



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
CIVIL DIVISION  
ZOMBA DISTRICT RESISTRY

CONSTITUTIONAL CAUSE NUMBER 1 OF 2023

(Before Honourable Justices *T. Masoamphambe, D. Sankhulani and P. Chirwa*)

BETWEEN:

ABDUL KARIM BATATAWALA.....1<sup>ST</sup> CLAIMANT

ELVIS THODI.....2<sup>ND</sup> CLAIMANT

-AND-

THE DIRECTOR OF ANTI CORRUPTION BUREAU.....1<sup>ST</sup> DEFENDANT

ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT

CORAM: HONOURABLE JUSTICE TEXIOUS MASOAMPHAMBE

HONOURABLE JUSTICE DICK SANKHULANI

HONOURABLE JUSTICE PATRICK CHIRWA

Honourable Thabo Chakaka Nyirenda, The Attorney General

Mr Ndoli Chiume-Attorney General's Chambers

Ms. Martha Chizuma, Director General, Anti-Corruption Bureau

Mr. Imran Saidi, Chief Prosecutor, Anti-Corruption Bureau

M/s Tamando Chokhotho and Fostino Maele, for the Claimants

Linda Chirambo Mboga, Court Reporter  
Gloria Amosi, Court Reporter  
Womaliza Twea, Official Court Interpreter

**Summary of Important Dates**

---

**Certification:** 11<sup>th</sup> April, 2023

**Scheduling Conference:** 2<sup>nd</sup> February, 2024

**Hearing:** 20<sup>th</sup> February, 2024

**Judgment:** 10<sup>th</sup> April, 2024

---

**JUDGMENT**

**Introduction and Background**

- [1] At the outset, we wish to point out that this is a unanimous decision of members of the panel.
- [2] The Claimants, in this matter, are answering various charges in a criminal matter that is before the Principal Resident Magistrate (PRM) sitting at Blantyre. Among the charges are offences of money laundering contrary to section 42(1)(c) of the Financial Crimes Act (FCA). The criminal matter was commenced in the court of the said PRM in the year 2021.
- [3] The money laundering offences are alleged to have been committed during the period between the years 2010 and 2012, as particularized in the relevant counts. The Claimants pleaded not guilty to all the charges against them, including the ones relating to money laundering. Following the pleas of not guilty, the 1<sup>st</sup> Defendant, the Anti-Corruption Bureau (ACB), started parading witnesses in the case.
- [4] After they had paraded 8 witnesses, the Claimants raised an objection to the further proceeding of the case, in respect of the money laundering counts. The Claimants argued that the 1<sup>st</sup> Defendant had applied the provisions of the FCA retrospectively, that Act having been enacted in the year 2017, years after the alleged commission of the offences charged.

[5] On the same basis, the Claimants proceeded to make an application before the PRM for the matter to be referred to the Honourable the Chief Justice for certification as a constitutional matter. The application was granted, and consequently, the matter was referred to the Honourable the Chief Justice under Order 19 rules 3 and 7 of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR). The Honourable the Chief Justice, on 11<sup>th</sup> April 2023, certified the matter as a constitutional one. The referral had one question, namely: *whether charging the Claimants with offences of money laundering under the FCA for acts that are alleged to have occurred before the Act came into force amounted to a retrospective application of the FCA and therefore a violation of the Claimants' right to a fair trial as guaranteed under Section 42(2)(f)(vi) of the Constitution of the Republic of Malawi (the Constitution).*

[6] The matter was assigned to this Court for determination. On 2<sup>nd</sup> February 2024, a scheduling conference was held where this Court issued directions on the further conduct of the matter. The Claimants filed summons on 9<sup>th</sup> February 2024, seeking two reliefs as follows:

1. A determination whether charging the Claimants before the PRM's court with offence of money laundering under Section 42(1)(c) of the FCA for acts that are alleged to have happened between the years 2010 and 2012, before that Act came into force, amounts to retrospective application of the FCA and a violation of the Claimant's right to a fair trial as guaranteed under Section 42(2)(f)(vi) of the Constitution; and
2. A declaration that the charges against the Claimants in the PRM's court for offences of money laundering under Section 42(2)(c) of the FCA for acts that are alleged to have happened between the years 2010 and 2012, before that Act came into force, amounts to retrospective application of the FCA and are a violation of the Claimant's right to a fair trial as guaranteed under Section 42(2)(f)(vi) of the Constitution and are, therefore, void.

[7] In their statement of case, the Claimants stated as follows:

1. *The 1<sup>st</sup> and 2<sup>nd</sup> Claimants are citizens of the Republic of Malawi.*
2. *The 1<sup>st</sup> Defendant is the Prosecutor in the Principal Resident Magistrate Court sitting at Blantyre Criminal Case number 1152 of 2021 in which the 1<sup>st</sup> and 2<sup>nd</sup> Claimant stand charged, and; the 2<sup>nd</sup> Defendant is a necessary party to this matter, being a Constitutional cause.*

