Republic v Henry Mathanga & Others

Judgment

Court:	High Court of Malawi
Registry:	Financial Crimes Division
Bench:	Honourable Justice R.E. Kapindu, PhD
Cause Number:	Criminal Case Number 19 of 2023
Date of Judgment:	May 08, 2025
Bar:	For the State: Counsel Nyasulu, Liwimbi, Chibwana, and Patridge For 1st Accused: Counsel Nkhutabasa, For 2nd Accused: Counsel Maele, For 3rd and 4th Accused: Dr. Kalekeni Kaphale SC

The Charges

1. The Applicant in the present matter, who is the 4th Accused Person, the Honourable Mr. Joseph Mathyola Mwanamvekha, MP, a former Minister of Finance, Economic Planning and Development; together with Dr. Dalitso Kabambe, a former Governor of the Reserve Bank of Malawi (RBM), Mr Henry Mathanga, a former Deputy Governor of the RBM, and Mr. Cliff Kenneth Chiunda, a former Secretary to the Treasury in the Ministry of Finance, Economic Planning and Development, are facing criminal charges on 3 counts.

2. On the 1st Count, the four accused persons herein are charged with the offence of conspiracy, contrary to section 404 of the Penal Code (Cap. 7:01 of the Laws of Malawi) as read with sections 23, 54 and 88(1)(e) of the Public Finance Management Act, 2003. The particulars of the charge on this count allege that all the four accused persons herein, "*between September 2018 and 24 September, 2020 at the Reserve Bank of Malawi in the City of Lilongwe, conspired together to expend public money without Parliamentary authorisation amounting to three hundred and fifty million United States Dollars (U$350,000,000.00) property of Government*."

3. On Count 2, three accused persons herein, namely Mr. Henry Mathanga, Dr. Dalitso Kabambe and Honourable Mr. Joseph Mwanamvekha, are charged with the offence of making misleading statements, contrary to sections 41 and 29(5) of the Financial Crimes Act (Cap.7:07 of the Laws of Malawi), as read with section 62 of the Reserve Bank of Malawi Act (Cap. 44:02 of the Laws of Malawi). The particulars of the charge allege that the three accused persons herein, between September 2018 and 24 September, 2020, at the Reserve Bank of Malawi in the City of Lilongwe, knowingly made misleading statements by not including in the Reserve Bank's annual reports and in the reports submitted to the International Monetary Fund, information relating to the U$350 million facility obtained from the African Export and Import Bank (Afrexim Bank).

4. Finally on Count 3, all four accused persons are being charged with the offence of money laundering, contrary to section 42(1)(c) of the Financial Crimes Act. The particulars of the offence allege that the three accused persons, between September 2018 and 24 September, 2020, at the Reserve Bank of Malawi in the

City of Lilongwe, knowing that the money represented proceeds of funds obtained without Parliamentary authorisation, possessed three hundred and fifty million United States dollars (U$350,000,000) property of Government.

The Initial Discharge

5. The 4th accused person was previously discharged by this Court on 9th January, 2024. Prior to the said discharge, the accused persons herein, apart from Mr. Cliff Kenneth Chiunda who had not yet been added as an accused person, were facing two charges on two counts.

6. In the 1st count, all the three accused persons were charged with fraud other than false pretence, contrary to section 319A of the Penal Code. The particulars of the charge alleged that between June 2018 and September, 2019, in the Republic of Malawi, being persons employed in the public service at the time as Governor and Deputy Governor of the Reserve Bank of Malawi (RBM) respectively, with intent to deceive, did not disclose crucial information to RBM departments responsible for computing and calculating Net International Reserves (NIR) to allow it to make an accurate computation of the said NIR as required by the IMF, and consequently causing a detriment to the Malawi Government as the IMF cancelled the U$D108 million Extended Credit Facility to the said Government.

7. In the 2nd count, all the accused persons were jointly charged with abuse of office contrary to sections 95(1) and 95(2) of the Penal Code. The particulars of the offence alleged that between the period of June, 2018 and September, 2019,

being persons employed in the public service at the time as Governor and Deputy Governor of the Reserve Bank of Malawi respectively, in abuse of their offices, the accused persons did an arbitrary act, namely flouting the terms of the Technical Memorandum of Understanding (TMU) between the IMF and the Government of Malawi by procuring or counselling Rodrick Wiyo and Leah Donga, Director and Manager in the Financial Market Operations Department of the Reserve Bank of Malawi at the time, respectively, not to disclose to the IMF the gross reserve liabilities of the RBM in the calculation of NIR as was required by the said TMU, hence prejudicing the rights of the said Government to access the U$D108 million Extended Credit Facility as it was eventually cancelled by the said IMF.

8. The said discharge, which was made under Section 247(1) of the Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi)(the CP & EC), followed the 4th accused person's application for a discharge (then as 1st Accused person) which was based on the following grounds:

(a) That he did not occupy the position of Governor of the RBM or Deputy Governor of the RBM as alleged in Counts 1 and 2, or at any time at all.

