



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CASE NUMBER 25 OF 2022**

**BETWEEN:**

**THE STATE (On the application of  
DR. JUSTICE MICHAEL MTAMBO)**

**CLAIMANT**

**JUDICIAL SERVICE COMMISSION  
THE PRESIDENT OF THE REPUBLIC OF  
MALAWI**

**1<sup>st</sup> DEFENDANT**

**2<sup>nd</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Claimant, Acting in person  
Mankhambera, Court clerk

**ORDER**

1. This is the order of this Court on the claimant's application, under Order 19 rule 20 (3) Courts (High Court) (Civil Procedure) Rules without notice to the defendant, for an order for permission to apply for judicial review of several decisions of the putative defendants. The impugned decisions are indicated. The failure of the 1<sup>st</sup> defendant to promulgate and follow reasonable, objective, credible and transparent criteria for promotion from High Court Judge to Supreme Court of Appeal Judge. The decision of the 1<sup>st</sup> defendant to remove the claimant's name from the list of candidates for promotion to the

Supreme Court of Appeal which was initially sent to the 2<sup>nd</sup> defendant without giving the claimant a hearing for taking such adverse action not consistent with previous promotion exercises where seniority was used, recognized and accepted by all. The decision of the 1<sup>st</sup> defendant to leave out the claimant for promotion on the ground that the claimant will soon be retiring when the circumstances have been caused by the defendants' own negligence and incompetence in omitting to fill vacancies in the Supreme Court of Appeal for over seven months after they arose in November, 2021 when the last four Justices of Appeal retired which conduct paralyzed the Supreme Court of Appeal for seven months and was unlawful as it undermined the independence of the judiciary. The decision of the 2<sup>nd</sup> defendant inducing or influencing the 1<sup>st</sup> defendant to remove the name of the claimant from the list of names of candidates for promotion to the Supreme Court of Appeal purportedly on account of irrelevant political considerations and purported regional and other balances in the Supreme Court of Appeal.

2. If permission is granted, the claimant will seek several declarations. A declaration that it is unreasonable in the *Wednesbury* sense for the defendants to use their own breaches of duty in inordinately delaying the appointment of Supreme Court of Appeal Judges and then claim that the claimant cannot be promoted because he is near retirement age. A declaration that the defendants' conduct in denying the claimant a promotion on the pretext that he is nearing retirement is discriminatory taking into account that the late Justice Chimasula Phiri was promoted even though he was very sick and never sat in the Supreme Court of Appeal. A declaration the defendants' conduct is tantamount to demoting the claimant as four of his juniors were promoted over him and his JUD ranking number has dropped from 8 to 12 without being accorded a hearing for such adverse action. A declaration that to base promotion on sex, age and regional origin is discriminatory and unconstitutional.
3. The claimant stated the facts on which his present application is based. He indicated that he is a High Court Judge. He sits in the Commercial Division of the High Court. He was appointed as a Judge on 1<sup>st</sup> May, 2007.
4. The claimant asserted that the 1<sup>st</sup> defendant is a constitutional body created under section 116 of the Constitution for the regulation of judicial officers and the submission of names of Judges for appointment to the High Court and promotion to the Supreme Court of Appeal to the 2<sup>nd</sup> defendant for his action.

He asserted further that the 2<sup>nd</sup> defendant is empowered to make appointment of Judges to the High Court and to the Supreme Court of Appeal on the recommendation of the 1<sup>st</sup> defendant.

