

# IN THE HIGH COURT OF MALAWI

## PRINCIPAL REGISTRY

Misc. Civil Application No. 77 of 2010

In The Matter of an Application for Judicial Review

BETWEEN

THE STATE

-VS-

Ex Parte : THE REGISTERED TRUSTEES OF  
FURNITURE PRODUCERS ASSOCIATION.....APPLICANT  
OF MALAWI (FUPA)

AND

TECHNICAL, ENTERPRENEURILA AND VOCATIONAL  
EDUCATION TRAINING (TEVET).....RESPONDENT

Coram: **Manda, J**

**Salimu** for the Applicant

**Chilenga** for the Respondent

**Mrs Matekenya** Court Clerk/Interpreter

This was the applicant's application for Judicial Review apparently against a decision by the Respondent by the Respondent not to disburse funds to them and all its interested which funds were apparently donated by the Danish Institute for International Development (DANIDA). From the documents that were filed, these funds were apparently donated to TEVETA sometime around 2002. It was the applicant's belief that the donated funds were supposed to be for their benefit as well as for the benefit of interested organisations falling under them.

The reliefs that the applicant now seeks are enumerated as follows:-

1. A like order of *certiorari* quashing the Respondent's decision not to disburse the funds
2. A like order of *mandamus* compelling the Respondent to disclose how much money they received from DANIDA
3. A like order of *Mandamus* compelling the Respondent to disclose how much money has been invested over the years and how much therefore is now available
4. A like order of *Mandamus* compelling the Respondent to disburse the funds in issue to the Applicant's members, and finally
5. An order of injunction restraining the Respondent from disbursing the Applicant's share of the DANIDA funds to other people or organisations.

The grounds on which the above reliefs were being sought were also enumerated as follows:-

1. That TEVET is a creature of statute and is regulated by an Act of Parliament
2. That the statutory functions bestowed on the Respondent under the TEVET Act are expressly spelt out in Section 5 of the Act and that do not include TEVET being a conduit for funds from donors to beneficiary organisation like it happened herein
3. That the involvement of the Respondent in the disbursement of the funds donated by DANIDA was *ultra vires* the TEVET Act and thus illegal.

The background to this matter is apparently that sometime in 2002, the applicant's approached DANIDA for Financial Assistance to roll out their furniture production and tool centre projects. In the same year however Denmark severed its diplomatic ties with Malawi, which also meant that DANIDA had to pull out of Malawi, thereby curtailing Danish development assistance to Malawi. However, it would seem that as DANIDA were pulling out they advised the applicant's by phone that they had provided for funds for the applicant's proposed projects. Later, the applicant's also claim that the Respondent also informed them by phone that DANIDA had left funds that would be disbursed to them in due course, it would seem however that it took quite some time before the funds were disbursed as allegedly promised by the Respondent.

It was the applicant's evidence, as provided in affidavit sworn by Mr. Salimu, of counsel, and the same is contained in the affidavit of George F.G. Kulupajiri (in the amended motion), that following the elapse some years, (it is not clear how many), and some follow ups by the Applicants, they were apparently advised by the Respondent that the funds were to be distributed

through the Malawi Rural Finance Company (MRFC). It was however the Applicants' evidence that their approach to MRFC did not yield anything. It is again not clear as to why MRFC did not assist the Applicants. Suffice to say that after they had not been assisted by MRFC, the Applicants felt the need to report the matter to the Anti-Corruption Bureau (ACB). It is again not clear as to why this matter was reported to the ACB and what the Applicant's wanted the ACB to do on their complaint, however the ACB did write a letter responding to the Applicant's complaint. The letter was addressed to one George Kulupajiri. The letter reads as follows:-

*"We acknowledge receipt of your complaint.*

*TEVETA have told us that the loan portion of the money they got from DANIDA had been given to Malawi Rural Finance and your members were free to access the loans. They further said that noen of your members accessed the funds as such that they were forced to withdraw the funds after three years. The funds are now being used as loans to graduates of Techninical Colleges.*

*We have therefore closed the file and wish you all the best in your efforts of soliciting funding for you organisation.*

*Thank you for trusting us with your matter"*

The letter was signed by S.A. Kadyakale, an Investigations Officer on behalf of the Director of ACB.

