JUDICIARY

IN THE INDUSTRIAL RELATIONS COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MATTER NO.IRC. LL 55 OF 2015

BETWEEN

CHRISTOPHER MAKILENI ....APPLICANT

AND

THE ATTORNEY GENERAL

(OFFICE OF THE PRESIDENT AND CABINET) .... RESPONDENT

CORAM:	**Hon. K. Banda**	**Deputy Chairperson**
	Mr. A. Maulidi	Counsel for the Applicant
	Mr. T.C. Nyirenda	Attorney General Counsel for the Respondent
	Mrs. G Thunde	Court Clerk

RULING ON PRELIMINARY OBJECTION.

This is the ruling on application for preliminary objection by the Respondent in respect of the Applicants notice of motion for orders in the following terms:

1. That this court should make a declaratory order declaring that the negotiations on redeployment of the Applicant to his previous position of principal secretary for local government as proposed by the Respondent have collapsed and terminated by close of business on the 16th of November,2020, the last day fixed by the court on 2nd November, 2020.
2. That further this court should grant an order that the respondent through Mr. Zangazanga Chikhosi, the Secretary to the Office of the President and Cabinet and his deputy Dr. Janet Banda SC and Mr. Chancy Simwaka, the Secretary to the Treasury should appear in court to show cause why an order of commitment should not be made against them for willfully failing or refusing to pay to the Applicant the amount of MK754,835,824.14 as ordered by the court through the consent judgement dated the 4th of August,2020.

3. An order that the Respondent pay to the Applicant the sum of MK754,835,824.14 within 7days/…days from the date of service of the order/decree herein or as fixed by court.
4. An order that should the respondent fail to pay the said sum of MK754,835,824.14, the Applicant be at liberty to apply for commitment to prison of Mr. Zangazanga Chikhosi, the Secretary to the President and Cabinet, his deputy Dr. Janet Banda SC and Mr. Chancy Simwaka, the Secretary to the Treasury for contempt of court unless and until the said sum of MK754.835.824.14 is paid in full.
5. An order that the Respondent be condemned to pay costs of this action to be assessed if not agreed to.

The Respondents proceeded to file a notice of preliminary objection to the hearing of "contempt of court charges" and or in the alternative notice of motion to set aside the Application for contempt of court proceedings. Their objection was premised on the following grounds:

1. That the government is immune from execution and that the Applicants application is an application for execution or enforcement of judgment disguised as a motion for commitment;
2. That Mr. Zangazanga Chikhosi and Dr Janet Banda are not parties to the case;
3. That the motion is incompetent and /or inadmissible since public officers are immune from arrest for failure to pay out money;
4. That the order subject of the contempt of court proceedings did not contain a penal notice.

The matter was heard on 8th January,2021. Both parties appeared before the court and made presentations. We adjourned the matter for ruling but for the events that followed. This is mainly due to the impact of the pandemic which badly affected the court and its staff and further due to the subsequent directions by government on how to handle work schedules. These to a greater extent affected the time period for effecting the ruling and indeed continuity of the matter. Hopefully the situation will continue to normalize.

That said, this court would like to urge both counsel that in the future they should ensure that they make effort to understand the real issue or issues before the court; or indeed what they are pursuing or defending to ensure that courts time, their time and that of the parties, and the parties action is also not delayed for no apparent reasons of their own in additional to the delay caused by natural circumstances as outlined earlier. This court states so because of what was observed in the course of

the hearing of this preliminary objection. This will be noted to be the case herein later in the course of this ruling.

Reverting to the matters herein, this court will endeavor to summarise the arguments and counter arguments of the parties suffice to state that it will not belabor to conclude the matters solely on the basis of the arguments herein but for the reasons that will become apparent also in the course of this ruling.

That said, this courts observation was that the essence of the Respondents objection in the main was that the Applicants notice of motion though framed as a contempt of court motion, it in essence was a motion for the enforcement of the consent order of 4th August,2020. In essence the Respondents are of the view that the Applicant intend to execute against government property and further that the tone of the language used and expressly put in his prayer to the court by way of his notice of motion, also intend to commit to prison the public officers mention in his amended notice but without following the correct procedure.

And the Respondents having set the premises as indicated above, they therefore argued vehemently that such was not attainable at law due to the several grounds they raise below.