(b) That there was no evidence in the disclosure bundles availed to him of any dealings between himself and any staff at the RBM or any staff of the RBM responsible for computing, calculating, approving or submitting Net International Reserves data before the end December, 2018 and end June 2019 reporting dates, to the International Monetary Fund (IMF) and hence, that it was not possible for him to have participated, as alleged, in deceiving the IMF through

non-disclosure of information as alleged under Count 1.

(c) That the evidence on record from the witness statement of late Hon. Goodall Gondwe clearly pointed to the fact that the raw data for calculating Net International Reserves is generated by and domiciled in the Reserve Bank of Malawi and not at the Ministry of Finance.

(d) That even if the data was generated by or domiciled at the Ministry of Finance, which was denied, the 4th Defendant herein only reported for duties at the Ministry of Finance in the first week of July, 2019 which was after the end June 2019 reporting date to the IMF, hence that he was not privy to the generation or reporting of the data that was submitted by the RBM to the IMF.

(e) That in the circumstances, prosecuting him on the two counts preferred against him was contrary to his right to human dignity as it would curtail his personal liberty and amount to cruel and degrading treatment in that he would be made to undergo a criminal trial when there was no iota of evidence disclosed that linked him to any of the charges.

(f) Further, that by reason of the above, the criminal trial process was being used against him arbitrarily and for pure reasons of vexation, and hence amounted to an abuse of the process of the court for ulterior ends, and that the Court in its inherent jurisdiction, had the power to prevent the abuse of its process in the manner proposed to be done by the prosecution.

9. In addition to the above grounds advanced by the 4th Accused person, the Prosecution itself was also clear and unequivocal in its representations that the State lacked sufficient evidence to substantiate the charges against him. Considering the State's clear position with regard to the said application, the Court asked Counsel for the State why, if the Prosecution was so clear that it had no evidence to justify the charges brought against the 4th Accused Person herein (then 1st Accused Person), the Director of Public Prosecutions (the DPP) did not proceed to enter a discontinuance in terms of Section 99(2)(c) of the Constitution of the Republic of Malawi (the Constitution) as read with Section 77 of the CP & EC.

10. The State, however, on the material day, literally failed to provide any satisfactory explanation, or at all, for opting to seek that the accused person be discharged by the Court on the grounds of lack of evidence instead of the State itself entering a discontinuance.

11. During the Court's engagement with Counsel on the material day, the Court was emphatic that it was of opinion that if ever there was a plausible ground for the DPP to exercise his or her powers of discontinuance under Section 99(2)(c) of the Constitution, then the circumstance that had presented itself in the instant case was clearly one.

12. As noted in the Court's decision of 9th January, 2024, the Court had to take the rather unusual effort of asking Counsel more than once to consult with the DPP on the prospect of the State simply entering a discontinuance instead of requiring the Court to pursue its own process under the CP & EC and to deliver a reasoned ruling on discharge. After a series of consultations on the material day, Counsel still came back to report to the Court that the State remained unwilling

to discontinue the case and that the position of the State was that it was ultimately up to the Court to make a decision. At the same time, the State maintained that the State had no evidence against the 4th accused person that would raise the prospect of a conviction. As the Court sees it, here we had a clear admission by the prosecution, an admission made under oath, that after reviewing the matter, the prosecution was of the view that there was no legal justification to continue to have the accused person herein charged based on the available facts, and yet the prosecution was at the same time refusing to discontinue the case, essentially saying "*we do not want to do it, we would rather the Court does it for us instead*."

13. To provide better context, it is perhaps apposite at this point to outline some of the words that Counsel Sakanda expressed, under oath, in his responding affidavit. At paragraph 6 of the affidavit, Counsel stated that:

"*An analysis of the evidence of the prosecution's key witnesses only leaves a remote possibility of conviction against the 1st Accused person while on the other hand, [it] leans much more favourably to the conviction of the other co-accused persons (Mr. Mathanga and Dr. Kabambe*."

14. Further, at paragraph 7, he stated that:

"*there is no evidence on the file that links the 1st accused person to the commission of the offence he stands charged with. Nor is there circumstantial evidence strong enough linking him to the crime. Considering the totality of the evidence, the prospect of obtaining a conviction against the 1st Accused person [now 4th Accused person] is unrealistic*"

15. Counsel then proceeded to state, at paragraph 8, that:

"*in view of the foregoing, discharging the 1st Accused person in respect of the charges levelled against him would be in the interests of justice*."

16. In his oral representations to the Court, Counsel Sakanda stated, among other things, that:
"Initially, we thought that we had evidence but, upon review, we think there is no evidence."

17. Counsel was thus clear that the position being adopted by the State was not just a quick decision made in the spur of the moment on the material day, but that it was actually a carefully thought through position, arrived at after a review, departing from an earlier position where the State had thought that there was evidence against the 4th accused person herein.