3. Both the 1<sup>st</sup> and 2<sup>nd</sup> Claimant stand charged in the Principal Resident Magistrate Court sitting at Blantyre Criminal Case number 1152 of 2021 with, among other offences, Money Laundering contrary to section 42(1)(c) of the Financial Crimes Act in the 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> counts on the charge sheet.
4. The particulars of the offence on the charge sheet allege that the offences were committed between the years 2010 and 2012.
5. The Financial Crimes Act came into force on 17<sup>th</sup> February 2017, after the dates of the alleged offences.
6. The Financial Crimes Act repealed the Money Laundering, Proceeds of Serious Crime Terrorist Financing Act (MLA) that was in force at the time of the alleged offences.
7. The Financial Crimes Act did not save offences under the Money Laundering, proceeds of Serious Crimes and Terrorist Financing Act.
8. In the alternative and without prejudice to paragraph 6 above, the offence of money laundering under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act is fundamentally different from the offence of Money Laundering under the Financial Crimes Act such that the offence of money laundering under the Financial Crimes Act did not exist at the alleged time of the offences in 2010 to 2012.
9. Further paragraphs 5,6 and 7 above, the punishment for money laundering under the Financial Crimes Act is far more severe being imprisonment for life; as opposed to the maximum 10 years' imprisonment under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act.
10. Charging the Claimants in the Principal Resident Magistrate Court sitting at Blantyre Criminal Case Number 1152 if 2021 for offences of money laundering under section 42(1)(c) of the Financial Crimes Act for acts that are alleged to have happened between the years 2010 and 2012, before the Act came into force therefore amounts to retrospective application of the Financial Crimes Act and are a violation of the Claimant's right to a fair trial as guaranteed under Section 42(2)(f)(vi) of the Constitution and are therefore void.

[8] The Defendants oppose the claim. The 1<sup>st</sup> Defendant, in opposition, states as follows:

1. *The 1<sup>st</sup> Defendant refers to paragraphs 1,2 and 3 of the Claimants' Statement of Case and admits the contents therein.*
2. *The 1<sup>st</sup> Defendant refers to paragraphs 4,5 and 6 of the Claimants' Statement of Case and admits the contents therein.*
3. *The 1<sup>st</sup> Defendant refers to paragraph 7 of the Claimants' Statement of Case and denies the contents therein and puts the Claimants to strict proof thereof. The 1<sup>st</sup> Defendant further states that the Financial Crimes Act under Section 141(2) did save offences under the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act and aptly took care of the concerns being alleged by the Claimants in this matter.*
4. *The 1<sup>st</sup> Defendant refers to paragraph 8 of the Claimants' Statement of Claim and denies the contents therein. The offences under Financial Crimes Act are not different at all from the offences under the Money Laundering, proceeds of Serious Crime and Terrorist Financing Act in both substance and objective. The offences in the former were just imported into the Financial Crimes Act and the elements required to prove their commission are the same.*
5. *The 1<sup>st</sup> Defendant refers to paragraph 9 of the Claimants' Statement of Claim and states that the slight difference in the penalty cannot be used to abrogate the offences and this can easily be cured during sentencing.*

[9] In paragraph 6, the 1<sup>st</sup> Defendant denies the claims by the Claimants. And in paragraph 7, the 1<sup>st</sup> Defendant denies each and every allegation of fact (save those admitted) as if the same were traversed *seriatim*.

[10] The 2<sup>nd</sup> Defendant, in opposition, states as follows:

1. *The 2<sup>nd</sup> Defendant refers to paragraphs 1,2 and 3 of the Claimants' Statement of Case and makes no comment on the contents therein.*
2. *The 2<sup>nd</sup> Defendant refers to paragraphs 4,5 and 6 of the Claimants' Statement of Case and admits the contents therein.*
3. *The 2<sup>nd</sup> Defendant refers to paragraph 7 of the Claimants' Statement of Case and denies the contents therein and puts the Claimants to strict proof. The 2<sup>nd</sup> Defendant further states though the Money Laundering, Proceeds of Serious Crime and Terrorist*

*Financing Act was repealed by the Financial Crimes Act, the offences that the Claimants were charged with and are still facing are fully covered under the Financial Crimes Act.*

4. *The 2<sup>d</sup> Defendant refers to paragraph 8 of the Claimants' Statement of Case and denies the contents therein. The offence of Money Laundering existed under the Financial Crimes Act and the said provision of the offence is under Section 42 of the Financial Crimes Act.*
5. *The 2<sup>d</sup> Defendant refers to paragraph 9 of the Claimants' Statement of case and denies the contents therein and makes no comment on the content therein.*
6. *The 2<sup>d</sup> Defendant refers to paragraph 10 of the Claimants' Statement of Case and denies the contents therein. The Claimants are being charged with offences that were in the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act and were not repealed by the Financial Crimes Act, as such the 1<sup>st</sup> Defendant's actions to charge the Claimants under Section 42 of the Financial Crimes Act does not amount to them applying the law retrospectively and it does not in any way violate the Claimants' right to fair trial.*
7. *The 2<sup>d</sup> Defendant refers to paragraph 11 of the Claimants' Statement of Case and denies the contents therein. The 2<sup>d</sup> Defendant further states that there has been no violation of the Claimants' rights to a fair trial and further denies that the Financial Crimes Act was used retrospectively when charging the Claimants.*

[11] In paragraph 8, the 2<sup>nd</sup> Defendant denies the claims by the Claimants and in paragraph 9 he denies each and every allegation of fact (save those admitted) as if the same were traversed *seriatim*.

### **Skeleton Arguments**

[12] Each party filed skeleton arguments which they later adopted during the hearing of the matter.

#### ***The Claimants***

[13] The main argument advanced by the Claimants is that the charge of money laundering under section 42 (1) (c) the FCA is unconstitutional in that it was non-existent at the time it was alleged to have been committed and it prescribes a heavier sentence than the one applicable at the time the

offence was allegedly committed. They rely, as the basis for this argument, on section 42(2)(f)(vi) of the Constitution, which we shall later reproduce.