Recalling their arguments one by one, they *inter alia* argued that ***under s.6(a) of the Civil Procedure Act,*** public officers are not liable to arrest or attachment of their property for failure to satisfy judgment. In short that they are immune to arrest. In support, they cited the cases of ***The Sheriff of Malawi and Attorney General v Universal Kit Supplies,*** Civil Appeal No.6 of 2017 MSCA(Unrep) and ***The Attorney General (Controller of Printing Services) v AG Latif,*** Civil Appeal No. 35 of 2003, HC.

In reference to the cited cases, it was their averment that the first related to a warrant of execution against government and the second related to a garnishee order against government accounts. That further in all the two cases, the argument of enforcement of judgment by the means mentioned above, i.e warrant of execution and garnishee order, was not granted on the strength of the provisions of s.6(a) as cited earlier. They then went on to plead with the court to follow the reasoning in the above cited judgments, as to them, the orders being sought were simply a disguised way of execution against government as a result of which would be payment of money.

The Respondents second argument was premised on irregularity of the proceedings. They highlighted that the consent judgment that was subject of the proceedings, did not give meaning. For instance, they say it had no penal notice and that there was no personal service.

The third arguments premise was said to be lack of particulars. They claimed that there were no sufficient particulars made known to the alleged contemnors to enable them to defend themselves. The ***Mpinganjira v Lemani and another*** [2000-2001] MLR 295(HC). Case was cited as the authority.

The Respondent then proceeded to raise the fourth argument to the effect that the alleged contemnors were not parties to the case. This they did not however show as to how suffice to state that as will be deduced by observation in the course of this ruling, leaving this out, does not affect the decision of the court herein at all.

The final point was on costs. They argued that in terms of **s.72(2) of the Labour Relations Act**, the matters herein are vexatious and that as such it was their prayer that the court should award cost.

They then summarized their application by arguing that the court herein is a subordinate court and hence lacks jurisdiction to hear and grant the orders sought by the Applicant. In particular, they mentioned the declaratory orders on the status of the renegotiated consent orders. In support of this argument they made reference to **s.39(2) of the Courts Act**, in particular paragraph (g).

The Respondents summarized their arguments by stating that the proceedings were irregular and that since courts power derive from statute and that the statutes do not provide express powers of enforcement of judgment debt through contempt of court proceedings and that since under s.39(2) of the Courts Act, this court cannot issue declaratory orders, the proceedings should be set aside.

In countering the above arguments, the applicant first argued the issue of immunity. It was the applicants averment that the Respondents relied heavily on the immunity of government from execution in particular as shown by their reliance on the cited cases that discussed the issues of warrant of execution and another on garnishee order .The Applicant argued that the Respondent were deliberately trying to misled the court to believe that the intention of the Applicant was to issue warrant of execution(writ of fifa) or obtain a garnishee order against governments bank accounts and denied that such was not the intention of the Applicant. In short they denied approaching the court to get such two orders as a mode of intended enforcement of the consent order.

It was the Applicants averment that their application is not about the court granting a warrant of execution or garnishee order or committing the parties to prison but rather for an order and declaration that intended negotiations between the parties have failed.

The Applicant informed this court that apart from seeking declaratory orders mentioned in the preceding paragraph, he was also asking the court to fix time within which the Respondents should satisfy the consent order. And he however was asking the court to consider not to grant a longer period. That is to say for the purpose of their application and the Applicants case, the period that ought to be granted had already elapsed as the consent order was obtained on 4th August,2020 and that more than 90 days as at the time of hearing the application, had already elapsed.

The Applicant argued that this application was being made with the specific intention of satisfying the said order of the court under s.75 of the Labour Relations Act (hereinafter referred to as the LRA) and also under the inherent jurisdiction of the court.

That aside the Applicant went on to argue against the claim of irregularity of the order and in that regard, stated that the current consent order was signed for by both parties and then later endorsed by the court hence it does not qualify to be an irregular order and that if such was the case, the Respondent would have shown the same to the court but did not.

In particular reference to the argument of irregularity with respect to service, the Applicant referred this court to page 17 of the paginated bundle and in particular to a purported affidavit of service showing that the Attorney General had been served with consent order on 4th August, 2020.