18. To the above representations by Counsel for the State, the Court responded in the following terms:
"*Why then does the State not just enter a discontinuance...Since the State has conceded that it has no evidence against the 1st accused, why not just enter a discontinuance?*"

19. Counsel came to see the Judge in chambers. Subsequently, State Counsel

came back to address the Court in open Court and stated that:

"*With regards to the issue of why the State has not entered a discontinuance, the State is not ready to respond. However, considering the lack of evidence, the State is not opposed to the discharge. The Honourable Court may therefore proceed to exercise its discretion on whether to grant the prayer or no*t."

20. It was clear that the State was unable to proceed with the prosecution, but was also, at the same time, unwilling to be seen to be unable to proceed with the prosecution.

21. The Court then proceeded to deliver a reasoned ruling, dated 9th January, 2024, in which it specifically noted the State's failure to justify its decision not to enter a discontinuance under the circumstances, despite clearly acknowledging that there was no evidence to justify the charges against the 4th accused person herein.

22. In the result, the Court held that it was left with no choice but to discharge the 4th accused person herein (then as 1st accused person), on the grounds that the State was unable or unwilling to proceed with the prosecution due to a lack of evidence. The Court rested its decision upon the provisions of section 247 of the CP & EC.

Fresh Indictment of the Accused Person

23. Following the said discharge by the Court under Section 247(1) of the CP & EC, in a turn of events, just over two months later, the DPP reinstated charges against the 4th accused person herein. Whilst the charges were different from the initial ones, the disclosures remained the same. Counsel Nyasulu was very clear when he was introducing the fresh charges herein to the Court, that the State would be relying on the same disclosures that it had already filed with the Court.

24. In response to that development, the 4th Accused Person herein, through his legal practitioner, Senior Counsel Dr. Kalekeni Kaphale, objected to the bringing of fresh charges against him, arguing that the same constituted an abuse of the Court's process and would infringe upon his fair trial rights as guaranteed by Section 42(2)(f) of the Constitution.

25. The Prosecution, on its part, in its defence, invoked Section 247(2) of the CP & EC, which, they argued, permits the bringing of fresh charges based on the same facts within twelve months of a discharge.

The Court's Ruling of 3rd February, 2025

26. On 3rd February 2025, this Court delivered a comprehensive Ruling on various Preliminary Objections that had been raised by various accused persons in the matter. In the Ruling, the Court acknowledged that with respect to the bringing of fresh charges against the 4th Accused person, after he had earlier been discharged by the Court, Section 247(2) of the CP & EC indeed allows for

such recommencement of prosecution within twelve months from the date of discharge. The Court agreed that the provision was indeed clear on that point.

27. However, the Court also found that the provisions of Section 247(2) of the CP & EC are subject to constitutional provisions, including the fair trial principles outlined in Section 42(2)(f) of the Constitution, and that in appropriate cases, where there are good and compelling reasons for doing so, a Court, guarding against the abuse of its process, may decline the State permission to proceed with a fresh prosecution, especially where the discharge was made by the Court under that provision.

28. The Court referred to, and would like to reiterate the position expressed by the Supreme Court of Appeal in the case of Namata v. Republic, 2018 MWSC 9, being Criminal Appeal 13 of 2015, where the Court stated that:
"*whereas before 1994 the CP & EC was the alpha and omega of criminal procedure and practice in Malawi, the same cannot be presently. Now there is a constitution[al] perspective to contend with*."

29. The Court also wishes to add, at this juncture, the erudite remarks eloquently expressed by the Supreme Court of Appeal in the case of Taipi vs Republic, MSCA Criminal Appeal No. 9 of 2014, where Chipeta, JA, delivering a unanimous decision of the Court, stated that:

"*any statutory provision, including Sections 161 G and I of the CP & EC which the Appellant has ascribed some independence from the constraints of Section 42(2)(e) of the Constitution, ought to be subservient to the Constitution...*

Sections 161 G and I of the CP & EC, being mere creatures of a Statute, cannot pretend to be as powerful as, or even to be superior to, the provisions of Section 42(2)(e) of the Constitution... A statutory provision, we are convinced, even if promulgated later in time than its parent Constitutional provision can never be so potent as to set the boundaries within which the constitutional provision should operate. Without a doubt, therefore, whenever statutory provisions are being measured against Constitutional provisions, as Sections 161 G and I are being measured in this case, they must of necessity be viewed as being subservient and obedient to the said Constitutional provisions. If instead of being so subservient they are rebellious, then they lose their validity as pieces of law."

30. Thus, in the present matter, it is this Court's position that whilst indeed section 247(2) of the CP & EC does not suggest, on its face, that the State may be called upon to justify its decision to recommence a prosecution against a previously discharged person on the same set of facts, there is the Constitution to contend with, and it is open, in appropriate cases, for the Court to weigh such a position with broader constitutional imperatives. Such a position cannot, therefore, in the light of the above clear jurisprudence from the courts including the Supreme Court of Appeal, be treated as the alpha and omega of the matter.

31. In the circumstances of the present case, the Court expressed serious displeasure at how the prosecution had conducted itself leading to the Court's earlier Order of discharge. It is noteworthy that the Court made determined efforts in enquiring from the State so as to make sure that the State was sure about the approach that it had opted to take – that is to say, opting against entering a discontinuance, but also continuing to admit lacking the requisite evidence, whilst at the same time clearly endorsing and supporting the decision

to make an order of discharge instead.

