REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CONSTITUTION REFERRAL No. 2 OF 2024

(Being Criminal Case No. 43 of 2022 before Senior Resident Magistrate's Court siting at Lilongwe)

(BEFORE Hon. Justice Dr. C. J. Kachale)

(BEFORE Hon. Justice F. A. Mwale)

(BEFORE Hon. Justice M. Mvula)

BETWEEN:

THE ATTORNEY GENERAL ……CLAIMANT

AND

JOSHUA CHISA MBELE ……..……DEFENDANT

CORAM : THE HONOURABLE JUSTICE DR. C. KACHALE

THE HONOURABLE JUSTICE F. MWALE

THE HONOURABLE JUSTICE M. MVULA

: Masanjala/Kaunde, for the Attorney General

: Khonyongwa, for the Defendant

RULING ON PRELIMINARY POINT ON THE CITATION OF PARTIES

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1. The question this Court rose to determine is whether the Attorney General ought to be the Claimant in a matter, where the Defendant moved the court. Our starting point is that commencement of a constitutional matter under Order 19 rule 3 of the of the Courts (High Court) Civil Procedure Rules 2017, (herein after called CPR) provides as follows:

> *3.—(1) Subject to sub rule (2), a proceeding under this Part shall be commenced by summons under Order 5.*
>
> *(2) In the case of a referral by the President under section 89 (1) (h) of the Constitution, the proceeding shall be commenced by a notice of referral under rule 6.*

(3) In the case of a referral by any other court under rule 7, the proceeding shall be commenced by a notice of referral in Form 20.

The position that the Court originally took was that these proceedings having been referred by a court under Order 19 rule 3(3) of CPR, and not by either a party under Order 19 rule 3(1) of CPR, or the President under Order 19 rule 3(1) of CPR. Conceptually therefore, in order to distinguish the different modes of commencement, the Court initially reasoned that since it was the court and not a party, the party was not the one moving the court and therefore the Attorney General should be the claimant. The Attorney General, (herein after called AG) took issue with this position and this Court ordered the parties to address it on the issue. Due to various challenges, the Attorney General was only able to submit their arguments today, the day of the hearing and counsel for the defendant was unable to submit any.

2. The first question we considered was whether Order 19 rule 7 of CPR applies in the present case so as to treat the within matter as "a court referral." In which circumstances, the issue becomes whether the Court in making the referral has an interest in the case which shall be articulated by the AG. We agree with the argument by the AG that this situation raises a conceptual issue with a number of substantial difficulties.

3. The first difficulty is that the *Republic* was the respondent in the High Court. However, after being certified by the Chief Justice, the matter is now entitled the *Attorney General v Chisa Mbele.* The obvious difficulty with this current entitling is the burden of proof. It is trite law that the burden of proof is always on the Claimant. The case of ***Commercial Bank of Malawi v Mhango [2002–2003] MLR 43 (SCA)*** illuminates on this age-old practice:

Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of ***Robins v National Trust Co [1927] AC 515*** *that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in* ***Constantine Line v Imperial***

Smelting Corporation [1943] AC 154, 174 *stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see* ***Bond Air Services Ltd v Hill [1955] 2 QB 417****.*

4. The Supreme Court continued on this aspect, by saying as follows:

> *The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the "balance of probabilities", and this is the standard of proof required in civil cases.*

5. Counsel for the AG further cited the recent case of ***Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)*** which at page 120 presents the burden of proof in constitutional matters. The position is captured as in the following way:

> *"…There is always a presumption in favour of the constitutionality of the enactment,"* the law *"casts the burden of showing the unconstitutionality of the law on the person challenging it. He or she has to show, on a balance of probabilities, that the challenged provisions offend the relevant constitutional provisions."*

6. The court proceeded saying that:

> *"Once the claimant establishes a prima facie case that a law infringes his or right under chapter IV of the Constitution, the burden then shifts to the State, mostly the Attorney General, to show that although there is an infringement of the claimant's chapter four rights, the same passes the requirements for limitation under section 44 of the Constitution."*

7. From the very beginning of the matter, it has been the Defendant challenging the constitutionality of section 200 of the Penal Code. He should therefore be the Claimant. Any other position produces the first difficulty being considered. It has never been the Attorney General or the State arguing that the said section is unconstitutional. It will therefore be illogical to place the burden on the AG when it is not the AG or the State that "invokes the aid of the law" requiring him to discharge that burden. We concur entirely with this submission.

8. With regard to the second difficulty, Counsel for the AG has argued that Order 19 rule 7(1) of the CPR provides that:

> *Where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary as determined by an original court, the Judge, magistrate or chairperson of the original court shall, within 7 days from the date of the determination, submit the referral in Form 20 to the Chief Justice for certification under rule 2.*

We agree with counsel for the AG that there is nothing which suggests that when a matter has been certified following submission of Form 20 then the Attorney General becomes the Claimant. It is not in keeping with established practice or a strict reading of the law.