The Applicant also referred this court to page 58 of the paginated bundle and argued that since there was personal service to the named officials i.e Mr. Zanga Zanga Chikhosi and Dr Janet Banda, who are the Secretary to the President and Cabinet and his deputy respectively, then the Respondents assertions run contrary to the truth.

The Applicant further referred the court to page 20 of his paginated bundle, where it indicated the written 'follow up letters' and went on to state that apart from the service on the Attorney General, as shown in his affidavit earlier, he also wrote follow up letters like the one on the said page 20. And buttressed that the said letters are reflective of the numerous meetings they had with the Respondents. And argued that in effect therefore there was no irregularity in terms of personal service.

The Applicant then tackled the issue of lack of penal notice in the consent order. He argued that such was not an irregularity as the consent order was never intended to proceed to committal proceedings. And that according to them the order being by consent they are of the view that such did not require a penal notice. And then argued that what the Respondent had done in paragraph 3.13 was essentially to repeat the same thing, that is to say there was no order drawn and signed by the court when in fact the order of 4th August,2020 was duly signed by the court. He then trashed the Respondents argument as lacking merit. That is in reference to the argument of irregularity.

In regard to validity of contempt of court proceedings, as raised in paragraph 3.16 of the Respondents argument, the Applicant conceded that there indeed no contempt of court proceedings as the same can only commence if there is an order specifying the period within which the consent order need to be satisfied and the Respondent fails to abide by that order. The Applicant then went on to state that such order specifying or fixing time is not there and that, it is exactly one of the order they are seeking from the court. And that as already alluded earlier, all what they are looking for from this court are specific orders under section 75 of the LRA for the Applicant to enforce the consent order.

The Applicant then argued that the cases of ***The Sheriff of Malawi and Attorney General v Universal Kit Supplies,*** Civil Appeal No.6 of 2017 MSCA(Unrep) and ***The Attorney General (Controller of Printing Services) v AG Latif,*** Civil Appeal No. 35 of 2003, relied on which are at page 62 and 66 of the paginated bundle are distinguishable as they were not on a similar footing like this one, in that they were about an execution warrant and garnishee order execution on a government property which in the case of the warrant the sheriff refused because the law did not allow.

And moving on to the latter case, the Applicant argued that though the case is an authority that we cannot execute against government property, their lordships in the same case provided an alternate mode of enforcing judgment, i.e. that it is lawful and acceptable to enforce judgment by resorting to appropriate government officials who are responsible and have a duty that government debts are paid as ordered by the court.

In respect of the issue of lack of particulars and jurisdiction, the Applicant argued that the same was not raised by the Respondents in their notice of preliminary objection and that in the same vein as stated above, the issue of jurisdiction was also not before the court. And that as such the issue of particulars and jurisdiction could not stand and could not be raised at the hearing. The Applicant

therefore implored the court to dismiss the preliminary objection since according to the provisions of s.75 of the LRA, this court has powers to enforce its judgments.

The Applicant then addressed the question of costs. The Respondent in the main argued that costs are not payable in this court unless the matter is frivolous and vexatious and hence asked the court to order that each party foot its own costs. The Applicant on the other implored the court to examine the application of the Respondents on preliminary objection in light of the substantive claim before the court and decide which among the two is frivolous. And in his conclusion asked the court to order the Respondent to pay costs of this action for being frivolous and vexatious.

In response the Respondent was brief and responded as follows:

1. That all cases that he cited relate to payment of money by government and are therefore applicable. The said money to be paid arising from government debt.
2. On reference to section 75 of the LRA, he implored the court to consider the section the way it is. i.e to ask itself if the said section 75 of LRA extends to the words that counsel is seeking. The Respondents view is that it does not.
3. That the Industrial Relations Court does not have inherent jurisdiction. And hence that the application having being made under the inherent jurisdiction is not valid. He referred the court to the case of the ***Ministry of Finance and Secretary to the Treasury, Ex parte Hon Bazuka Mhango and others.*** And averred that the court in that case mentioned that enforcement of judgment is not governed by inherent jurisdiction of the court but rather by the Courts Act.
4. He conceded that as pointed out by the Applicant, the issue of particulars and inherent jurisdiction were not included in the notice of preliminary objection though the skeleton arguments discussed the same in detail.
5. That issue of jurisdiction can be raised at any point during the trial. He cited the ***Bazuka Mhango case*** as an authority on the point and also ***Mvula v Shire Bus lines***, Civil Appeal No.4 of 2007.
6. The Respondent further argued that in relation to the Industrial Relations Court form 1 which requires one to accede to the jurisdiction of the court before pursuing any matter, and to which the Applicants argued that the Respondent did and therefore cannot raise the issue now; that one cannot anticipate that there will be issues of contempt of court at that stage and hence they could not put it.

