IN THE MALAWI SUPREME COURT OF APPEAL
MSCA CIVIL CASE NUMBER 25 OF 2021

[Being High Court of Malawi, Lilongwe Registry, Judicial Review Case Number 5 of 2021]

BETWEEN:
THE STATE[ON THE APPLICATION OF FLATLAND TIMBERS LTD] APPLICANT

AND

DEPARTMENT OF FORESTRY[DIRECTOR OF FORESTRY] RESPONDENT

CORAM:
HON. JUSTICE L. P. CHIKOPA SC, JA.
Dikiya/hara of Counsel for the Petitioner
Chisiza state advocate of Counsel for the Respondent
Masiyano[Ms.] Court Clerk

RULING

BACKGROUND

The applicant was granted a special licence to harvest timber in Chikangawa Forest by the respondent Department for the year beginning January 2020 to December 2020. The harvesting was to be from two plots in respect of which the applicant paid the sums of MK15,499,700.00 and MK19,756,700.00 respectively.

The applicant alleges that according to the agreement entered into between the parties, the conditions of the licence, past conduct/practice and the consideration paid in respect of the licence the applicant was entitled to the

specific quantity of timber on the plot. In other words, and as we understood them, meaning that once the above sums of money were paid they were entitled to all the timber on the two plots.

The applicant says it was not able to harvest all the timber on the plots. That their activities were hampered by the Covid - 19 pandemic. They were so badly affected their operations were massively scaled down and in some instances actually came to a standstill.

In view of the above scenario the applicant says it approached the respondent in the person of its then Director, Mrs. Stella Gama to find a way of retrieving the situation. She, according to the applicant, expressly assured the respondent, and made undertakings in that regard that the applicant's licence would be renewed when it fell due in January 2021 so that the harvesting could move to completion.

As it turns out the license has not been renewed. Instead the respondent is seeking to evict the applicant from the above plots and has to that end sent its officers to do the needful.

The applicant feels aggrieved. It believes that the decisions not to renew the contract and to evict it from the two plots before harvesting is completed is in the circumstances of this case unreasonable in the Wednesbury sense and clearly against its legitimate expectations. It therefore approached the court below and sought, *ex parte*, leave to commence judicial review against the respondent.

The court below asked that the matter be heard *inter parties*. It heard the matter and proceeded to dismiss the application for leave for judicial review.

The applicant then approached this court with a fresh application for leave to commence judicial review. The approach was made *ex parte*. We opted to hear and determine the application *inter parties*.

PRELIMINARIES

On the appointed day it turned out the respondent had filed nothing in relation to the application. Something was said about a relevant officer not being present to swear an affidavit. We take it it was to explain the delay, indeed inability to file any responses. The respondent then requested that the hearing be adjourned in order to permit them file the required responses.

We will not be the first to say this. We do sincerely hope however that we are the last[see **Celcom Ltd v American Palace & Attorney General** MSCA Miscellaneous Application Number 24 of 2015[unreported]]. Without beating about the bush the respondent's inability to file any responses is most unfortunate. And that is putting it mildly. Secondly the reasons advanced therefor are most unconvincing. Again that is putting it mildly. If indeed the relevant officer was not available the correct thing to do in our view was to promptly inform the court and the applicant. That way the current predicament where we have to grapple with a possible loss of time, treasury and a total lack of input from the respondent would have been avoided with minimum inconvenience.

As a basis for an adjournment the respondent's explanations are clearly insufficient. Just in case the respondent needs reminding parties have at most only the right to ask for an adjournment. They have no right to the adjournment itself. Whether or not a matter will be adjourned is in the discretion of the court the same to be exercised judicially. In practice an adjournment will only be granted for good reason. There is no such reason in the instant case. The respondent could have dealt with whatever challenges they had better and differently. The application for an adjournment is consequently dismissed.

The applicant, who for the record opposed the application for an adjournment, prayed that we proceed to hear the application. We will do that and more. Again, and in case it needs confirmation, the respondent is presently in the position of a party who has not complied with the procedural protocols necessary for appearances in this court. Noncompliance is no longer a small

matter in this court. Sitting as a full bench this Court has held that the appropriate sanction for noncompliance with procedural protocols is a denial of audience. See **Standard Bank Ltd v Maone Oil Mills & Others, Chipeta v Banda & FDH Bank** and **NBS Bank v Lungu FMB Ltd.** In the instant case we agree with the applicant that this matter should proceed. And also that the respondent should not be heard in this matter on account of noncompliance.