32. Among other things, the Court recalled the clear words expressed in the affidavit of Senior State Advocate Sakanda for the State (as shown above).

33. The Court then stated, at paragraph 150, that:

"*The Court wishes to emphasise that it is of utmost importance that the processes of the Court be taken very seriously. This must be so for the integrity of the Courts and the entire legal system. The State needs to provide a clear account of how this matter ended up being handled in this manner from the start up to the present day. Without this, the process of the Court itself may come into disrepute where the Court, having discharged an accused person on the basis that the charges against him could not be supported by the available evidence, following clear representations to this effect not only by the accused person himself but, more fundamentally, by the State itself, proceeds to allow the State to come back and proceed with prosecuting the same accused person on the same facts, without proffering clear reasons for what had happened before*."

34. The Court went on to observe at paragraph 151 of the 3rd February 2025 Ruling, that:

"*It is not enough, in this Court's view, for the State to argue that Section 247(2) of the CP & EC does not require such reasons to be given. Well, the broad constitutional right to a fair trial under section 42(2)(f) of the Constitution does. As Chikopa J (as he then was) lucidly put it in Republic v Carton Mphande [2008] MLR 253 (HC): "We said this in the Serengu case and also in Rep v Given Visomba Confirmation Case Number 627 of 2007 [High Court, Mzuzu Registry].*

We will say it again now. Those that proceed with criminal trials in disregard of the Constitution do so at their great peril. Whereas it was before 1994 permissible to regard the CP & EC as the alpha and omega of criminal procedure and practice in Malawi, the same cannot be presently. Now there is the Constitution to contend with. And because the Constitution takes precedence over the CP&EC [see section 5 of the former] it is even more important that practitioners of the law take careful notice of whatever the Constitution says vis-a-vis criminal practice and procedure. Under section 42(2)(f)(ii) of the Constitution for instance, an accused has, as part of the fair trial regime, the right to be 'informed with sufficient particularity of the charge against him'"

35. The Court made it clear, at paragraph 153 of that Ruling, that:
"*These decisions make it clear that we cannot, post-1994, in the wake of the current constitutional dispensation, proceed to read the provisions of the CP & EC without considering whether they would also be impacted by superior constitutional imperatives*."

36. It is, in this regard, significant to note that section 42(2)(f)(iv) of the Constitution guarantees every accused person in a criminal case, the right to "adduce and challenge evidence." Evidence is challenged in various ways in Court. Generally, evidence is challenged through cross-examination ad challenging the admissibility of evidence.

37. Cross-examination goes to the weight to be attached to the evidence adduced. The accused person is entitled, through cross-examination, to

challenge, among other things, the credibility, reliability, accuracy or consistency of both the witness and the testimony that he or she gives. Admissibility on the other hand goes to the usability of evidence during the trial. The accused person may argue that certain evidence be excluded by the Court on such grounds as lack of relevance, illegality in the manner that it was obtained – such as evidence obtained through torture, its hearsay character, or the same being inadmissible opinion evidence, among others. In order for both of these avenues of challenging evidence to be effective, they require that the evidentiary material be made available to the accused person in advance, before commencement of the trial. An accused person should not be walked into a trial court blindfolded as to what evidence he or she has to encounter when his or her trial starts.

38. An accused person therefore needs to be afforded a reasonable opportunity to go through the evidentiary material in advance, in order to prepare for cross-examination, or for the accused person to evaluate the legality and admissibility of the evidentiary material. What constitutes a reasonable opportunity will be objectively determined based on the facts and circumstances of each case.

39. Further, prior disclosure of the evidentiary material serves to give effect to the constitutional requirement under section 42(2)(f)(ii) to be informed with sufficient particularity of the charge. Appreciating the particularity of the charge includes appreciating whether the evidential material disclosed shows any connection to the charge. That helps the accused person to appreciate the strength of the prosecution’s case against him or her, or the lack thereof.

40. If it is clear from the outset that the disclosures reveal no evidence at all

linking or potentially linking the accused person to the charges, then, although the CP & EC does not contain an express provision for summary judgment, it becomes otiose and a clear abuse of not only the court's process, but also of the rights of the accused person to personal liberty, security of the person and dignity, among others, for the State to persist in pursuing a prosecution whose ultimate end lies in an inevitable failure. Making a similar point in the Canadian case of Walton v Gardiner, (1992) 177 CLR 378, the Court, per Mason CJ, Deane and Dawson JJ stated at paragraph 23, that:

"*The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance*, ***proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fai***l." [Emphasis added]

41. Thus, where it is clear from the outset that owing to a complete lack of evidentiary material establishing a link between the charges and the accused person, the criminal proceedings are doomed to fail, a persistence by the State to proceed with a prosecution in such a matter would represent a classic instance of an unfair trial which the courts should never condone. They should never allow their own process to be abused in such a way. Under such circumstances, it becomes the duty of the Court to stop such abuse.

