

The State (on the application of Dalitso Dawn Chimbe) v The Officer in Charge (Fiscal Police) and Others

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Judicial Review Case Number 8 of 2024
Date of Judgment:	December 11, 2025
Bar:	Mr Alexander Chibayo & Mr Lusungu Mtonga, Counsel for the Claimant Mr Francis MacJessie, Counsel for the 1st, 2nd, 3rd and 4th Defendants (absent) Mr Justin Dzonzi & Ms Musiwa, Counsel for the 5th Defendant

Head Notes

Administrative Law – Judicial Review – Scope of review – Review is concerned with the decision-making process, not the merits of the decision – Application for judicial review dismissed

Criminal Law – Prosecution – Legal practitioner suspected of criminal offence during practice – Proper jurisdiction is Director of Public Prosecutions

Legal Profession - Misconduct - Committing a criminal offence during professional work - Not solely a disciplinary matter for the Malawi Law Society

Administrative Law - Constitutional Duty - Public bodies investigating and prosecuting criminal suspicion - Finding that duty was correctly and appropriately discharged

Civil Procedure - Costs - Considering professional rights and stalled main proceedings - Each party bears its own costs.

Summary

The Claimant, a legal practitioner, sought judicial review in the High Court, Principal Registry, challenging the decisions of the Defendants to arrest, detain, question, or prosecute him. The Claimant contended that the decisions were unlawful, procedurally unfair, and unjustifiable, primarily because the actions stemmed from his commencement of civil proceedings (the Midima Matters) on behalf of clients against the Fifth Defendant, the Registered Trustees of Family Health Services (FHS). These civil claims alleged that FHS had circumcised over 336 minors without the lawful consent of their parents or guardians. The Claimant further challenged the Fiscal Police's demand for confidential attorney-client information and the bail condition prohibiting him from communicating with his clients.

The Fifth Defendant, FHS, had engaged a private investigator after receiving over 312 suspicious claims from the Claimant. The investigation confirmed fraudulent activities and fabrication of evidence, which led FHS to lodge a formal complaint with the Fiscal Police. The First Defendant, Fiscal Police, conducted a thorough, independent investigation, which allegedly established a conspiracy to defraud FHS. The principal

legal questions before the Court were whether the Defendants' decisions were unlawful or procedurally unfair and whether the Claimant's alleged conduct should have been exclusively dealt with as a disciplinary matter by the Malawi Law Society.

The application for judicial review was dismissed. The Court found that the Defendants correctly and appropriately considered and discharged their administrative or constitutional duties. The decisive rationale was that while the Claimant's conduct arose in the course of his legal practice, the facts alleged a criminal offence, conspiracy to defraud, which falls squarely within the purview of the Director of Public Prosecutions, not solely the Malawi Law Society. The Court further held that judicial review concerns the decision-making process, which was found to be sound, as the Fiscal Police launched their investigation only after receiving a credible report and conducting their own thorough checks. Moreover, the claims in the Midima Matters were deemed tainted with illegality (*ex turpi causa non oritur action*) and could not proceed. The Court ordered that the criminal proceedings against the Claimant proceed within 60 days. Considering the professional rights of the Claimant and the public nature of the proceedings, the Court ordered that each party was to bear their own costs.

Legislation Construed

Republican Constitution of Malawi (1994) s 99

Criminal Procedure and Evidence Code (Cap 8:01) s 76

Judgment

1. The Claimant is a legal practitioner operating a law practice under the trade name 'Dawn Patrick's Attorneys.' He commenced judicial review proceedings against the Officer in Charge (Fiscal Police) (1st Defendant); the Regional Prosecutions Officer (2nd Defendant); the Inspector General of Police (3rd Defendant); the Principal Resident Magistrate (Blantyre - Chichiri) (4th Defendant) and the Registered Trustees of Family Health Services (FHS) (formerly, Population Services International [PSI]) (5th Defendant).

2. The Claimant is challenging the Defendants' decisions to arrest, detain, question or prosecute him on the basis that he commenced civil proceedings as a legal practitioner acting on behalf of certain individuals in matters under Civil Causes 1599, 1813 and 1828 of 2023 before the Resident Magistrate sitting at Midima (Midima Matters). The claims were brought against FHS based on alleged circumcision of more than 336 minors without lawful consent of their parents or guardians. The Claimant further states that Fiscal Police's decision to demand and obtain disclosure of confidential information subject to attorney-client privileges is unreasonable. That the Defendants' decision to demand that the Claimant should not communicate with his clients as a condition for his release on bail is unreasonable.