7. That penal notice is a legal requirement and cannot be dispersed with.

That said, the view of this court is quite brief. As alluded earlier, this court had indicated that it is vital that parties to an action before the court should first understand what is the essence of the matter before the court and what exactly is it that they are pursuing in their respective application or indeed a counter application. For instance, herein, several issues were argued and counter argued by the parties. In essence the parties were on several occasion trying to outwit each other over a dead matter, that is in our view. We are of such firm view as we are mindful of the fact that as earlier indicated and captioned in this ruling, the Respondents application in the main is basically to object to what they purport to be an application for contempt of court. And that further, or in the alternative for an order setting aside the same.

In reply the Applicant is very explicit in his explanation that he totally agrees with the Respondent that there is basically no contempt of court proceedings. And such is even clear if one critically analyse the whole documentation filed by the Applicant. And hence at that juncture one wonders why the Applicant had to expend his energy explaining and defending each position that had to do with issues of contempt of court when the same were already covered under the Applicants concession.

That aside the second view of the court is that though the Applicant is aware of what he himself is looking for before the court, which is basically to enforce the subsisting consent order of 4th August,2020, he seem to be confused as to what exactly is the way to follow. The proper application in our view at that particular moment was not supposed to be for the Respondents to show cause why they should not be committed to prison but rather one for period within which to satisfy the order of the court. As the notice stands, that is, where it brings in issues of committal when in the first place there was no time period given for purposes of satisfying the same, it definitely lacks merit and is not fair to the Respondents. Put it the other way, it can be said to be premature.

Moving further from the above discussion, this court noted that the Applicant continuously made reference to making his application under s.75 of the LRA. He however did not come out clear. This court therefore thinks it pertinent to first consider the essence of s.75. Perhaps a reproduction of s. 75 at this point is pertinent. This particular provision as observed simply states that

Any decision or order of the Industrial Relations Court shall have the same force and effect as any other decision or order of a competent court and shall be enforceable accordingly.

To this court, the catch words are; **"any decision or order" "same force and effect"** as **'any other decision or order of a competent court'** and **"shall be enforceable accordingly"**. This in the view of this court serves to cover situations that may perplex some uncertain mind on the procedure to be followed in respect of the available options at law but not open to this court. The provision in our view is wide. It does not confine the mode of enforcement to be limited to the means available to the surbordinate court only, the IRC being one of them, but opens up even to those means available for purpose of enforcement of orders and judgments in the superior courts. And further in our view this provision operates to act as a link for allowing that enforcement means available at law generally but not specifically provided or covered under the rules applicable in the Industrial Relations Court can be resorted to in times of need.

Like herein, the situation is that if the consent order is still subsisting, then the mist surrounding the procedure to be followed in enforce it at any stage ought to be demystified before the conclusion of the actual application so that the Applicant does not feel helpless in his pursuit of justice but has a way out, which if he or she can show that she deserves what she or he has, can then use as means of satisfying the order of the court.

The above explanation therefore would still leave one with a challenge on how to prepare the documentation in a particular situation, this we state should not be the case as the resort is to rule 16 of the IRC, which simply requires that for any interlocutory applications, one use IRC form 3 to bring such application by notice of motion of course with modifications that allows the motion to make sense.