5. The claimant then asserted that there has over the years developed a practice that when promoting judges from the High Court to the Supreme Court of Appeal, seniority is used as a criterion. He added that there has also been a practice that once names have been submitted by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant for promotion, the 2<sup>nd</sup> defendant approves such names and does not send them back asking for other names. He asserted that this practice bodes well for the independence of the judiciary as it removes room at the Executive level for political influence to affect the appointment and promotion of Judges in an independent arm of Government.
6. He then asserted that, sometime in November, 2021, the 1<sup>st</sup> defendant submitted to the 2<sup>nd</sup> defendant four names of Judges for promotion to the Supreme Court of Appeal on which list the claimant, being the most senior Judge in the High Court at the material time, was number one.
7. The claimant proclaimed that, contrary to practice and expectations, the 2<sup>nd</sup> defendant sat on the list for over four months without acting on it thereby paralyzing the operations of the Supreme Court of Appeal which could not form a quorum in matters where there was an appeal against the decision of a Supreme Court of Appeal Judge rendered while they were in the High Court.
8. He asserted that the 2<sup>nd</sup> defendant is duty bound to act with reasonable dispatch to fill vacancies in the judiciary and not undermine it by paralyzing its operations. He added that such reasonable dispatch promotes the independence of the judiciary as the judiciary or judges do not have to be pleading with the 2<sup>nd</sup> defendant or the executive branch of Government to perform the duties of their office as if the judiciary or judges are beggars seeking favours.
9. The claimant then averred that after inordinate delay, the 2<sup>nd</sup> defendant sent back the list of four names to the 1<sup>st</sup> defendant and demanded to be given another list purportedly for regional and other balances. He indicated that he was informed by a senior Government official and verily believes that the 2<sup>nd</sup> defendant was unhappy to be given four names when there were four vacancies and demanded four names. He asserted that that the demand of the 2<sup>nd</sup> defendant was contrary to prevailing practice. And that, in any event, in

- the two previous occasions that the 2<sup>nd</sup> defendant made appointments to the High Court, he was given a number of names that corresponded to the vacancies available and he never sent the names back to ask for more names.
10. He then stated that following the demand from the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant sent to the 2<sup>nd</sup> defendant a new list of four names that excluded the claimant and instead included the name of another Judge. He opined that even if it can be accepted that the 2<sup>nd</sup> defendant was entitled to desire gender balance on the Supreme Court of Appeal bench, the desire would have been fulfilled by just adding the name of the other Judge without removing that of the claimant given that the Supreme Court of Appeal has an establishment of 13 Judges and only 11 have been filled.
  11. The claimant then indicated that to buttress his belief that the names submitted by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant are promoted as a matter of *fait accompli*, after removing the name of the claimant from the list and sending a new list of four judges to the 2<sup>nd</sup> defendant to be promoted to the Supreme Court of Appeal, everybody on the list was promoted. The claimant concluded that he was unfairly targeted for political or other irrelevant reasons to be left out on promotion.
  12. The claimant then stated that on 10<sup>th</sup> June, 2022, almost seven months after the promotion exercise was commenced, an announcement was made that the 2<sup>nd</sup> defendant had approved the promotion of four judges to the Supreme Court of Appeal excluding the claimant.
  13. The claimant indicated that about three weeks prior to the announcement, he met in the banking hall of one of the banks in Blantyre a former acquaintance who used to be Registrar of the then Chancellor College and he informed the claimant that from his reliable sources the claimant would be passed over in promotion because he is of the wrong sex, from the wrong region and was about to retire. He indicated that he believed this acquaintance because of the senior positions he held in the past and his good reputation. The claimant indicated that what his acquaintance said came to pass on 10<sup>th</sup> June, 2022 when four judges got promoted excluding the claimant who was the most senior judge in the High Court.
  14. The claimant then proclaimed that it is unreasonable for the defendants to use their own breach of duty in failing to complete the promotion exercise expeditiously by taking over seven months to conclude it and then turning

- around to assert that the claimant cannot be promoted because he will be retiring very soon. He proclaimed further that the conduct of the defendants is unlawful as it discriminates on the basis of sex, age and regional of origin.
15. The claimant then asserted that it is unlawful for the defendants to deny him promotion which he legitimately expected from established and accepted practice to promote High Court judges to the Supreme Court of Appeal based on seniority. He further asserted that breach of his constitutional rights cannot be adequately compensated by damages. He then submitted that he has made out a case fit for judicial review.
  16. This Court is aware that the purpose of a permission application like the instant one is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi* Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported); *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93.
  17. This Court is further aware that permission to apply for judicial review will be granted if the Court is satisfied that there is an arguable case for granting the relief claimed by the applicant. At this stage, there is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an arguable case then permission should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review. See *Ombudsman v Malawi Broadcasting Corporation*.
  18. This Court must therefore consider whether the facts as presented by the claimant show that there is an arguable case for further investigation at a full hearing. There is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an arguable case then permission should be granted.
  19. This Court observes at the outset that the claimant's application makes a subtle assertion that masks a fundamental error by equating appointment to the

Supreme Court of Appeal with promotion to the said Court from the High Court. The claimant's application refers to promotion interchangeably with appointment of High Court judges to the Supreme Court of Appeal. This error must be corrected. What obtains is that there are appointments that are made by the 2<sup>nd</sup> defendant to the Supreme Court of Appeal. It is not a question of promotion.