From the reading of this letter, it is quite clear that the Respondent was cleared of any wrong-doing, which wrong-doing was the alleged failure by the Respondent to disburse funds to the Applicants. Indeed my assumption is that the clearing of the Respondent by the ACB was made after an investigation had been fully conducted in this matter and some findings made on the same. Indeed from the letter quoted above one such finding is that the alleged funds were made available to the applicants through MRFC but that the applicants chose not to access them for over three years. It must be noted then that this creates a contradiction in the applicant's own evidence. On one hand they seem to want to present the picture that MRFC never assisted them despite all their attempts to access those funds. Yet on the other hand here is the applicant presenting evidence to the effect that the applicants did not access the funds for three years. Which is which, if I am use this term? In this regard, it is noted that the applicants never addressed the fact that they were seemingly at fault in not accessing the funds when the same were made available to them, and in looking at the nature of this matter, I would think that this is something that they should have done.

Anyway, it would seem that following the letter from the ACB, there were apparently several meetings that were held between the applicants and the respondent, at which meetings the applicants were apparently given the impression that despite their earlier tardiness in accessing the funds, the funds would still be disbursed to them. As evidence of this apparent impression, the applicants produced in evidence, a letter marked AB2. The letter is from the Applicants' head office and is addressed to the Chief Accountant of the Respondent. The letter reads as follows:-

*"This is in reference to the conversation we had last time I came to Lilongwe on 16<sup>th</sup> of November, 2010 concerning our association Furniture Producers Association of Malawi.*

*I am pleased to inform you that we have finally produced the final document of proposal and revived our entire membership and current records indicate that the figure we had before the onset of the project remains intact and they are now only waiting to see the project implemented.*

*As for the business plan for tools center we have just enclosed the document that enables you to work on it. However as you will be working on the Tools Centre business plan the members will be working on the ground to ensure the project moves on as it has been dormant for a long time due to financial constraints.*

*Finally it is our hope that this letter has been taken into consideration.*

*Waiting to hear from you soon."*

The letter is signed by the chairman and the secretary of FUPA. One thing that is clear though from this letter is that it does not mention anything about the provision of the DANIDA funds to the applicants or indeed that the conversation that is being referred to related to the provision to the applicants of the said funds.

The next piece of evidence is then a letter from Salimu and Associates to the Executive Director of TEVETA which has the headline 'DANIDA Funds for Furniture Producers Association'. This is in essence a letter of demand in which the law firm was asking the Executive Director of the Respondent for the following details:-

1. The exact amount of money received from DANIDA
2. Where these funds were
3. Why had the funds not been disbursed to FUPA
4. Whether the funds were ever invested, how they were invested and with which institution the investment was done

The letter also makes mention of the fact that the Respondent were being approached first before the applicants approached the donors on the same issues. The letter also makes the assertion that funds were donated to the applicants and that this therefore gave them a legal right to the same. Of course the question would be that if the funds were indeed donated to the applicants by DANIDA, would the applicants not have been in a position to know exactly how much was given to them? In my view, I would think that the applicants should have had this information with them. The other question will be that if indeed the funds that DANIDA made available were specifically for the applicants, would DANIDA not have deposited the same directly into the applicants' accounts? In view of these questions then, I would have thought that the best approach the applicants should have taken was to actually approach DANIDA and get written confirmation from them that indeed an amount of funds were given to the Respondent for onward disbursement to the applicants. But then if this were to happen could it not be said that by the Respondent's forwarding the said sum to the applicants, they would be acting *ultra vires*, which is in fact one of the grounds on which this application is premised? Indeed then the question is should the court be asked to coerce the Respondent to do an act which is against the law? This I believe is what would happen if the court were to order that the Respondent should disburse the funds from DANIDA to them as they are asking. So again I must state that it seems not to be clear as to what the applicants are asking this court to do.

Finally, in terms of the documentation that was made available to the court is a letter that was written on 'without prejudice' basis in response to the letter of demand from Salimu and Associated. The letter was marked AB4 and was signed by the Executive Director of the Respondent. The middle part of this letter is not legible since it was apparently a faxed copy and the receiving fax had a problem. Nonetheless, this being privileged communication which was written in pre-trial negotiations it will generally be inadmissible, especially if no agreement had been reached (See **Construction & Development Ltd v Munyenyembe** (S.C.A) 12 MLR 292). In this instance there was clearly no agreement that was reached and I do not see how this letter can then be admissible as proof that the Respondent had made an admission that it received funds from DANIDA which were to be exclusively given to the applicants.