42. The Court, in the 3rd February, 2025 decision, further observed, at paragraphs 154 and 155, that:

"The Court might perhaps not have been so demanding on the State if they had opted for the route of exercising the DPP's executive power to discontinue the charges under Section 99 of the Constitution. As these Courts have previously decided, in the spirit of the separation of powers, the process of discontinuance by the DPP is a constitutional process where the courts, save in exceptional cases, will defer to the constitutional discretion of the Director of Public Prosecutions as it is an incident of the exercise of executive rather than administrative power. Being a constitutional power, which falls outside the ambit of the Bill of Rights, how courts will approach the exercise thereof will markedly differ from how the Courts approach processes which are only founded upon statutory premises without any constitutional footing. [Thus], the situation changes fundamentally where the prosecution deliberately chooses to forego the constitutional process of discontinuance, and instead chooses to push the Court to invoke a mere statutory power of discharge, and invites the Court to do so after, as happened here, the issues of lack of evidence had been thoroughly ventilated by the parties in Court, and there was no contest. Under such circumstances, the section 247(2) process could not just be narrowly read disjunctively as a fully self-contained procedural provision, without regard to the broader constitutional right to a fair trial. This Court holds that under the present circumstances, fair trial demands that the prosecution must provide clear justification for both the original approach that it took in essentially advocating for the discharge of the 4th Accused Person by the Court, and now for the decision to institute fresh criminal proceedings against him based on the same

facts."

43. Finally, the Court directed that the Prosecution must file with the Court and serve the 4th Accused person's Counsel with a detailed affidavit, supported by skeleton arguments, justifying the necessity of bringing fresh charges against the 4th Accused person in view of the circumstances that surrounded the earlier discharge. Specifically, the Court stated at paragraphs 156 and 157, that:

"*it is this Court's decision that the charges against [the 4th accused person] herein remain conditional, contingent on the State coming out clearly, beyond the few statements that they have made in their current written arguments, on* ***what it is, in summary, that they have found linking the 4th Accused Person to the available evidence herein, vis-à-vis the charges now preferred against him, and also on why the State proceeded to make the categorical statements it made in Court leading to his earlier discharge, and why this time around the same State has decided that it is appropriate that they prosecute him on the same facts they earlier found categorically wanting.*** *The Court gives the State 14 days within which to provide such convincing reasons, by way of affidavit and supported by Skeleton Arguments, after which the issue will be heard and determined by the Court during the next Court hearing of the matter, and after which the Court will make a final decision on the future of the fresh charges against the 4th Accused person*."

44. In the Court's 3rd February, 2025 Ruling, the Court further pointed out, at paragraph 145, that:

"It should be recalled that in its ruling on this issue, the Court, in discharging the 4th Accused Person herein, then as a 1st Accused Person, stated, at paragraph 33, that: "this Court finds, afortiori, that it is rather perverse that there should be a prosecution where there is no credible evidence against an accused person. Such approach would amount to an abuse of the process of the Court.""

45. The Court proceeded to point out, at paragraphs 146 and 147, that:
"*In the circumstances of the present case, the prosecution earlier made clear and categorical statements under oath that trying the accused person was untenable. Despite categorising the continued prosecution of the case as untenable, with no real prospect of securing a conviction, they still, in the same breath, proceeded to unnecessarily push the Court into making its own painstaking reasoned decision to have the accused person herein discharged, when, under such circumstances, the State should have been the one making its own decision to discontinue the case against Hon. Mwanamvekha. Under those circumstances, the Court, having carefully examined the matter, opined that proceeding with prosecution under such circumstances would amount to an abuse of its own process and proceeded to pronounce a discharge from the criminal charges against him under section 247 of the CP & EC*."

10th March 2025 Adjournment

46. When the Court was rising after the 3rd February, 2025 proceedings, it adjourned the matter to the 10th day of March, 2025, at 10 O'clock in the morning to hear representations from the State, with a possible response from the 4th accused person, as to why the Court should not proceed to have the 4th

accused person herein permanently discharged based on the same set of facts.

47. However, when the Court convened on 10th March, 2025, it became apparent that the prosecution had not complied with the Court's Order that they file an affidavit justifying the bringing of fresh charges, stating clearly what the State had "*found linking the 4th Accused person to the available evidence herein, vis-a-vis the charges now preferred against him", and "why this time around the same State has decided that it is appropriate that they prosecute him on the same facts* they earlier found categorically wanting." The said Order was also very clear that the State was to file Skeleton Arguments. The Skeleton Arguments were not filed.

48. Counsel Liwimbi for the prosecution, informed the Court that the failure to file the requisite documents was due to miscommunication within the DPP's office. He apologised for this development. He told the Court that he had only been informed of the day's proceedings earlier that morning by Counsel Malunda. This suggested that between 3rd February, 2025 and 10th March, 2025, prosecution Counsel who attended Court on 3rd February, 2025 following delivery of the Court's Ruling on that day, did not communicate in respect of the matter with Counsel definitively seized with and having conduct of the matter. This is a very regrettable State of affairs. The State is enjoined to strive to do better in future.