That said, and perhaps it is proper that by way of deviation from the main issue herein, clarity on the validity of the consent order of 4th August,2020, ought to be made herein before proceeding further. In that regard, the consent order is said to be subsisting because it is yet to be set aside. And at the hearing this application, which had in the alternative an application for stay, it was the courts observation that the Respondents did not dwell on such issue but only of irregularity of the order. As noted therefore counsel did not address us sufficiently and convincingly on this question. And by way of extension that the order has been subsisting since its endorsement by the parties. And all what this court is aware of is that due diligence was had before the court endorsed it just to ensure that the purported signed order had indeed emanated from the Attorney General as the sole constitutionally empowered authority to do so on behalf of government under s.98(2) of the Constitution of this Republic; and further that the Attorney General did appear in person on 2nd November, 2020, and

sought adjournment to give room for further engagement out of court for a possible renewed consent order on mutual terms by the parties. Essentially meaning that he did not even challenge the order or question its validity. And that therefore to state to the court that the said order was invalid and meaningless is indirectly for counsel to shoot himself in the foot as he is himself on delegated duties by the Attorney General. It is also a personal insult to the person holding the position of the Attorney General and the intellect of the court bearing in mind that consent orders are drawn by the parties and not the courts. And that in this particular matter, counsel should know better that the court does not play advisory role to government and its organs but the Attorney General who in fact did confirm the validity of the contents with a copy of the minutes emanating from the office of the Secretary to the President and Cabinet attached. And that, having said this unless a better basis is established and evidence is available, the court will never stand in the way of its own purpose, that is ensuring justice to all, to stop the parties from applying for further pursuit of of justice according to law. However, as the matter stands, such issues in this particular proceedings are therefore now not open for contention as the order was only endorsed by the court upon the party's agreement based on the terms of the offer as suggested to the Applicant by the Office of the President and Cabinet through the Attorney General.

The above said, therefore this court is of the view that only two matters from the Applicants notice of motion are therefore worth consideration. That is those involving the issues raised under points numbered (1) and (3) in the Applicants notice of motion. For point number 2,4 and 5, this court notes that;

1. Point number 2, talks of the Respondents being required to show cause why they should not be committed to prison for willfully failing or refusing to pay the Applicant the sum indicated in the consent order dated 4th August,2020. This point is a complete contradiction in terms from point number 3 which explicitly requires that time be fixed by this court within which the payment be effected. This courts simple question in this regard is that how can you tell a person to explain why he should not be committed to prison for contempt when in the first place you admit that there is no contempt of court proceedings. This alone tells how disorganized the notice of motion was prepared. The Applicant must make one reasonable application at a time or indeed if they are one or more, he should try to put it in such a way that they don't stand to contradict each other.

And so by virtue of the reasoning above this naturally falls off. It was not necessary right from the start.

2. Point number 4, is asking the court that it makes an order giving liberty to the Applicant to apply for committal proceedings should the Respondent fail to pay. This court is of the view that such again should not be the approach. Is the Applicant apprehensive that the Respondent will not pay? How does he arrive at such conclusion?

   We are mindful that though it is true that the Attorney General did produce some documentation to the court on the day the court requested for an update on the suggested out of court settlement, the same was for purpose of showing the court that there was goodwill on the part of the Respondent and that the same has not been shown to have been withdrawn. And it must be put in clear terms that in the view of this court, some documentation produced at the hearing though may create a feeling on the part of the Applicant that conclusion of the matter is not potentially impossible, the same should not form a basis for thinking that one intends to disobey the court order. For to do so is to act on assumptions that are baseless and unfounded. The court implores the Applicant to consider that even if the decision is arrived to pay, there will still be procedure to be followed. And after at all the one to pay may not be the individuals mentioned herein but the particular office assigned to make payments of such nature.

   And perhaps to add that the Applicant ought not to have taken this route, i.e asking the court to grant an order that he be at liberty to bring committal application as naturally that follows if the proper party required to act does not act. This court implores the Applicant not to allow emotions hijack his faculty of reason.

   For the reason given this court sees no justification of making this order and dismisses it as well.

3. That point number 5 asks for an order for costs of this action to be thrown at the Respondent. With due respect this court is of the view that the preliminary objection was not frivolous or vexatious. It somehow tried to raise red flags in the Applicants application. Such as the issues of whether one can be ordered; to show cause why they should not be committed to prison when in the first place there are no such proceedings before the court. And further when no specific time frame was previously set so as to act as a bench mark for forming the idea as to whether there has been compliance or not. This also falls off.

That said, focus can now move to points 1 and 3. Point number 1 in the Applicants notice of motion is contested by the Respondents on the basis that the Industrial Relations Court is a subordinate court and hence does not have jurisdiction to make declaratory orders. This they argue therefore implies that application for the declaratory orders must fall.