THE ARGUMENT, THE COURT'S CONSIDERATION THEREOF

Coming to the substance of this matter first we must emphasize that where leave for judicial review is denied the remedy is not to appeal against the denial. It is to resubmit the request for leave to the Supreme Court of Appeal. To that extent therefore any references to an appeal in cases where leave has been denied are with respect most likely misplaced.

Secondly we think we should restate the fact that an application for judicial review is in two parts. The first part, which is oftentimes brought *ex parte*, is the request for leave part. It is exactly what it says it is. A party approaches the court for permission to bring an application for judicial review. At that stage a party does not argue the merits of their judicial review case. All they need to show is that there is a question worth the court's consideration by way of judicial review.

The second part is the judicial review itself. This follows a grant of leave for judicial review. At this stage the parties argue the merits of their respective positions.

With respect we must agree with the applicant that herein the court below dealt with the first stage as if it was the second stage. It heard both parties and delved into questions/issues which the applicant wanted answered during the substantive judicial review. Again with respect it should not be that way. The danger, and as clearly happened in the instant case, is that neither of the parties were heard in relation to some of the conclusions arrived at by the court below. The question being what to do?

We will subject the request for leave to fresh review and ask ourselves the question whether leave for judicial review should be granted. Our answer is in the positive. We have no doubt whatsoever that there is a circumstance worthy of consideration by the courts by way judicial review.

WHETHER OR NOT TO GRANT A STAY

There was also the matter of a stay of the respondent's decision. The argument from the applicant is that they should be allowed to harvest the trees on the plots while this matter journeys on in the justice system. In their view the convenience and justice of the matter warrants no other course of action. The trees were already paid for. No economic injustice will be suffered by the respondent. And if turns out that they should not have been allowed to harvest the applicant will make any loss thereby suffered by way of damages.

Not staying the order will on the other hand cause irreparable damage to the applicant. The trees are for trade/business. Time is therefore of the essence. Not harvesting now will be not only a loss of irretrievable time in the context of the current pandemic but will also include substantial trade/business losses which are difficult to calculate and might be too substantial for the respondent to make good.

We are mindful that that at this stage we are not hearing the judicial review application. But we cannot help noticing the fact that the trees on the plots were indeed paid for. There is also clearly some truth to the contention that a payment was tied down to the amount of trees on the plot. The receipt Exh JK 2a has some indications of volume of trees. If the applicant were allowed to harvest but it turns out they should not have it is simpler to compensate the respondent for the trees so harvested. The applicant would be in the position of a harvester without licence. An unlicensed harvester in other words. There are ways and means of dealing with such kind of persons which can be resorted to including fines.

If however there is no stay and the decision turns out to be erroneous the damages will indeed be much more and difficult to calculate. They will most

likely also be substantial as they will most probably include damages for loss of business/profits. They will be drain on the public purse. It is imperative in our view that the public purse should only be burdened when there is no other way out. The interests of justice in our judgment lean more towards the grant of a stay herein.

DETERMINATION

Accordingly leave for judicial review is hereby granted. The matter will be remitted to the Judge in Charge, Mzuzu Registry of the High Court of Malawi who will place it before a Judge other than the one whose decision is under consideration. The placement should be done within 21 days from this date. Thereafter the matter will proceed to conclusion in the manner provided for by our substantial and procedural law.

Similarly a stay is granted the same to subsist up to and until the trees on the two plots abovementioned are harvested or until a further order of a court of competent jurisdiction whichever is earlier. The stay is granted on the further condition that the applicant will provide security in the form of a noncash bond in the sum of MK15,000,000.00. The said sum of money will be paid over to the respondent towards any assessed damages/fines if it turns out the applicant should not have been granted the stay.

COSTS

Costs are in the discretion of the Court. In exercise of such discretion we are of the view that the same should be in the course to abide by the outcome of the forthcoming judicial review.

Dated this July 7, 2021 at Blantyre.

L P CHIKOPA SC
JUSTICE OF APPEAL