49. Counsel Liwimbi then undertook to file the required documents before the end of business that day. He therefore sought an adjournment of the matter to another date.

50. Senior Counsel Dr. Kaphale for the 4th Accused Person strongly opposed the request for an adjournment. It was his contention that the Prosecution's failure to file the required documents after over a month amounted to inexcusable failure to comply with the Court's Order of 3rd February, 2025. He characterised the State's conduct as being tantamount to disobedience of the Court's Order. He argued that the situation was aggravated by the fact that the DPP himself was present in Court when the Court made its Order of 3rd February, 2025. He submitted that it was unacceptable for the Prosecution to delay proceedings through the adjournment sought, observing that it had taken over a month since the Court Ordered the filing of the said documents.

51. Dr. Kaphale therefore invited the Court to dismiss the request for an adjournment and, consequently, to grant the 4th Accused Person the ultimate relief that he was seeking, which was and is essentially a permanent discharge from prosecution based on the present facts.

52. Counsel Liwimbi in reply, acknowledged the regrettable nature of the Prosecution's conduct but maintained that it was inadvertent miscommunication within the DPP's Chambers and not an act of disobedience to the Court's Order. Counsel Liwimbi further reiterated the Prosecution's commitment to file the necessary documents before close of business that day.

53. The Court, after carefully considering the representations of both Counsel Liwimbi and Senior Counsel Dr. Kaphale, expressed its deep concern with the Prosecution's continued lapses in the manner that the matter concerning the 4th

Accused Person was being handled. The Court pointed out that the Prosecution could have done better under the circumstances. The Court formed the view that the failure to file the required documents reflected badly on the prosecution's commitment to pursue the prosecution of the 4th Accused Person with diligence and seriousness.

54. The Court pointed out that it had already made its displeasure very clear as regards the manner in which the State conducted itself leading to the earlier discharge of the 4th accused person herein, which was now a fresh subject of contention. The Court further stated that the reasons for the Court's displeasure had already been well expressed in both the Court's Ruling discharging the 4th Accused person (then as 1st Accused Person) of 9th January, 2024, and its subsequent Ruling of 3rd February, 2025 wherein it directed the 10th March 2025 hearing.

55. The Court found it most unfortunate that the alleged miscommunication within the DPP's Chambers, as explained before the Court by Counsel Liwimbi, ever happened.

56. The Court stated that this was not just a serious matter in terms of the charges that were being levelled against the accused persons, but that it was also a matter of great national interest.

57. However, the Court stated that the above concerns notwithstanding, it was also mindful that the Order that it was considering making, if made, would be highly consequential. The Court thus considered the desirability of proceeding to

make such an Order without affording the State another opportunity to make final representations as directed in its 3rd February, 2025 Ruling. Ultimately, the Court opined that fairness still demanded that the State be afforded yet another opportunity to make representations. Weighing both prongs of the matter, the Court held the view that the interests of justice tilted towards ensuring that before the Court made its final Order on this issue either way, it still needed to have the benefit of receiving and hearing comprehensive representations from both parties as it had earlier directed on 3rd February, 2025.

58. In the premises, the Court granted the State's request for an adjournment, with the understanding that the required documents were to be filed no later than 12 noon on the following day, namely 11th March, 2025. The matter was consequently adjourned to 3rd April, 2025 for hearing of the above-stated representations.

Hearing of Further Representations

59. When Court convened on 3rd April, 2025, Counsel Nyasulu for the State effectively adopted and took the Court through the affidavit sworn by Counsel Liwimbi which was filed on 11th March, 2025.

60. In the said affidavit Counsel Liwimbi stated that when the allegations were initially made against the 4th accused person herein, Hon. Mr. Joseph Mwanamvekha and others, the focus of the State's investigation was on the Extended Credit Facility (ECF) agreement with the International Monetary Fund (IMF), specifically concerning the calculation of Net International Reserves (NIR).

61. He stated, in this regard, that the focus was initially limited to reporting to the IMF during the first reporting cycle of the ECF around June, 2019. He deposed that, at that stage, the State had approached the allegations as matters of strict liability and had not explored the possible existence of any motive or underlying basis for the alleged misreporting.

62. He further stated that it was against this backdrop that the accused persons were charged with the misdemeanour of abuse of office and the felony of fraud other than false pretences, which he characterised as minor in comparison to the charges the accused persons are presently facing before the Court.

63. Counsel Liwimbi deposed in the affidavit that in January 2024, he was appointed, together with Counsel Kamudoni Nyasulu and Mr Enock Chibwana, to what he referred to as the "*Prosecution Team Linthumbu*" ("*Linthumbu*" are a species of Fire ants in English or Solenopsis invicta as a Latin scientific name). He stated that although the case had been assigned to *Prosecution Team Linthumbu*, the said team was still reviewing the docket when the 4th accused person herein was discharged from the proceedings.

64. Counsel Liwimbi averred that Prosecution Team Linthumbu's review of the docket and the disclosures revealed several important elements that had been omitted by the State at the time of the initial institution of proceedings.