[14] It is the Claimants' argument that while the FCA came into force on the 17<sup>th</sup> February 2017, the particulars of the charge allege that the offences occurred between 2010 and 2012, which is a period prior to the coming into force of the FCA. They contend that the prosecution cannot, therefore, proffer a charge under the FCA when the Act was non-existent in 2010 and 2012, unless such offences were saved by the FCA.

[15] The Claimants referred this Court to section 141 of the FCA and called upon us to note that the FCA does not save offences under the repealed Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (MLA), but only saves acts done in accordance with the said Act. In buttressing that argument, they compared the scenario with the saving provisions under section 2 of the Penal Code where some offences are specifically saved. They also referred this Court to section 14(2)(e) of the General Interpretation Act (GIA), which is a saving clause in instances where there is a repeal in whole or in part to a written law. They argue that in view of the said provisions, it would have been redundant for the FCA to save the offences when they are already effectively saved by law. They further submit that the provision also highlights the error of charging the accused with an offence that was non-existent at the alleged time of the offence when in fact they could have been charged under the law applicable at the time of the offence.

[16] The Claimants further argue that although money laundering was an offence under the MLA there are still some fundamental differences between the money laundering offence in the FCA and the one in the MLA. They contend that the offence of money laundering in its current form was not existent at the alleged times of the offences herein. They argue that under the MLA, the provisions were geared mainly against preventing the assistance by the offender to another person in cleaning proceeds of a crime, whereas, under the FCA, any handling of proceeds of a crime, whether by the principal offender or by others is termed money laundering.

[17] They, then, referred this Court to the case of **Republic v Oswald Lutepo, Criminal Cause Number 2 of 2014**, especially paragraphs 24-35. It is their submission that while they agree with the words of the Honourable Judge, in that case, on most aspects, they do not agree with the him that the FCA saves offences under the MLA. They note that the court in that case concentrated on the

phrase '*anything done*' and inadvertently overlooked the phrase '*in accordance with*' which, according to the Claimants, makes a big difference. They argue that offences are committed contrary to an Act and not in accordance with the Act. They argue that procedural aspects in criminal law that do not constitute the prosecution of the case itself or punishment, may be applied retrospectively. They cite the case of **Phillips v Director of Prosecutions (Witwatersrand Local Division) 2003 (3) SA 345** which dealt with confiscation orders just as in the **Lutepo Case (supra)**.

[18] They argue that according to the Judge in the **Lutepo Case**, the Legislature did not offer any guidance in respect of how retrospective application of the law may be exercised in situations where the new provision is partially similar to the repealed provision, and the sentence in the new provision has been enhanced. They submit that the learned Judge suggested that if the new provision creating the offence, and sentence are different from the repealed provisions such that it cannot be said to be the same offence and sentence as before, it would be wrong to commence any criminal proceedings under the new law for offences occurring before the commencement of the Act.

[19] They, therefore, submit, in sum, that in the present matter it is unconstitutional and therefore void to charge the Claimants under the FCA for alleged offences that were committed before the Act came into force. Consequently, so they argue, charging the accused under section 42(1)(c) of the FCA for offences allegedly committed between 2010 and 2012 is unconstitutional, and the charges are, therefore, void.

#### ***1<sup>st</sup> Defendant***

[20] At the very outset, the 1<sup>st</sup> Defendant refers this Court to section 141 (1) and (2) of the FCA and argues that, by virtue of this provision, money laundering criminal acts under the previous regime of the MLA can be charged under the FCA as the section clearly reads. The 1<sup>st</sup> Defendant referred this Court to paragraph 22 of the decision in the **Lutepo Case (supra)** where the learned Judge highlighted the importance of noting that the filing of the application for confiscation of property and the resulting pecuniary penalty were a step which was made under the MLA but which in terms of section 141(2) of the FCA, were to be treated as if it had been made pursuant to the FCA.

[21] The 1<sup>st</sup> Defendant called this Court's attention to the citation by the Judge, in **Lutepo Case (supra)**, of the cases of **Lenson Mwalwanda v Stanbic Bank [2007] MLR 198 (HC)** and **Stanbic Bank**

**Limited v Mwalwanda [2008] MLR 361 (SCA)**, both of which are to the effect that the law in Malawi is settled that a statute shall not be interpreted to have retrospective operation unless such construction appears very clearly in the terms of such statute, or it arises by necessary and distinct implication.

[22] The 1<sup>st</sup> Defendant, therefore, submits that the position on retrospective application of statutes in Malawi is settled. The 1<sup>st</sup> Defendant goes on to argue that the FCA clearly states, in section 141 (2) thereof, the intention of Parliament is that it should be retrospective in nature, and that as such the facts that gave rise to money laundering offences under the previous MLA Act can be deemed to have arisen under the FCA. The 1<sup>st</sup> Defendant submits that the Claimants were therefore rightly charged.

[23] The 1<sup>st</sup> Defendant also drew this Court's attention to section 35 (1) of the **MLA** and section 42 (1) (c) of the FCA and argues that, save for the sentence, the offences in the **MLA** were simply imported into the FCA and that they were in the same form and substance in as far as the requirements to prove their commission is concerned.

[24] The 1<sup>st</sup> Defendant, then, proceeded to answer the question whether there was a breach of the Claimants' constitutional rights. It was the 1<sup>st</sup> Defendant's submission that section 42(2)(f)(vi) of the Constitution envisaged that an individual could not be convicted for an act or omission that was not recognized as an offence at the time it occurred, or if there was no legal prohibition against it enacted by an Act of Parliament. It was further contended that that principle does not apply to the current case, as money laundering was already declared illegal in 2006 with the passing into law of the **MLA**. Consequently, any illegal acts of money laundering said to have occurred between 2010 and 2012 were already offences not strange to the law.