Let it be put clear here that in answering to this question this court is not granting the said order. For that would be on another occasion, where parties must make presentations. This the court states so having in mind that such question would require examination of all the relevant facts. For now, the question being answered is that of whether this court has jurisdiction to grant the declaratory order as sought. In short, it is a question of jurisdiction only.

That said, this court also noted that the Respondent brought in issues of jurisdiction and argued that the Industrial Relations Court has no jurisdiction to deal with, try or determine any civil matter seeking any declaratory decree. They premised their argument on s.39(2) of the Courts Act. Their argument on this point was further cemented by their observation that the IRC is a subordinate court. This is true, the IRC is a subordinate court.

However, this court notices that in terms of jurisdiction, counsel did not fully exercise his mind in terms of what s.39(2)(g) meant when it talked of jurisdiction. This for a good three reasons that we will explain now:

Firstly, he failed to realize or consider that the Industrial Relations Court despite being a subordinate court, is a specialized court with its own rules of practice and procedure not applicable to any court. And that further if counsel had properly applied his mind to what the heading to section 39 states, he would have been slow to use that particular provision. For the sake of the discussion, the heading says "***Civil Jurisdiction of Courts of Magistrates***" and not "***Civil Jurisdiction of Subordinate Courts***". This two statements are quite clearly different both in meaning and even in the syntax itself. It is in our view not a mistake that the words are put that way. And obviously the drafters of this statute did not use that heading for this particular provision by mistake but by cognizance of the fact that magistrate's courts though subordinate to the High Court like the IRC, they however are not the same in terms of jurisdiction.

Secondly, while appreciating that at times and it must be mentioned that in rare circumstances, the two courts share the same mode of procedure, the same is not open ended, it is clearly marked, hence the IRC procedural rules only recognize the procedure on appeal in the magistrate court as of equal

applicability in the IRC as provided in rule 27 and equally on dealing with issues of witness allowances for those witnesses summoned by the court as provided in rule 24.

And that said, thirdly he did not revert to look at what the rules of procedure in the IRC state should be done in terms of situations where no specific procedural rules are provided for. The rules do not put it open that in such instances, then one has to resort to the Courts Act. It makes a provision under rule 16. This must however not be understood to mean that the IRC is completely divorced from the provisions of the Courts Act, no. It is a specialized court yes, but since the Courts Act is overarching, it implies that they would be instances where resort to it may be unavoidable but definitely not in the situation obtaining herein.

At this point, this court will fail in its obligation if it does not bring to the attention of counsel, the important provisions on procedure that deals with situations where one finds himself or herself unable to move out of a situation due to procedural constraints when pursuing a matter in the IRC.

Rule 16 of the IRC procedure rules takes care of any interlocutory applications and any matters not covered by the rules. It states as follows;

> *16. Interlocutory applications and matters not covered by these Rules*
>
> *(1) An interlocutory application or other application incidental to any proceedings pending before the Court in respect of which no procedure has been provided for by the Act or by these Rules shall be brought by a party on notice of motion which shall, as near as possible, be in the form set out in IRC Form 3.*
>
> *(2) The applications referred to in sub rule (1) shall be supported by an affidavit:*
>
> *Provided that—*
>
> *(a) applications as to procedural aspects need not be supported by affidavit; and*
>
> *(b) depending on the nature of the application, the Court may dispense with such notice.*

Applications of the nature such as the one before us herein, that is the one dealing with declaratory orders, is basically an interlocutory application that can therefore be brought using the above provisions.

The question of inherent jurisdiction is skipped as it would be an academic exercise having noted that at this point it will not affect any changes to our final position on the ruling.

All said, in conclusion, the only parts of the application that this court allows are point number (1) and point number (3). For the avoidance of doubt this is on declaratory order and on the specified time suffice to state that setting of time will depend on the outcome of the courts view on the hearing of the application for grant of declaratory orders.

Further to this, this court will no longer be seized of this matter any subsequent application emanating from this matter from now on. All incoming applications will be made before my brother deputy chairperson, His Hon. Pemba, who is now in charge of the Registry and who has already been informed.

Ordered in Chambers this 6th day of August,2021 at Area 4, Lilongwe in the Republic.

K Banda

Deputy Chairperson.