65. He went on to explain that the reporting period under the ECF extended beyond June 2019, ending in September 2020 when the facility was cancelled.

66.He deposed that the alleged misreporting to the IMF was merely a symptom of underlying fraud and misrepresentation in the financial statements of the RBM, both before and after June, 2019.

67. He stated that the underlying cause of the misreporting was that the Government and the RBM had, in December 2018, borrowed US$350 million from the Afreximbank on non-concessional terms, which was contrary to the ECF's conditions.

68. He asserted that such borrowing violated the terms of the ECF agreement entered into with the IMF in April 2018, which prohibited borrowing on non-concessional terms by both the Government and the RBM.

69. Counsel Liwimbi further deposed that the Government and RBM had made false representations to Afreximbank that the US$350 million borrowed would be used for developmental projects, specifically the rehabilitation of Kamuzu International Airport and the Lakeshore Road.

70. He stated that these representations were fraudulent as the Government had no Parliamentary authorisation for the borrowing.

71. He averred that the US$350 million borrowing was not accounted for in the financial statements of the RBM for the financial year ending December 2018.

72. He went on to depose that the expenditure of the loan proceeds commenced after June 2019 and continued into 2020 during the tenure of the 4th accused person as Minister of Finance.

73. He proceeded to state that the expenditure of the proceeds lacked Parliamentary authorisation by way of appropriation.

74. He averred that neither the US$350 million loan nor the expenditure of its proceeds were reflected in the RBM's financial statements for the year ending December 2019.

75. He stated that the 2020 report to the IMF, signed by the 4th accused and the 2nd accused, Dr. Dalitso Kabambe, fraudulently excluded the US$350 million loan, its proceeds, and their derivatives.

76. He therefore concluded his affidavit by praying that the Court should confirm the re-institution of the criminal proceedings against the 4th accused person herein on the charges as they currently stand.

77. Pausing here, it is worth noting that whilst Counsel Liwimbi stated that the positions that he articulated in his affidavit were arrived at upon a review by " *Prosecution Team Linthumbu*" which review was ongoing at the time that the 4th accused person was earlier discharged, Counsel Sakanda, by contrast, also indicated in his representations that the State had earlier formed the view that it

had evidence revealing criminality against the 4th accused person, but that “upon review”, again at the time that the 4th accused person was being discharged, they had come to the definitive conclusion that there was no evidence against him.

78. It therefore follows that if what Counsel Liwimbi deposed in his affidavit is anything to go by, it then speaks to the existence of simultaneous parallel reviews of the same matter within the State’s Chambers, that is to say by the prosecution team to which Counsel Sakanda belonged on the one hand, and “Prosecution Team Linthumbu” on the other, which reviews were going in diametrically opposite directions, and which contrary positions ended up reflecting in the rather confused manner in which the State has handled this matter before this Court.

79. In response, Senior Counsel Dr. Kaphale stated that the starting point of his argument in opposition would be a consideration of nature of Counsel Liwimbi’s affidavit as described above.

80. He invited the Court to recall that Counsel Sakanda for the State swore an affidavit asserting that there was no evidence on the disclosures file, linking the 4th accused person to the offences on record. He stated that one would therefore have expected, given that the issue herein centred around issues of the availability of evidence, that Counsel Liwimbi’s affidavit would contain specific aspects linking the 4th accused person to the charges herein.

81. However, he noted, it was surprising that Counsel Liwimbi’s affidavit merely

presented theoretical assertions rather than specific evidence linking the 4th accused person herein to the charges.

82. He stated that, considering that affidavits are intended to be vehicles of fact rather than opinion, the lack of reference to substantive evidence that would show a linkage to and therefore sustain the charges herein entailed that the State had failed to adequately respond to the inquiries made and the directions given by the Court.

83. In the circumstances, Dr. Kaphale invited the Court to strike out Counsel Liwimbi's affidavit for not addressing the specific queries and issues that the Court had directed the State to answer and address.

84. Added to this, Senior Counsel stated that Counsel Liwimbi's affidavit was defective in that it was not paragraph numbered, an oversight that he said he found embarrassing.

85. He however stated that notwithstanding these observations, in respect of which he invited the Court to make a decision, he would still proceed to demonstrate that the State had failed to provide evidence linking the 4th accused person to the charges, as directed by the Court.

86. Under the 1st Count, Senior Counsel pointed out that the 4th accused person was not in office in 2018, and that the State actually conceded that he assumed office after June 2019. He therefore questioned what evidence existed linking the

4th accused person to the alleged offences between July 2019 and September 2020.

87. He stated that given the Court's queries and directions as per its Ruling of 3rd February, 2025, the State should have demonstrated whether there were any documents, emails, or even oral communications evidencing that the 4th accused person authorised unlawful expenditure without appropriation, or that he engaged in some conspiracy during this period.

88. Dr. Kaphale argued that no such evidence was produced. He submitted that such evidence was not produced because it did not exist. It was his contention that if such evidence had existed, it would have been referred to in, or exhibited to, Counsel Liwimbi's affidavit.