[25] On the issue of whether the Claimants' constitutional right under the second limb of section 42 (2) (f) (vi) of the Constitution, namely, the right not to be sentenced to a more severe punishment than that which was previously applicable, was violated, the 1<sup>st</sup> Defendant argued that that concern is currently irrelevant and that the same would be addressed during submissions for sentencing should the Claimants get convicted.

In conclusion, the 1<sup>st</sup> Defendant prays that this Court should dismiss the claims with costs.

## ***2<sup>nd</sup> Defendant***

[26] The 2<sup>nd</sup> Defendant refers this Court to section 42(2)(f)(vi) of the Constitution on which the Claimants rely. He contends that the provision does not make reference to the charging of an accused person, but rather the conviction of an accused for an offence. The 2<sup>nd</sup> defendant submits that the Legislature deliberately left out the use of the word '*charge*' deferring it to the trial court to satisfy itself whether the act or omission, subject of the charge, was not criminalized at the time it was done or omitted to be done. He submits that the Claimants have not proven that they have been convicted of an offence in respect of any act or omission which was not an offence at the time when the act was done or omitted to be done.

[27] The 2<sup>nd</sup> Defendant goes on to argue that the use of the clause '*not to be sentenced to a more severe punishment than that which was applicable when the offence was committed*', shows that certain criminal conduct could attract a more severe punishment than was provided before. He observes that the Legislature was forward looking, which means that if convicted, the Claimants would not be subjected to punishment of more than 10 years and that if they are sentenced to more than 10 years, they would have a right to complain to the court. He argues that this Court cannot be called upon to add new elements of the right to fair trial under section 42(2)(f)(vi) of the Constitution. That task should be left to the Legislature, so he argues. He further argues that it is a general rule of interpretation that a Legislature does not employ unnecessary words in its legislative text, and hence every word should normally be seen as having significance. He cites, among cases, the case of **Auchterarder Presbytery v Earl of Kinnoul (1839) Maclean & Robinson 220** as an authority for this assertion.

[28] The 2<sup>nd</sup> Defendant further argues that the Claimants have simply flagged out the provisions of the constitution without analysing and substantiating them and the applicable laws as guided in the case of **The State v The Minister of Finance and Governor of Reserve Bank of Malawi ex parte Golden Forex Bureau Ltd and 13 others, Civil Cause Number 16 of 2007, HC, PR**, (unreported). He submits that the Claimants have failed to demonstrate to the court that the crimes they are being accused of under the FCA are different from the offences under the MLA in substance and objective. He submits that the Claimants' right to a fair trial has, in no way, been violated by the actions of the 1<sup>st</sup> Defendant, and that the charges that the Claimants currently face do not contravene the Constitution.

[29] He argues that for there to be a valid case premised on violation of section 42(2)(f)(vi) of the Constitution, the following elements ought to exist:

- (a) That the Claimants were convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done; and
- (b) That the Claimants had been sentenced to a more severe punishment than that which was applicable when the offence was committed.

[30] It is his argument that none of the above elements exist in the present case, as the Claimants have neither been convicted of any offences for conduct which was not previously an offence, nor have they been sentenced to a more severe punishment than that which was applicable when the offence was committed. He adds that the Claimants have sued for what might happen in future as opposed to what has already happened. In other words, there is presently no reasonable cause of action, though there could be a cause of action in future. He invited this Court to have recourse to the cases of **James Phiri v Dr Bakili Muluzi and Another (Constitutional Case No. 1 of 2008)** and **The Registered Trustees of the Women and Law (Malawi) Research and Education Trust v The Attorney General, Constitutional Case number 3 of 2009** (High Court of Malawi), to buttress his argument that the Claimants by bringing this matter to the court when there is no reasonable cause of action are merely seeking the court's advisory opinion by merely raising abstract, hypothetical, moot, academic and contingent questions.

[31] Coming to the statutory provision in issue, the 2<sup>nd</sup> Defendant calls this Court's attention to section 35 (1)(c) of the MLA and section 42(1) of the FCA, and argues that the Claimants' claim that the provision in the repealed MLA is fundamentally different from the one introduced by the FCA, is a baseless claim, and does not support the argument that the 1<sup>st</sup> Defendant acted retrospectively in applying the FCA in charging the Claimants. He submits that the offences in the MLA were just imported into the FCA and are in the same form and substance as evidenced by the language and even elements, which are required to prove their commission.

[32] He also draws the attention of this Court to section 141(2) of the FCA and the decision of the court in the **Lutepo Case (supra)**. He goes on to say that according to the decision in that case, section 141 of the FCA distinguishes the FCA from the MLA, in that it, specifically, connects the two Acts. The 2<sup>nd</sup> Defendant went on to invite this Court to the Kenyan decision in **Overseas Private**

**Investment Corporation & 2 others v Attorney General [2013] Eklr Petition No. 319 of 2012** (unreported), which was also cited in the **Lutepo Case (supra)**. That case, so he argues, also supports his position.

[33] Counsel also refers this Court to section 14 of the GIA. He contends that the repeal of the MLA by the FCA cannot, on the strength of Section 14(2)(e) of the GIA, affect the criminal proceedings before the PRM's court.

