTANI, JUDGE
Mwenefumbo, Counsel for the Plaintiff
Chuma, Official Interpreter

ORDER

This is an ***ex-parte*** application by the applicant, Titus Divala, seeking the leave of the Court to commence judicial review proceedings against the decisions of the Speaker of the National Assembly adjourning the budget sitting of Parliament indefinitely without first requiring the National Assembly to make provision allowing the Minister Responsible for Finance to withdraw money from the Consolidated Fund for purposes of carrying out Government services after July 31, 2007. There is on file the applicant's affidavit setting out the facts in aid of the application.

The requirement for leave before the commencement of judicial review proceedings is there to serve essentially two broad purposes, that is, to eliminate frivolous,

vexations or hopeless applications for judicial review without the need for a substantive ***inter-partes*** judiCial review hearing and secondly to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case that deserves further probe at a full ***inter-partes*** hearing. In short, therefore, the leave stage offers a screening process to ensure that only deserving cases and not trivia go for judicial review. Thus in considering whether or not leave should be granted, the court would have to address its mind to four principal questions tkat come into consideration in judicial review proceedings namely:

1. Who can apply for judicial review?
2. Against what persons or bodies of persons does judicial review lie?
3. On what grounds can the decisions of such persons or bodies by impugned?
4. Does the case involve matters of public law as opposed to private law?

As to the question who can apply for judicial review, it is a person with sufficient interest in the matter. A person with sufficient interest is one who has a direct personal interest in the relief he is seeking. If the interest is not direct or personal but is a general or public interest it is the duty of the court to determine whether he or she has the requisite standing to apply for judicial relief. The interest the applicant has in this case is that he is a student at the University of Malawi which runs on Government funding and he apprehends that if the Minister of Finance is not allowed to draw funds from the Consolidated Fund, the University System will be crippled as a result he will not be able to continue with his education. In the view of the court, this amply demonstrates that the applicant has a direct personal interest in the relief he is seeking and, therefore, has sufficieNt interest in the matter. Beyond that, the applicant is President of the University of Malawi Students' Union and by virtue of that he has the requisite standing to apply for judicial relief on matters that affect members of his Union at large.

As regards persons or bodies against whom judicial review can lie, it lies against public persons or bodies exercising ***quisi-judicial*** and administrative power. See ***Ridge v Baldwin*** (1964) AC 40. In the case at hand, all the three intended respondents are public officials and bodies created by statute and they exercise public functions. They are, therefore, proper persons and bodies against whom judicial review can lie.

Then the third critical question relates to on what grounds can decisions of public bodies and/or authorities be impugned. Four major grounds have evolved and these are where there is want or excess of jurisdiction, or where there is an error of law on the face of the record, or where there is failure to comply with the rules of natural justice or where the decision complained of is unreasonable in the ***Wednesbury*** sense.

Reading through the applicant's affidavit and his statement of the case, that is, Form 86 A, the gist of the applicant's case is that the decision complained of is unreasonable. The doctrine of unreasonableness in judicial review has its roots in the case of ***Associated Provincial Picture House Limited v Wednesbury Corporation*** (1948) 2 KB 223. The gist of the doctrine is that decisions of persons or bodies which perform public duties or functions will be liable to be quashed or

otherwise dealt with by an appropriate order in judicial review proceedings where it appears that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached such a decision. It is the applicant's contention, among others, that the decision complained of does not augur well with section 178 of the Constitution as its effect is to cripple Government operations which in turn would deprive the applicant and others essential services and therefore unreasonable. It is in the light of this that the court does find th.at there is a ***prima facie*** case of unreasonableness made out by the applicant against the respondents.

The fourth and last question is whether the case relates to public law as opposed to private law matters. It is plainly clear that the case revolves around constitutional issues in the domain of public law.

In view of the foregoing, the court comes to the conclusion that the case at hand is one that has passed the screening process as a deserving one to go for judicial review. Leave to commence judicial review is, therefore, granted.