3. The reliefs sought include the following: a declaration that decisions taken by the Defendants were unlawful, procedurally unfair and not justifiable. That such decisions violated the Claimant's constitutional freedoms and rights and an order of compensation in relation thereto. A quashing and prohibition order against the Defendants' decisions to arrest, detain, question or prosecute him and prevent him from communicating with his clients in relation to the Midima Matters. A mandatory order against the Defendants to destroy all the information obtained in the said

matters and costs of this action.

4. During trial the Claimant adopted his witness statement and the following exhibits: **DDC 1** (Registration certificate for Dawn Patrick's Attorneys); **DCC 2** (the High Court Judgment of Madise J. [as he then was] holding that PSI was circumcising minors without parental consent – *Muloza and Another v PSI* Personal Injury Cause Number 339 of 2019); **DDC 3** (Contingent Fee Agreement with some Plaintiffs); **DCC 4, DDC 5** and **DDC 6** (Summons in the Midima Matters); **DDC 7, DCC 8** and **DDC 9** (Defences in the Midima Matters filed by FHS); **DCC 10** and **DDC 11** (FHS request for further and better particulars); **DDC 12** (Charge Sheet for the Claimant's offence – conspiracy to defraud FHS); **DDC 13** (Claimant's bail bond); **DCC 14** (withdrawal of one of the action in the Midima Matters by the Claimants' clients); **DDC 15** and **DCC 16** (news reports on the Midima Matters and the Claimant's arrest) and **DDC 17** (discharge of another Midima Matter by the Claimants' clients).

5. In cross-examination, the witness agreed that it is possible for a legal practitioner to commit a criminal offence in the course of his professional work. He, however, insisted that the same is a disciplinary matter for the Malawi Law Society to determine and probably recommend to the Director of Public Prosecutions to prosecute it. He also stated that the information in the summonses was verified but further scrutiny would take place at the point of filing witness statements. That there was, therefore, no illegality. 6. In re-examination, he maintained that his arrest was unlawful as the Midima Matters were freshly commenced; FHS duly filed their defence and requested for further and better particulars. That their defence did not allege any illegality. That if illegality was discovered later, he would have amended the summonses accordingly.

7. It is important to mention, at this point, that the Attorney General, on behalf of the 1st, 2nd, 3rd and 4th Defendants, duly filed a defence and skeleton arguments. They also entered a notice that they would rely on all the documents filed by FHS.

8. FHS paraded three witnesses. The first was their Chief Executive Officer, Jephta Mtema. He adopted his witness statement and exhibits **JM 1** (Certificate of Registration for PSI); **JM 2** and **JM 3** (World Health Organisation recommendations on male circumcision for HIV prevention); **JM 4** and **JM 5** (Malawi National Strategic Plan for HIV and AIDS 2020 - 2025); **JM 6** (Image of mobile clinic van used by FHS); **JM 7** (Voluntary Medical Male Circumcision [VMMC] Quality of Care Plan); **JM 8** (VMMC Informed Consent Protocol); **JM 9** (Contract with private investigator); **JM 10** and **JM 11** (Court dockets for persons arrested for illegal VMMC); **12 JM, 13 JM, 14 JM** and **15 JM** (Summons for the Midima Matters - over 312 Plaintiffs) and that over 200 Plaintiffs were disowned by the Claimant after further and better particulars were sought - exhibit **JM 16**.

9. In cross-examination, he agreed that FHS is a private entity and it only lodged a complaint following which Fiscal Police conducted their own investigations leading to the arrest of the suspects. That the Midima Matters were not concluded and it was up to the Courts to determine whether the claims were false. He was aware of a High Court Judgment that faulted FHS for conducting circumcision on minors, without consent. That some Midima Matters related to periods before the Judgment, however FHS had revised its procedures long before the Judgment and he would not expect a repeat of unprocedural conduct by FHS members of staff.

10. The second witness in defence was Detective Inspector Vincent Muyawa. He adopted his witness statement and Exhibits **VM 1** to **VM 17**. Exhibit **MV1** was the private investigator's report upon which FHS lodged a complaint to fiscal police over the Midima Matter (exhibited as **VM 2** and **VM 3**). That an independent investigation was launched which included interviews with chiefs: a statement of Village Headman Jimu was exhibited as **VM 4** and that of Village Headman Jamali was exhibited as **VM 5**. Some plaintiffs were not minors as presented in the summonses and there were false claims on guardianship per exhibits **VM 6**, **VM 7**, **VM 9** and **VM 10**. Some plaintiffs were not circumcised at all - exhibit VM 8. That the Contingent Fee Agreement was signed by chiefs without appointment by the plaintiffs per exhibit **VM 11**. That FHS was not using Health Passports (exhibited as VM 14), as claimed by the plaintiffs, but Client Intake Forms, a copy of which was exhibited as VM 12. That some of the suspects were found with lists of the plaintiffs per **VM 13**. Some suspects admitted to obtaining the Health Passports and entering false information therein per **VM 15**. The witness obtained a search warrant (VM 16) and a call log analysis exhibited as VM 17 established various calls amongst the suspects, including the Claimant herein. This culminated in the arrest of the Claimant and the other suspects.