[34] The 2<sup>nd</sup> Defendant argues, in sum, that there is no reasonable cause of action and that the Claimants are just employing delaying tactics and a *Stalingrad* defence to the criminal proceedings before the PRM. He concluded by praying that this Court should dismiss the declarations sought by the Claimants.

### **Issues for Determination**

#### **Commencement**

[35] The 2<sup>nd</sup> Defendant introduced multiple issues on procedural aspects of the present proceedings. Key among them was the issue of commencement, which we will deal with summarily. He argued that the matter was wrongly brought before this Court on a summons, because the Claimants failed to comply with section 4 of the Civil Procedure (Suits by and against the Government and Public Officers) Act, which states that:

No suit shall be instituted against the Government, or against any public officer until the expiration of three months next after notice in writing has been, in the case of the Government, delivered to or left at his office, stating the cause of action, name, description and place of residence of the plaintiff and the relief which he claims.

[36] While we agree with the 2<sup>nd</sup> Defendant that this is the position of the law, we are of the view that this is a constitutional referral made by a Magistrate and therefore captured under Order 19 Rule 3(3) of the CPR which states as follows:

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.

[37] Order 19 Rule 7(1) provides as follows:

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.

[38] Therefore, for a referral made by a Magistrate as in the instant case, the submitting of the referral in Form 20 suffices as commencement. So, in our most-considered opinion, there was no need, in the present case, for the Claimants to file a summons under Order 5 of the CPR. Consequently, there was no need to comply with the requirements of Section 4 of the Civil Procedure (Suits by or Against the Government and Public Officers). In as far as the Attorney General is concerned, Order 19(8) of the CPR provides that:

Every process under this part shall be served on the Attorney General whether or not the Attorney General is party to the proceeding.

[39] We are of the firm view that the service described in Rule 8 above precludes the need for a 90-days' notice. The Attorney General, who in this case, is the 2<sup>nd</sup> Defendant, appears in these proceedings, as custodian of the Constitution. Accordingly, we find no fault with the manner the matter was commenced. As long as the referral herein took the form prescribed in Form 20 and the process was served upon the Attorney General, which we find to have been the case, there was nothing more to be done apart from filing and serving the submissions for hearing of the referral. We, therefore, dismiss the 2<sup>nd</sup> Defendant's argument in this regard.

[40] We have not bothered to delve into the other issues the 2<sup>nd</sup> Defendant brought. We believe they are in the nature of preliminary objections. We had given the parties time to file preliminary objections so that they could be heard before the hearing of the substantive matter. As it happened, none filed any objections. Therefore, the 2<sup>nd</sup> Defendant cannot bring preliminary objections through the back door. We find this approach problematic.

### Determination

[41] The following is the issue for this Court's determination:

Whether the charging of the Claimants in the Principal Resident Magistrate Court at Blantyre in **Criminal Case Number 1152 of 2021** with offences of money laundering under section 42(1) (c) of the FCA for acts which were allegedly committed between 2010 and 2012 before the Act came into force amounts to retrospective application and a violation of the Claimants' right to a fair trial as guaranteed under section 42(2)(f)(iv) of the Constitution.

***The provisions in issue***

**Section 35 (1) of the MLA (Repealed)**

[42] This section provided as follows:

- (1) *A person commits the offence of money laundering if the person knowing, or having reason to believe that any property in whole or in part directly represents any persons proceeds of crime-*
- (a) *Converts or transfers property knowing or having reason to believe that property is the proceeds of crime, with the aim of concealing or disguising the illicit origin of that property, or if aiding any person involved in the commission of an offence to evade the legal consequences thereof,*
- (b) *Conceals or disguises the true nature, origin, location, disposition, movement or ownership of that property knowing or having reason to believe that the property is the proceeds of crime,*
- (c) *Acquires, possesses or uses that property, knowing or having reason to believe that it is derived, directly or indirectly, from proceeds of crime,*
- (d) *Participates in, associates with or conspires to commit, attempts to commit and aids, abets, facilitates the commission of any or omission referred to in paragraph (a), (b) or (c).*
- (2) *For purpose of proving of the money laundering offence under sub-section (1), it is not necessary that the serious crime be committed.*
- (3) *A person who contravenes this section commits an offence and shall, on conviction, be liable-*

(a) in the case of a natural person, to imprisonment for ten years and, to a fine of K2,000,000, and

(b) in the case of a corporation, a fine of K10,000,000 and loss of business authority.

### **Section 42 of the FCA**

[43] It provides as follows:

*"(1) A person who, knowingly or who has reasonable grounds to believe that any property, including his own property, in whole or in part, directly or indirectly, represents proceeds of a predicate offence—*

*(a) converts or transfers property with the aim of concealing or disguising the illicit origin of that property, or of aiding any person, including himself, involved in the commission of the offence to evade the legal consequences thereof;*

*(b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property;*

*(c) acquires, possesses or uses that property; or*

*(d) participates in, associates with or conspires to commit, attempts to commit and aids, abets and facilitates the commission of any act or omission referred to in paragraphs (a), (b) or (c), commits an offence.*

*(2) For purposes of proving an offence under subsection (1), it is not necessary that the predicate offence be committed.*

*(3) A person who commits an offence under this section shall, on conviction be liable—*

*(a) In the case of a natural person, to imprisonment for life.*

*(b) In the case of a legal person, a fine of K500,000,000 and revocation of a business licence.*

### **Section 141 of the FCA**

[44] The section provides as follows:

*"(1) Subject to subsection (2), the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act is hereby repealed.*