9. We have thus been referred to and are bound by a similar case, ***DPP v Norman Paul Chisale 6 Others (Constitutional Reference 1 of 2021) 2022 MWHC 7 (26 January 2022) (2)*** the Defendant applied for stay of proceedings and further requested for the matter to be certified by the Chief Justice. The matter proceeded as under section 9(2) and (3) of the Courts Act and Order 19 rule 7(1) of the CPR. The Defendants became the Applicants, and the Claimants became the Respondents. This allowed the Defendants who had moved the court to present their case and have the thirty minutes right of reply. We therefore concur that the Attorney General should become party to Constitutional proceedings in instances pursuant to Order 19 rule 8 of the CPR, or where the original suit had the AG as a party, or a party to the proceedings has elected to be represented by the AG.

10. Such a determination indeed allows the provision of Order 19 rule 8 of the CPR to flourish. We have had several instances of this in recent constitutional cases such as: ***Constitutional Case Number 4 & 5 of2021 AJ (Minor) vs The State and The Inspector General of Police and The Attorney General Ex-Parte Stanford Siliro Shaba on behalf of T.S (a Minor); DPP v Norman Paul Chisale and 6 Others (Constitutional Reference 1 of 2021) 2022 MWHC 7 (26 January 2022) (2); Akster v Attorney General (Constitutional Case 2 of 2021) MWHC (16 November 2021)***.

11. We have in coming to our decision also considered the foregoing arguments in light of ***Professor Arthur PeterMutharika and the Electoral Commission v Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera MSCA Constitutional Appeal No. 1 of 2020.*** The Supreme Court was of the view that in Constitutional referrals, the Attorney General, as Law Officer number one and custodian of the Constitution should take the role of assisting or guiding the court in resolving the constitutional issues on matters of law which had been referred to the court. Since the Attorney General is a Law Officer and principal legal advisor to Government, in constitutional matters this role must not be forgotten but should be paramount.

12. In the case of ***Mutharika and another v Chilima and another (supra),*** the AG was representing one of the parties in the case. The Supreme Court lamented this state of affairs and that the AG dominated proceedings and spoke first even though he was counsel for the second defendant. The present matter will proceed on the footing that the AG will speak first and therefore have a right of reply. This is not wrong in and of itself but it is unconventional when the Defendant has approached the court arguing that his constitutional rights have been violated and he ends up with less time to argue his case.

13. Further bolstering the argument is the case of ***Akster v Attorney General (supra)*** the court said:

> *The Attorney General being the Law Officer responsible for the rules of law and constitutionalism is to be put on notice where the constitutionality of a provision in a statute is being litigated in a court of law. We are of the view, as observed above, that once the Attorney General is put on notice, he or she may exercise his or her discretion whether to join the proceedings.*

14. We therefore agree that the current matter emanates from criminal case No. 43 of 2022 before the Senior Resident Magistrate's Court sitting at Lilongwe. The genesis of the matter is criminal. Perhaps, as observed by Mtalimanja J in ***Joshua Chisa Mbele v Republic Misc. Criminal Case No. 04 of 2022,*** that the absence of a provision akin to Order 19 of the CPR to apply in criminal matters, creates this difficulty of properly assigning parties to the proceedings. However, this does not need to be the case. In one breath the courts are discouraging the Attorney General of taking definitive side ***(Mutharika and Another v Chilima and Another, MSCA Constitutional Appeal No. 1 of 2020)*** yet in another breath the courts, as in the present matter, have decided that the Attorney General should be the Claimant. We are grateful to counsel for the AG for these succinct and persuasive arguments with which we concur fully.

15. In conclusion and to reiterate, the different modes of commencement under Order 19 rule 3 notwithstanding, the fact that the referral in this matter has been made by the court does not require a change in the original citation of the parties. The role of the Attorney General should be above the fray of litigation to preserve his sacrosanct position as the custodian of the Constitution. Whether it is the President who commences under Order 19 rule 2 or the court under Order 19 rule 3, the Attorney General should not be the claimant or a party who takes a side.

16. This was well articulated by the Supreme Court of Appeal as reasoned above the Attorney General, as Law Officer number one and custodian of the Constitution should take the role of assisting or guiding the court in resolving the constitutional issues on matters of law which had been referred to the court. Since the AG is a Law Officer and principal legal advisor to Government, in constitutional matters this role must not be forgotten but should be paramount.

Directions

17. Against these backgrounds, directions for further conduct of the matter, as follows:
    - 17.1 The original parties to the matter are hereby reinstated;
    - 17.2 The defendant Chisa Joshua Mbele therefore becomes the claimant.
    - 18.3 The State shall be the defendant.
    - 18.4 The AG shall be served as is required under order 19 rule 8 of the CPR.
    - 18.5 The parties shall accordingly be required to make their submissions afresh by 21st January 2025 by filing with the Court copies and serve each other.
    - 18.6 The parties shall appear for a Pre-Trial Conference on 23rd January 2025.

18.7 Trial is set down on 28th January 2025 at 09:00 hours in the fore noon at Area 3, High Court (Criminal Division).

18.8 The parties shall be required to comply with Order 19 rule 8 of the CPR and serve the AG. Proof of due service shall be required. Each party shall be given one hour to make oral submissions, but the claimant shall in addition have 30 minutes to reply.

18.9 Judgment shall be delivered by 12th March 2025.

Made in open court this 17th day of December 2024 in Lilongwe.

Honourable Justice Dr Chifundo Jairus Kachale

Honourable Justice Fiona Atupele Mwale

Honourable Justice Mzonde Mvula