11. In cross-examination, the witness conceded that the Claimant appeared to act as a legal practitioner when he filed the Midima Matters. That the Midima Matters were not concluded and it was up to the Courts to determine falsehood, much as they may be misled. He stated that the private investigator's report identified several suspects, including lawyers. However, the Claimant was arrested as he was believed to have committed the offences. There was no re-examination

12. The last witness, in defence, was Golden Mbeya, the private investigator. He adopted his witness statement and his letter of appointment exhibited as **GJM 1**; copies of summonses for the Midima Matters were exhibited as **GJM 2** and the Contingent Fee Agreement between the Claimant and some Plaintiffs as GJM 3. He conducted the investigations in Mulanje and Phalombe whose details were exhibited as **GJM 4, 5, 6** and **7**. He found fraudulent activities and fabrication of evidence in relation to VMMC championed by FHS and recommended that a formal complaint be lodged with the Police for further investigation against the Claimant and other suspects.

13. In cross-examination, he agreed that his investigation was launched when the Midima Matters were already filed. That the contents of the reports were reported to him through interviews. Such interviews did not include the Claimant as it was not important. There was no re-examination.

14. The legal principles in a judicial review proceeding were aptly summarised by Tembo J. in the case of ***The State and The Deputy Governor of the Reserve Bank of Malawi, Ex Parte NBS Bank Limited*** (Judicial Review Cause No. 91 of 2016 at page 16) as follows:

a) The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.

b) The court in judicial review proceedings does not act as a court of appeal. If the court were to attempt itself the task entrusted to that authority by law, the court would, under the guise of preventing abuse of power, be guilty itself of usurping power. Judicial review looks at the procedure in the decision-making process of the public body.

15. Against these well settled principles, this Court has reviewed the evidence before it including the skeleton arguments and the submissions. It is a finding of this Court that the Defendants correctly and appropriately considered and discharged their administrative or constitutional duties owed to the Claimant, in relation to the Midima Matters. The following are the reasons.

15.1 *Suspicious claims*: FHS received over 312 claims filed by the Claimant in the Midima Matters. The claims were based on circumcision of minors without their parents'/guardians' consent. This was certainly suspicious and FHS was within its rights to address the situation;

15.2 *Private investigation*: FHS did not rush into reporting the matter to Police but engaged the services of a private investigator. The investigation confirmed fraudulent activities allegedly perpetrated by the Claimant and others. A recommendation was, therefore, made that the suspects be reported to police which FHS duly did;

15.3 *Investigations and Arrest by Fiscal Police*: as the detailed evidence of Detective Inspector Vincent Muyawa establishes, Fiscal Police did not just arrest the Claimant and others: they only did so following thorough investigations. They allege that the

Claimant conspired with others to defraud FHS which are criminal matters that must be tried;

15.4 *Prosecution of the Claimant*: this Court does not agree with the Claimant's assertion that these are disciplinary matters that ought to have been solely dealt with by the Malawi Law Society. The present facts show that the Claimant is suspected of committing criminal offences in the course of his practice, as a legal practitioner. Such offences are a purview of the Director of Public Prosecutions or his delegate - see section 99 of the Republican Constitution of Malawi (1994); section 76 of the Criminal Procedure and Evidence Code Cap 8:01 of the Laws of Malawi and the case of Director of *Public Prosecutions v Norman Chisale and Others* Constitutional Reference Number 1 of 2021. That said, Malawi Law Society is not precluded from conducting its own disciplinary processes in accordance with the law;

15.5 *Ex turpi causa non oritur action*: meaning that 'action does not arise from a dishonourable cause,' this Court concludes that the Midima Matters, in their present form, cannot proceed as they are tainted with illegality which is subject to criminal proceedings. The Claimant should, therefore, be heard in the said criminal proceedings.

16. Counsel Chibayo for the Claimant raised various issues in his submissions such as whether the 5th Defendant was a proper party to the proceedings; whether the evidence of Golden Mbeya is admissible and whether the statements of third parties not called as witnesses in these proceedings are admissible. This Court has considered them all and is not persuaded by them.

17. All in all, having found that the Defendants correctly and appropriately considered and discharged their administrative or constitutional duties, the judicial review proceedings herein must fail and are hereby dismissed. The criminal proceedings shall proceed within 60 days from the date hereof.

18. Considering the circumstances of the case; the professional rights of the Claimant; that the main proceedings have stalled in the Court below and the public nature of all the attendant proceedings, each party shall bear their own costs of this action. It is so ordered.

Made in Open Court this 11th day of December, 2025.