20. This position is clear when one considers the current law on appointment to the Supreme Court of Appeal. The Constitution provides for qualification for appointment to the Supreme Court of Appeal. It does not talk about promotion to the Supreme Court of Appeal. The qualification is either not less than 10 years of service in the High Court as a judge or not less than 20 years' experience of practice of law. See section 112 (1) (d) (ii) of the Constitution. This illustrates clearly that what obtains is appointment and not promotion to the Supreme Court of Appeal.
21. The two Courts are also different. So that a person is appointed as a judge to the High Court. And also appointed to the Supreme Court of Appeal. The two Courts are also provided for under different sections of the Constitution, namely, section 104 (1) for the Supreme Court of Appeal and section 108 (1) for the High Court. Different statutes also provide for the two courts separately respectively, namely, the Supreme Court of Appeal Act and the Courts Act. Usage of the term promotion from the High Court to the Supreme Court instead of appointment to the Supreme Court of Appeal is therefore not accurate, erroneous and not inconsequential.
22. With regard to appointment to the Supreme Court of Appeal, the Constitution is clear. Section 105 (3) of the Constitution provides that a Justice of the Supreme Court of Appeal may only be appointed in accordance with section 111. And section 111 (2) of the Constitution provides that all judges shall be appointed by the President on the recommendation of the Judicial Service Commission. These constitutional provisions do not speak about promotion of a judge from the High Court to the Supreme Court of Appeal.
23. This Court observes that whilst the claimant asserted that there has over the years developed a practice that when promoting judges from the High Court to the Supreme Court of Appeal, seniority is used as a criterion. And further, that there has also been a practice that once names have been submitted by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant for promotion, the 2<sup>nd</sup> defendant approves

such names and does not send them back asking for other names. The claimant has not provided any evidence of such a practice to back up his assertion. All he has made is a bare assertion. Given that constitutionally speaking, appointment to the Supreme Court may be from the High Court or from law practice, there is no basis for entrenching seniority as the alleged accepted sole rationale for the said appointments. All factors must necessarily be considered.

24. This Court observes that the claimant asserted that this practice, that has not been demonstrated by any evidence, bodes well for the independence of the judiciary as it removes room at the Executive level for political influence to affect the appointment and promotion of Judges in an independent arm of Government. This Court finds this theory to be far removed from the reality of the Constitution. The framers of the Constitution gave powers to the President to appoint Judges on the recommendation of the Judicial Service Commission. The executive will therefore always have a final say on such appointments since that is what is provided for in the Constitution.
25. This Court observes that the claimant made another assertion without supporting evidence to the effect that sometime in November, 2021, the 1<sup>st</sup> defendant submitted to the 2<sup>nd</sup> defendant four names of Judges for promotion to the Supreme Court of Appeal on which list the claimant, being the most senior Judge in the High Court at the material time, was number one.
26. This Court then noted the claimant's proclamation that, contrary to practice and expectations, the 2<sup>nd</sup> defendant sat on the list for over four months without acting on it thereby paralyzing the operations of the Supreme Court of Appeal which could not form a quorum in matters where there was an appeal against the decision of a Supreme Court of Appeal Judge rendered while they were in the High Court. In this regard, this Court is not persuaded that the list was sat on as alleged since there is no shred of evidence to that effect. Further, with regard to the alleged paralysis of the operations of the Supreme Court of Appeal due to the alleged conduct of the 2<sup>nd</sup> defendant, the connection is rather tenuous even if the unsubstantiated facts of delay in effecting appointments alleged by the claimant were to be a given. The Constitution is clear on the composition of Supreme Court of Appeal. Section 105 (2) of the Constitution provides that when sitting to determine any matter, other than an interlocutory matter, it shall be composed of an uneven number of Justices of Appeal, not

being less than three. The claimant has not demonstrated that the Supreme Court of Appeal lacked three members to sit at any given point in time of his reference. The paralysis in the Supreme Court of Appeal cannot therefore be attributed to the 2<sup>nd</sup> defendant as alleged by the claimant but perhaps to some other factor.

