IN THE HIGH COURT OF MALAWI

Principal Registry
CONSTITUTIONAL CIVIL CAUSE NO. 2 OF 2009
(Being MISCELLANEOUS CIVIL CAUSE NO. 36 OF 2009)

BETWEEN:

THE STATE,
-AND-
THE ELECTORAL COMMISSION…..... RESPONDENT

-AND-

EX-PARTE: DR. BAKILI MULUZI ……...…1ST APPLICANT

UNITED DEMOCRATIC FRONT …. 2ND APPLICANT

CORAM: JUSTICE E.B. TWEA
JUSTICE H.S.B. POTANI
JUSTICE DR. M.C. MTAMBO
Messrs:Kaphale, Nyimba, J. Banda
and Mwankhwawa of Counsel for the Applicant
Dr. Ansah, A. Kamanga, R. Kanyuka, D. Nyamirandu
Dr. Z. Nkhowani and P. Kayira of Counsel for the Respondent
Manda, Official Interpreter
Mrs. Chingota, Court Reporter
Ms Chiphwanya, Typesetter

TWEA, J.

RULING

In this case, the First applicant is Dr Bakili Muluzi, who is the Chairperson of the second applicant, the United Democratic Front (UDF) Party. It is common knowledge that the second applicant had nominated the first applicant as its presidential candidate for the 2009 Presidential elections. The first applicant presented his nomination papers to the respondent, the Electoral Commission, sometime in February 2009. On 20th March, 2009 this respondent announced that the first applicant was not eligible to stand as presidential candidate. The applicants were, naturally, unhappy with this and they applied to the High Court to move for judicial review against the Electoral Commission which leave was duly granted. The respondent now apply to this court to discharge the leave to move for judicial review on grounds that the applicants suppressed some facts and further that the applicants have since indicated that they have gone into an alliance with another political party: the Malawi Congress Party (MCP), therefore that the judicial review proceedings are an abuse of the court process.

The applicants oppose this application.

The crux of the case for the respondents, now applicants, is that the applicants did not disclose that there are other remedies available to them to pursue their grievances than moving for judicial review. It has been argued that where there are other alternative remedies, the court should not allow judicial review until such remedies are exhausted. The applicants/respondents relied on ***R.V. Leeds City Council Ex parte P. Hendry*** (1994) Admin. L.R. 439 and ***Republic of Peru v Drefus Brothers and Company*** (55 L.T. 802 at 803) to stress the need for utmost good faith in disclosing of facts, and ***Re Preston*** (1995) AC 835 for the proposition that judicial review should not be had where there are other alternative remedies available.

The respondents/applicants do not dispute this. It was their submission however, that there are no remedies available to them and therefore they did not suppress any facts. They contended that the Parliamentary and Presidential Elections Act (PPEA), does not make any provision for dispute resolution in respect of nomination of presidential candidates. Consequently, they had to resort to judicial review.

It must be acknowledged that the PPEA is divided into several parts. These parts are in respect of particular stages in the election process. Be this as it

may, these parts are not disjunctive. They form a whole. The provisions of this Act therefore must never be read in isolation. They should be read in a way that would give effect to the intention of the legislature.

The Constitution creates the Electoral Commission which ***"Shall exercise such functions in relation to elections as are conferred upon it by this Constitution or an Act of Parliament."*** The powers and functions of the Electoral Commission are provided for in Section 76 of the Constitution and Section 8 of the Electoral Commission Act. Some of such powers and functions are specific and others are general. We may refer here to Section 8(2) of the Electoral Commission Act which states:

> **(2)** ***"For purposes of discharging the functions and exercising the powers conferred upon it by the Constitution, this Act or any other written law relating to elections, the Commission shall freely communicate with the Government and any political party or any candidate, person or organization."***

Such general powers do not specify in what circumstances they could be exercised as long as the duty of ***"discharging the functions and exercising the powers conferred"*** is met.

The holding of the general elections and by elections is provided for in Part IV of the PPEA Section 32(1) reads:

> ***"(1) A general election shall be at such times as are required by the Constitution."***

The PPEA itself does not provide for when a general election will be had. It is the Constitutional provision which provides for elections is Section 67(1). It reads:

> "(1) The National Assembly shall stand dissolved on the 20***th*** ***of March in the fifth year after its election, and the polling day for the general elections for the next National Assembly shall be the Tuesday in the third week of May that year: Provided that where it is not practicable for the polling to be held on the Tuesday in the third week of May, the polling shall be held on a day, within seven days from that Tuesday, appointed by the Electoral Commission, and provided further, that, in the case of the elections to be held in 1999, the polling shall be held on a day, not later than 15th June, 1999, appointed by the Electoral Commission."***

The dissolution of Parliament heralds the time table for the elections.

Part IV of the PPEA has three divisions; general, nomination of members of the National Assembly and nomination for election to the office of President, respectively.