*(2) Anything done **in accordance** with the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act repealed under subsection (1), prior to the commencement of this Act and which may be done **in accordance** with this Act, shall be deemed to have been done **in accordance** with this Act.*

*(3) Any subsidiary legislation made or deemed to have been made under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act repealed under subsection (1) in force immediately before the commencement of this Act-*

*(a) shall remain in force, unless in conflict with this Act, and shall be deemed to be subsidiary legislation made under this Act; and*

*(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.*

*(4) All contracts awarded by the Financial Intelligence Unit under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act repealed by subsection (1), prior to the commencement of this Act, shall be deemed to be contracts awarded by the Authority in accordance with this Act.*

#### Section 42(2)(f)(vi) of the Constitution

[45] The Constitutional provision is as follows:

*"42. (2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—*

*(f) as an accused person, to a fair trial, which shall include the right—*

*(vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe sentence than that which was applicable when the offence was committed.*

#### Section 5 of the Constitution

[46] The provision is as follows:

*Any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.*

### **Discussion and Findings**

[47] The question that is before us will be approached at 2 levels. At the first level we undertake to answer a temporal law question of whether the charging of the Claimants with offences of money laundering under section 42(1)(c) of the FCA for acts which were allegedly committed between 2010 and 2012 before the Act came into force amounts to retrospective application of the provisions of the FCA. At the second level, we will answer the question as to whether such charging of the Claimants amounts to a violation of their right to a fair trial as guaranteed under section 42 (2)(f)(vi) of the Constitution.

#### **“Retrospective” versus “Retroactive”**

[48] We note that during the hearing of the application and in some instances in the skeleton arguments, the parties tended to use the terms “retrospective” and “retroactive” interchangeably. This is a potential source of confusion. We wish to point out, at the outset, that the two terms are different, though the actual differentiating line is but very thin. The former term, which is relevant to the present case, is employed to refer to the temporal application of a statute or any of its provisions, while the latter term with which the former has often been confused, is used to refer to the temporal operation of a statute or any of its provisions. By temporal operation we mean the period during which the provisions of a statute legally become effective thus from the time the statute comes into force to the time it is repealed or expires. By temporal application, on the other hand, we mean the range of facts or events to which the statute or any of its provisions may appropriately be applied.

[49] The distinction, therefore, between the terms “retrospective” and “retroactive” is clear. In the case of **West v. Gwynne [1911] 2 Ch. 1 at 11-12 (C.A.)**, Buckley J said the following:

*During the argument the words “retrospective” and “retroactive” have been repeatedly used, and the question has been stated to be whether s. 3 of the Conveyancing Act, 1892 is retrospective. To my mind the question is not whether the section is retrospective.*

*Retrospective operation is one matter. Interference with existing rights is another. If an act provides that as of a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely leases executed after the passing of the Act.*

[50] A leading authority in the area of construction of statutes, Elmer Driedger said the following on the distinction:

*A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.<sup>1</sup>*

[51] We shall therefore discuss the issue before us with this clear distinction in mind. We will not be unnecessarily elongated upon this point.

#### The rule against retrospective application of a statute.

[52] Another authoritative scholar in the area of statutory interpretation, Maxwell proposes the following:

*Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation... They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not*

---

<sup>1</sup> E.A. Driedger, 'Statutes: Retroactive, Retrospective Reflections' (1978) 56 Can Bar Rev. 264 at 268-69.

*to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. But if the language is plainly retrospective it must be so interpreted.<sup>2</sup>*

[53] The English case of **Carson v Carson [1964] 1 W.L.R 512** applies and hoists these views of Maxwell to a status of authority. Scarman J said the following on page 516:

*I begin my consideration of the question by a reference to a passage in Maxwell...which has been so frequently quoted with approval that it now itself enjoys almost judicial authority..*

The learned Judge also made the following important remark:

*The rule against the retrospective effect of a statute is not a rigid or inflexible rule but one to be applied always in the light of the language of the statute and the subject matter with which the statute is dealing.*

[54] Here in Malawi the rule has also enjoyed recognition in a number of cases. Key among these is the case of **Lenson Mwalwanda v Stanbic Bank Limited [2007] MLR 198 (HC)** where Honourable Mzikamanda J (as he then was) said as follows:

*I must say that the law is indeed settled that a statute shall not be construed to have retrospective operation unless such construction appears very clearly in the terms of the statute or arises by necessary and distinct implication. The rule against retrospectivity of statutes is not rigid or inflexible. This means that therefore that there will be situations where a law or a statute may be construed to have retrospective operation. That a statute or a law may have retrospective effect is not a rule but an exception to the general rule. Being an exception to the general rule therefore there must be clear terms on retrospectivity, or it must arise by necessary or distinct implication.*

---

<sup>2</sup> P.B. Maxwell 'On the Interpretation of Statutes' 2<sup>nd</sup> Ed. (1883) London at 257

[55] This position was later affirmed by the Supreme Court in **Stanbic Bank Limited v Mwalwanda [2008] MLR 361** where Tambala JA said:

*'We agree with the learned Judge in the Court below and we are satisfied that he correctly stated the law on the retrospectivity of a statute or law.'*

[56] It has also been applied in latter cases such as the **Lutepo** case (supra), and **Director of Public Prosecutions v Norman Paul Chisale and others Constitutional Reference Number 01 of 2021**.

[57] It is therefore very clear to us from the preceding authorities that in as far as temporal application of statutes in Malawi is concerned, the rule is that a statute shall not operate retrospectively unless the same appears clearly in the terms of the statute itself or arises by necessary and distinct implication.