27. The claimant alleges that the defendants acted incompetently in delaying to fill vacancies herein from November last year to June this year. This controversial assertion appears to be self-serving. The defendants being what they are, handle a lot of public service business. In effect, they took six months to effect the last appointments to the Supreme Court of Appeal. The process as undertaken does not disclose incompetence on the part of the defendants to this Court. Perhaps, it is understandable that the claimant wanted the process to be far hastier so that he could beat his own retirement date and have more time remaining on his watch so that he was in serious contention for appointment to the Supreme Court of Appeal. The claimant has however not disclosed his retirement date for the appreciation of this Court. The defendants may legitimately have considered that it would be absurd and not be in the public interest to appoint the claimant to the Supreme Court of Appeal only for a very short period say weeks or three or six months and then have him retire and make another appointment. The defendants would legitimately consider that the public would obviously not get much out of his service in that regard.
28. This Court notes the claimant's assertion that even if it can be accepted that the 2<sup>nd</sup> defendant was entitled to desire gender balance on the Supreme Court of Appeal bench, the desire would have been fulfilled by just adding the name of the other Judge without removing that of the claimant given that the Supreme Court of Appeal has an establishment of 13 Judges and only 11 have been filled. Without evidence, this Court cannot confirm that the establishment of the Supreme Court of Appeal is 13. But, even if the establishment was 13, the issue of the closeness of the claimant to his retirement date, on which the claimant has kept mum as to the exact time he has left, may legitimately have compelled the defendants to consider that it was not in the interest of the public to appoint the claimant. In that case, it would not be simply a question of adding the other gender to the list as suggested by the claimant.



29. This Court observes that the claimant then indicated that to buttress his belief that the names submitted by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant are promoted as a matter of *fait accompli*, after removing the name of the claimant from the list and sending a new list of four judges to the 2<sup>nd</sup> defendant to be promoted to the Supreme Court of Appeal, everybody on the list was promoted. The claimant concluded that he was unfairly targeted for political or other irrelevant reasons to be left out on promotion. No evidence was proffered to substantiate any aspect of this assertion.
30. This Court observes that the claimant proclaimed further that the conduct of the defendants is unlawful as it discriminates against him on the basis of sex, age and regional of origin. With regard to the issue of gender or sex, this Court takes judicial notice of the fact that there was only one Lady Justice of Appeal prior to the last appointments herein. For that reason, the defendants cannot be faulted for taking into account gender balance on the Supreme Court of Appeal bench as is required by law under the Gender Equality Act. Gender would legitimately eclipse seniority in that regard. It is not a question of the claimant being of the wrong gender. As for the consideration of age by the defendants, that is a legitimate consideration as alluded to earlier on by this Court given that the claimant is very close to retire, while it is noted that he has kept mum on the time left for him to retire. This speaks volumes as to how soon it is. On the allegation of regional origin, the claimant has not elaborated how this alleged regional origin compares to those four that have been appointment so that this Court could form a view as to any possible unfair effect on the claimant on the basis of his regional origin.
31. The claimant indicated that he has been demoted due to the JUD numbering in the rank of the judiciary and he ought to have been heard. As already indicated by this Court, the High Court and the Supreme Court of Appeal are different Courts. The claimant remains the most senior High Court Judge until he retires and it seems that is soon. There can be no demotion of the claimant when he belongs to the High Court and the Justices of Appeal belong to a different Court, the Supreme Court of Appeal. As the law stands, qualifying members from law practice can also be appointed to the Supreme Court of Appeal, and if that had happened in this case, the claimant would not be demoted.

32. In the final analysis, this Court finds that the claimant's application is largely based on unsubstantiated claims of existing practices and facts. Such an application does not enthuse any hope.

33. In the foregoing premises, this Court is compelled to decline the claimant's application for permission to apply for judicial review for being unfit for further consideration at a full hearing for judicial review, as envisaged in the case of *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329.

Made in chambers at Blantyre this 15<sup>th</sup> July 2022.

M.A. Tembo  
**JUDGE**