The issue before us is whether Division 3 provides a remedy for a rejected nominee for presidential elections. The bone of contention is that Division 3 does not contain a similar provision like Section 40 in respect of Division 2 for nomination for the National Assembly. We have listened to the arguments carefully. We wish to point out that in respect of both the National Assembly and the Presidency, a poll will only be had if it becomes necessary this comes out from Sections 36(1) (c) and 48(1) (b) of the PPEA. Should there be only one candidate validly nominated, or who qualifies there shall be no necessity for a poll. In both respects, however, it is envisaged that there may be invalid or rejected nominations. It is important to note that in Division 3, in respect of Presidential nomination, it is expressly provided that when, at the end of nomination period no candidate is duly nominated, then the Electoral Commission will publish a notice in the gazette extending the nomination period: See Section 53. Further, in terms of Section 54 where no candidate is validly nominated or is duly qualified according to the Constitution, or dies, the Electoral Commission will likewise publish a notice in the gazette declaring the election void and the process will start afresh in accordance with the Act. In both cases there is no provision requiring the candidate to be informed of the invalidity or disqualification. Could it be said that the PPEA was intended to keep presidential candidates in the dark? The answer is obviously NO. This is clear from Section 49(3) of the PPEA which provides that provisions of Division 2, to wit Sections 37(2) and (3), 38 and 39 are expressly applicable to Presidential nominees. These Sections when read in respect of presidential nominees apply ***mutatis mutandis*** and that the Electoral Commission is the returning officer.

Section 38(3) requires the Commission to inform the presidential nominee of any defect in his nomination papers or documents and require him or her to rectify the defects before the nomination period closes. Section 39 provides that a candidate shall be deemed to stand nominated unless the Commission informs him that his nomination paper is invalid for not complying with the Act including not qualifying under the Constitution in terms of Section 54(b). Would such nominee be without a right against the Electoral Commission? We do not think so. It could not have been the intention of the legislature to have given a presidential nominee a like right to the nominee of the National Assembly and then deny him or her the right to seek redress from the Electoral

Commission before coming to the High Court. In this sense therefore, the omission of reference to Section 40 in Section 49(3) is a ***lacuna***. It would amount to denial of right to redress if every presidential nominee who wishes to challenge the Electoral Commission's decision were to be forced to come directly to the High Court.

It is our view that ordinarily a presidential nominee who is rejected has a right to seek redress from the Commission. In the same vein when the process of petition or appeal is pursued, he or she is entitled to have a stay of further proceedings in respect of the electoral process as provided for in the case of parliamentary nominee in Section 40(5) of the PPEA.

We hold this view bearing in mind Section 89 of the PPEA which gives candidates for both the National Assembly and President's office equal right to complain and right to a remedy in respect of voting at the polling stations, as well as Section 100 of the PPEA which gives powers to both candidates to petition the High Court directly in case of undue return or election. It is our view that the legislature did not intend to discriminate between nominees and candidates for the National Assembly and Presidential election in respect of legal redress. We hold the view however, that such remedy could only be pursued if the electoral calendar was maintained as provided for in the Constitution and the PPEA. Clearly in the present case, the Electoral Commission brought forward the Electoral Calendar and consequently nominations were closed at the time the applicants were informed of the disqualification. In effect this took away their remedy. We would on these facts find that they were entitled to move the court for judicial review.

We have considered the gist of Section 76(5) (a) of the Constitution. We are of the view that it is a very clear provision. We agree that there will be cases where an aggrieved party may not find a remedy in respect of the decision of the Electoral Commission. We would not wish to categorize such cases. The power given to the Judiciary however, only emphasizes the powers of the High Court under Section 108(2) of the Constitution, it is not an additional power.

Lastly, we look at the issue of withdrawal. We agree with the applicants. What is in issue is the decision of the Electoral Commission: whether or not the first applicant is eligible to stand as a presidential candidate until the court determines that or the applicants withdraw the case, they cannot be said to be abusing the court process. By supporting another candidate they are mitigating the political damage. This case is about their rights and it cannot be moot: See ***Council of University of Malawi vs CCASU and Others*** Civil Cause No. 2159 of 2007. This case can be distinguished from the case of ***James Phiri and***

Attorney General vs Dr Bakili Muluzi Constitutional Case No. 1 of 2008. In the present case there is a dispute between the parties. The court will be required to determine the rights of the applicants in view of the determination of the respondents.

Further, we agree that Section 52 of the PPEA is clear. Only a validly nominated candidate can withdraw. This can only be by notice in writing to the Commission. In the present case the 1st applicant is not yet a candidate. He does not come under the purview of Section 52 of the PPEA.

The application to discharge leave to move for judicial review therefore must fail. Costs will be in the cause.

PRONOUNCED in Open Court this 8th day of May 2009 at Blantyre.

E.B. TWEA
JUDGE

H.S.B. POTANI
JUDGE

DR. M.C. MTAMBO
JUDGE