Further, reading through the legible parts of the letter it does state that at the time that DANIDA was pulling out it gave a certain sum of money to TEVETA and asked the latter to create some kind of apprenticeship fund from which all entrepreneurs in the technical and vocational sector and graduates of the TEVET system to benefit. The letter goes on to state that

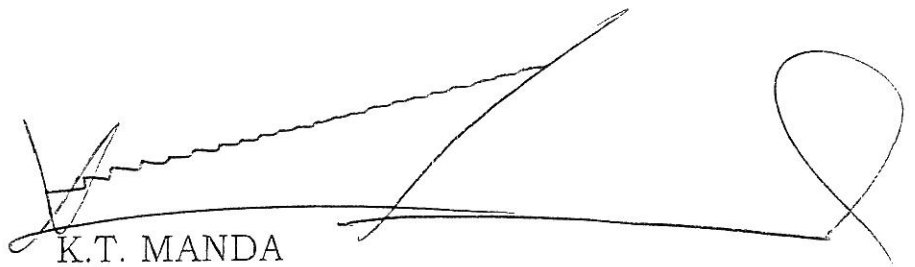


since TEVETA lacked experience in micro-lending it gave the facility to MRFC with instructions to lend to all graduates of the TEVET system of entrepreneurs in all technical trades including those from FUPA and that this information was duly given to the applicants. This fact is perhaps also corroborated by the letter from the ACB, which I have earlier quoted. The letter then also asks Salimu and Associates to obtain proof from the applicants that DANIDA had indeed provided funds which were to be disbursed exclusively to the applicants. From the evidence that is on file such evidence was never provided to the Respondent neither was it provided to the court. Instead the letter continues to read that the funds that were provided by DANIDA were withdrawn from MRFC due to undisclosed challenges and that the Respondent was in the process of identifying a potential micro-lending institution to manage the Apprenticeship Credit Fund on their behalf and also on behalf of all qualifying Malawians. Further the letter does also state that once a suitable institution has been identified a press release will be issued inviting applications for funding to be made to that institution. I do not honestly see how from what has been captioned above, it could be argued that the Respondent made an admission that the funds that were given to it by DANIDA were to be exclusively meant for the applicants. Indeed in terms of evidentially value, this letter would carry more weight in this court than what was allegedly discussed at some meeting between the applicants and the respondent's Chief Accountant. Indeed if we consider the letter marked AB2, what it seems to be talking about was some kind of proposal and business plan which were going to be given to the Chief Accountant for his consideration. This will then bring the question as to whether the Chief Accountant had the final mandate when it came to make decisions as to how institutions were going to benefit from the DANIDA funds. Indeed if he such a mandate, a follow-up question would be did he actually make an intimation that the applicants would automatically be given the funds without them going through some sort of vetting process? Further, it is also not clear that the Chief Accountant did suggest that the funds from DANIDA were going to be directly accessed from the Respondent and not from a micro-lending institution. We were not supplied with any evidence to this effect and in my view such evidence was critical in this application. And in respect of the disbursement of funds, I would indeed agree with the applicants that the Respondent does not have that kind of mandate under the law, an in view of that I do not see how the Chief Accountant would have made such kind of a commitment.

From the foregoing, I would agree with Mr. Chilenga that I do not find any evidence of a decision being made by the Respondent which can be subject to Judicial Review. By the applicants' own application, the respondent while having the mandate to source adequate and sustainable financing, does not

have the mandate to disburse any funds that are sourced. It can only do so through a micro-lending institution, which the respondent has clearly indicated is in the process of identifying. I do not honestly see what is wrong with such an action. Indeed in view of the fact that there is no evidence that the funds that were provided by DANIDA were exclusively meant for the applicants and only them alone, I really find no basis for this application and I must proceed to dismiss it with costs to the Respondent.

Made in Chambers this <sup>30<sup>th</sup></sup> day of March .....2011

A handwritten signature in black ink, consisting of a series of connected loops and a long horizontal stroke extending to the right.

K.T. MANDA

**JUDGE**