#### Has the rule against retrospectivity been contravened with respect to the FCA?

[58] The FCA came into force on 17<sup>th</sup> February 2017. It repealed the MLA. It is common ground that the Claimants were charged before the PRM with offences of money laundering under the FCA. However, the offences they were charged with are alleged to have been committed in between the years 2010 and 2012, before the FCA came into force. It is the contention of the Claimants that the State are thereby contravening the rule against retrospectivity of statutes.

[59] It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's argument in opposition that the charging of the Claimants under the FCA for offences which occurred in 2010 and 2012 is exempted from the rule against retrospectivity by operation of section 141(2) of the FCA. They seem to be suggesting, and inviting this Court to agree with them, that that provision is an express license for the retrospective charging of accused persons under the FCA. We, respectfully, disagree. The provision is not about retrospective charging of accused persons for offences committed before the Act came into force. We accept the argument by the Claimants that Section 141(2) does not save offences committed prior to the enactment of the FCA. The actual wording of the provision is clear in this regard. The provision's key phrase is 'anything done in accordance with the [MLA]...'. It is our view that an offence can never be committed in accordance with an Act of Parliament. It can only be committed contrary to an Act of Parliament. It would, therefore, be absurd and inconceivable to conclude that Parliament intended Section 141(2) to save offences. The clear terms of the provision, in our view relate to actions undertaken by parties to a case under the MLA being allowed to proceed as if they

had been undertaken in accordance with the FCA. These actions may include investigation, charging, prosecution, forfeiture proceedings, action challenging forfeiture proceedings, and the like.

[60] In the **Lutepo** case, Honourable Kapindu J, had the following to say about the provision:

*The effect of section 141(2) of the FCA is that any type of legal process commenced under the MLA which could be commenced under the FCA must be deemed to have been commenced under the FCA. Of particular significance to note under section 141(2) of the FCA are the words “anything done”. Section 141(2) states that “anything done” under the MLA which can be done under the FCA should be deemed to have been done under the FCA, and the word “anything”, in the view of this Court, means “anything.” This is of course subject to constitutional limitations. Thus where, for instance, “anything” means commencing prosecution of an offence in respect of conduct which did not constitute an offence under the MLA, or proceeding to impose a penalty under the FCA for conduct preceding the coming into effect of the FCA and where such penalty would be more severe than under the old law (the MLA), then the FCA would not apply.*

[61] Our reading of the above passage fortifies us in the view that by “anything done in accordance with the MLA” the provision means any act commenced in accordance with the MLA. We do not agree that this has anything to do with fresh prosecution of offences under the FCA for acts done prior to the coming in force of the Act.

[62] We, therefore, conclude that there is no provision in the FCA that expressly provides for the retrospective application of the offences under the Act. The presumption against retrospectivity therefore arises.

[63] Be that as it may, it has already been observed from the precedents above that the rule against retrospectivity is not rigid nor inflexible. There can be exceptions. The law allows for a court to construe an Act as having retrospective effect by necessary and distinct implication. This is where a court resorts to the wording of the provision in question or the entirety of the Act in issue to discern the intendment of the Legislature by its enactment. In the case of **Worrall v Commercial Banking Co of Sydney (1917) 24 CLR 28 at 32**, the court described what necessary implication entails. The joint judgment of Barton, Isaac and Rich JJ states:

*Necessary intendment only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable.*

[64] We have looked at the provision in Section 42 of the FCA and compared it with Section 35 of the MLA and have formed the firm view that the wording of the two provisions is not substantially different. The elements of money laundering in Section 42 of the FCA are the same as those in the MLA. The words used are not exactly the same, but the substance and objective has been maintained. The similarity of the words and the maintaining of the offence in its substantial essence, compel us to be impressed in only one direction, namely that this new provision was intended to apply retrospectively.

[65] We are also reinforced in this view by the words of the leading author already cited, Driedger, according to whom:

*Where an enactment is repealed or replaced, the new enactment is retrospective in so far as it is a repetition of the former enactment.<sup>3</sup>*

[66] We reckon that, save for the subsection on penalties, Section 42 of the FCA is a repetition of Section 35 of the repealed MLA. The money laundering under the FCA is the same one that was in the repealed MLA only that it is ornamented in a different garment. The name of the offence has not been altered; neither have the elements. We cannot begin to muse, in these circumstances, that Parliament intended to make the two offences different. Accordingly, it should be even harder, if not impossible, to find a different intent on the part of Parliament, than that it intended that the provision should apply to antecedent offences alike.

[67] Therefore, to answer the first prong of the issue, we find that, indeed, the charging of the Claimants under the FCA amounts to a retrospective application of the Act, but this is one that falls under the exception to the general rule. The retrospectivity in application of section 42 of the FCA arises by necessary implication. We so hold.

---

<sup>3</sup> E.A. Driedger(1983) 'Construction of Statutes' (2<sup>nd</sup> ed). Butterworths at pp. 202-3

Does the charging of the Claimants under the FCA amount to a violation of section 42(2)(f)(vi) of the Constitution?