It is further the applicant's prayer that if leave is granted, the court should make direction that the leave should operate as an injunction compelling the first and second respondents to meet within 14 days of the order to discuss and pass the 2007 to 2008 budget and restraining the first and second respondent from discussing matters relating to Section 65 of the Constitution and injunction obtained by Honourable Mussa, MP as they are matters before the court. It is to be noted that the injunction being sought has two limbs one of which is mandatory in nature. The law is well settled that an interlocutory mandatory injunction is an exceptional form of relief normally granted where the applicant's' case is unusually clear and strong. This in the view of the court can best be assessed at an ***inter-partes*** hearing which is not the case herein. Therefore in so far as the prayer to compel the first and second respondents to meet, discuss and pass the 2007 to 2008 budget within 14 days is concerned, it can not be properly be granted at this *ex **parte*** stage. On the second limb which relates to an order restraining the first and second respondents from discussing matters relating to
Section 65 of the Constitution ***vis a vis*** the injunction obtained by Honourable Mussa, MP, the important point to make is that while there is a legally authoritative ruling by the highest court in the land, the Malawi Supreme Court of Appeal on the validity and application of
Section 65 Of the Constitution, the ruling does not take away the rights of any person to seek redress from the courts on matters pertaining to the application of section 65 as the Honourabe Mussa, MP has done. It would therefore be unacceptable and tantamount to interference with judicial process to discuss such a matter while pending in court. The court therefore feels more persuaded that not to grant the injunction sought restraining the first and second respondents from discussing matters relating to Section 65 of the constitution ***vis a vis*** the injunction obtained by the Hounourable Mussa, MP.

Then there is the prayer that if leave is granted an interim order be made mandating the Minister of Finance to withdraw money from the Consolidated Fund to meet Government expenditure necessary for essential services until such a time when Parliament would have passed the necessary Appropriation Act or at least given effect to the requirements of section 178 of the Constitution and also an order

mandating the Malawi Revenue Authority (MRA) to collect and remit duty and tax until the Appropriation Bill is passed. This prayer appears reasonable in the circumstances of the case. However, reading through Chapter XVIII of the Constitution, the power to authorize collection of tax, rate, duty or levy; so too the power to authorize expenditure is the preserve of Parliament. The court, therefore, has to be slow in making orders which effectively would amount to taking over the authority which constitutionally belongs to Parliament on a mere application for judicial review before Parliament is heard. The prayer, therefore, cannot be granted at this stage but it is open to the applicant to pursue it at an ***inter-partes*** hearing.

By way of summary, the application for leave is successful while the prayers for interim reliefs except one which has succeed in part are not but the applicant can take them up ***inter-partes.*** The judicial review proceedings to be commenced by an originating motion supported by an affidavit. In view of the apparent urgency of the matter, the judicial review hearing shall be expedited and in order to facilitate such an expedited hearing the usual time requirements would have to be abridged as follows:

The applicant to file and serve the originating motion and other attendant documents on the respondents through personal service within 3 days hereof and within 3 days thereafter the respondents must file and serve their responses. Within 7 days after the time stipulated for filing and service of the respondents' documents, the parties must file and exchange skeletons arguments. It is, therefore, envisaged that the matter would be ready for hearing within 13 days hereof. In the event that the plaintiff is desirous of pursuing the failed prayers for interim reliefs through an ***inter-partes*** hearing, it is directed th,at the respondents should be served with the relevant documents at least 48 hours before the hearing date.

A final important point has to be made. The matter has a very apparent constitutional flavour so much so that it is likely to be suitable for determination by a panel of three High Court Judges in line with the prevailing law and practice. The parties are, therefore, implored to keep this at the back of their minds and strive to obtain the necessary certification from the office of the Chief Justice.

MADE in Chambers this day of July 31,2007, at Blantyre .

.S.B POTANI JUDGE