[68] Coming to the last prong of the issue, we find it apposite to reproduce the provision of section 42(2)(f)(vi) of the Constitution. It provides as follows:

*42. (2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—*

*(f) as an accused person, to a fair trial, which shall include the right—*

*(vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe sentence than that which was applicable when the offence was committed.*

[69] This provision proscribes the conviction of an accused person of an offence which was not known to law at the time the same was committed. In the case of **Lutepo**, Kapindu J said as follows in relation to this constitutional prohibition:

*Thus, where the effect of a law is to retrospectively criminalize conduct which did not previously constitute a criminal offence, such law would, to the extent that this is inconsistent with section 42(2)(f)(vi) of the Constitution, be invalid in terms of section 5 of the Constitution. This is because this specific type of retrospective operation of laws has been expressly prohibited under that section and, under section 45(2)(f) of the 14 Constitution, such prohibition is heightened to the status of a non-derogable right. Again, where the effect of a new law is to retrospectively impose a stiffer penalty than was previously applicable for a particular offence, the same section 42(2)(f)(vi) of the Constitution imposes the same nature of prohibition as that applicable for retrospective criminalization of previously non-criminal conduct. Apart from these two specific instances, there is no other proscription of the retrospective operation of laws whether under the Constitution or under statute; and the authorities that we have explored above provide guidance in terms of how to approach the issue.*

[70] It is the contention of the Claimants that their being charged under section 42 of the FCA for offences allegedly committed in 2010 and 2012, amounts to a violation of the above constitutional provision. It is their argument that the offence established under the FCA is not the same one that was in the MLA which was the regime applicable during the alleged period. They argue that the offence of money laundering as defined under the FCA, was non-existent in 2010 and 2012 such that charging them under that Act, can only mean that they have been charged with an offence which was not an offence at the time it was allegedly committed.

[71] The Claimants outline the purported differences between the money laundering provisions in the FCA and the MLA through the aid of a table. We reproduce it as follows:

| Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act     | Financial Crimes Act   |
|---|--|
| Property belongs to any person (apart from the accused)                     | Property belongs to person <b>including the accused</b>                                |
| Offender knows or has reason to believe the property is proceeds of a crime | Offender knows or has reasonable grounds to believe the property is proceeds of crime. |
| Sentence is imprisonment for 10 years and fine of K2,000,000                | Sentence is for life imprisonment  |
| No need for a predicate offence to be committed                             | A predicate offence must be established in evidence                                    |

[72] We have already made a finding on the similarity of the two provisions. Save with regard to the penal provision, all the Claimants have done is show the difference in the adornment of the provisions. Otherwise, the elements are essentially the same. We disagree with the Claimants when they argue, through the above tabulation, that the money laundering offence under the FCA requires that a predicate offence be established in evidence for it to be proved. We wonder where that is coming from. Section 42(2) of the FCA provides to the contrary. It states that:

*For purposes of proving an offence under subsection (1), it is not necessary that the predicate offence be committed.*

[73] We have held above that the offence of money laundering under the FCA is the same one that was in the repealed MLA, only that it is ornamented in a different garment. Therefore, it is our finding that the offence of money laundering, with which the Claimants stand charged, amongst others, was an offence known to the law at the time it was allegedly committed by them. Further we have also held that section 42(2)(f)(vi) of the Constitution proscribes the conviction of an accused person of an offence which was not known to law at the time the same was committed. In the premises, assuming that the charging of the Claimants with money laundering under section 42 of the FCA implies that they may be convicted of that offence, we are unable to see how the Defendants can be said to be in contravention of section 42(2)(f)(vi) of the Constitution. The ultimate conviction of the Claimants for the offence of money laundering would not run counter to section 42(2)(f)(vi) of the Constitution, since that provision proscribes the conviction of an accused person of an offence which was not known to law at the time it was committed, whereas money laundering was an offence known to law at the time it was allegedly committed by the Claimants. It is our finding, therefore, that the charging of the Claimants with money laundering under section 42 of the FCA, does not, in any way, amount to a violation of section 42(2)(f)(vi) of the Constitution.

[74] As we draw closer to the end of our discussion, we observe that there is a second limb to section 42(2)(f)(vi) of the Constitution which is to the effect that an accused person has the right not to be sentenced to a more severe penalty than what was obtaining at the time the offence was committed. The Claimants have, in addition to arguing that the offence in section 42 of the FCA was non-existent in 2010 and 2012, also argued that the new offence has a more severe penalty, namely life imprisonment, as contrasted with the penalty under the repealed MLA regime which was pegged at 10 years' imprisonment. It is their submission that this equally renders their charging a violation of Section 42(2)(f)(vi) of the Constitution. Respectfully, we do not agree with the Claimants on this point. The right of the Claimants is the right not to be sentenced to a more severe sentence than what was previously obtaining. That right does not obliterate the right of the State to prosecute them as long as the offence they are being tried for passes the test on the first limb of the provision.

[75] We are of the considered view that, should the matter reach sentencing stage, the Claimants shall have the right to address the court on their right under the said constitutional provision. At any rate, a court shall always be bound by the provisions of the Constitution as it is the supreme law of the land. Accordingly, we hold that where a court is sentencing an offender for an offence whose punishment is more severe than that which was applicable when the offence was committed, such

court is always under an obligation to sentence the convict in accordance with the provisions of section 42(2)(f)(vi) of the Constitution.

### **Disposal**

[76] From the foregoing, we dismiss the Claimants' claims herein in their entirety, and deny the granting of the declarations sought.

### **Costs**

[77] Costs normally follow the event, and they are in the court's discretion. We award costs to the Defendants.

We so order.

Pronounced in open court at Zomba this Wednesday, the 10<sup>th</sup> day of April 2024.

Honourable Justice Texious S Masoamphambe

Honourable Justice Dick Sankhulani

Honourable Justice Patrick C Chirwa