89. Senior Counsel proceeded to point out that Counsel Liwimbi's affidavit on page 4, indicated that the amount in question, namely U$350 million, was domiciled in the RBM, which was described as a "swap" under a contract with the said RBM rather than an agreement between Afrexim Bank and the Malawi Government.

90. Senior Counsel referred to Section 5 of the Reserve Bank of Malawi Act, which, he stated, speaks to the independence of the RBM. Section 5 of the RBM Act provides that:

"(1) *Except as provided by this Act, the Bank, the members of the Board and the staff of the Bank shall be independent, and shall not be subject to direction by any person or authority.*

(2) *Any person who improperly and unduly seeks to influence the Bank, a director or staff of the Bank, in the performance of its or his functions, commits an offence and shall, on conviction, be liable to a fine of twenty five million Kwacha (K25,000,000) and to imprisonment for ten (10) years*."

91. Dr. Kaphale thus wondered whether it was being alleged that as Minister of Finance, Hon. Mwanamvekha, the 4th accused person herein, directed the RBM regarding the expenditure of this amount, contrary to section 5 of the RBM Act. If this was so, he wondered whether there was any evidence to support such allegations, particularly in the light of Counsel Liwimbi's concession that the amount referred to herein was not accounted for in the financial statements of the RBM for the year ending 2019 rather than in the financial statements of the Malawi Government. He argued that all this pointed to the absence of material evidence to establish any linkage with the charges against the 4th accused person herein.

92. On Count 2, Senior Counsel pointed out that the 4th accused person is alleged to have made misleading statements at the Reserve Bank of Malawi. He argued that if these statements, as alleged, pertain to the RBM, as suggested by Counsel Liwimbi in his affidavit, then that raised additional questions regarding the timeline of events. He stated that the 4th accused person assumed office in July 2019; and the affidavit mentioned that the loans were obtained in December 2018. This, therefore necessitated further inquiry into how these actions could possibly implicate the 4th accused person, especially considering the RBM's autonomy in approving such transactions, as provided for under section 5 of the RBM Act. He pointed out that according to the RBM's legal framework, and in light of its autonomy, such decisions are approved by the Bank's Board of

Directors.

93. Dr. Kaphale, SC proceeded to observe that national budget appropriations occur in two stages, these being the main and supplementary budgets. He stated that there was no clarity on which appropriations were being referred to by the State in the charges.

94. He contended that all this showed that the State in the instant case had woefully failed to link the 4th accused person to the charges in order to justify the bringing of fresh charges after the initial discharge by the Court. He observed that the State appeared to be fumbling in the dark without material evidence and yet was still keen on pursuing charges against the 4th accused person.

95. Finally, Senior Counsel Dr. Kaphale ended by stating that he did not wish to dwell much on the 3rd Count on money laundering, save to state that he had noted that the charge of money laundering was, in recent times, increasingly being abusively employed as a sweeping charge without sufficient evidential backing, and that the present case was an instance.

96. In reply, Counsel Nyasulu for the State emphasised that the Court required the State to justify the reinstitution of proceedings against the 4th accused person, and not to prove his guilt. He stated that the State was only invited to clarify why the State agreed to the earlier discharge application. He reiterated to the Court that the affidavit of Counsel Liwimbi was not intended to prove guilt or innocence but to explain the state’s position.

97. Counsel Nyasulu pointed out that criminal trials are governed by the CP & EC, specifically Section 6, which addresses matters of the admissibility of evidence. He asserted that notably, over time, the requirements of Section 293 of the CP & EC have evolved to necessitate full disclosures before commencement of trial, and that all materials submitted under Section 293 should be available to the Court and the parties involved before commencement of trial. He stated that all relevant evidence in the instant matter had been disclosed under Section 293 of the CP & EC.

98. Counsel Nyasulu stated that it could not be correct to claim that certain documents were unavailable simply because they were not exhibited to Counsel Liwimbi's affidavit, when the same are already part of the Court record.

Analysis and Determination

99. Such, as above, were the developments and the arguments relating to the application by the 4th accused person herein for a permanent discharge or stay of proceedings in the instant case, based on the present set of facts.

100. It now behoves the Court to explore some principles and jurisprudence on this issue.

101. It is well settled under Malawian law that the Court has inherent power to make any necessary decisions to prevent the abuse of its process. See the cases of Vitsitsi v. Vitsitsi [2002-2003] MLR 419, 423 (SCA); the State & Another, Ex-Parte Dr. Bakili Muluzi & John Z.U. Tembo [2007] MLR 304, 307 (HC); and the

State vs Hon. Chief Justice of the Republic of Malawi & Others [2010] MLR 397, 404.

102. Elsewhere, in the case of Hui Chi Ming [1992] 1 AC 34, the Judicial Committee of the Privy Council, per Lord Lowry at page 57, described abuse of process, in the criminal context, as:

"*something so unfair and wrong that the court would not allow a prosecutor to proceed with what is in all other respects a regular proceeding"*
103. In the case of Connelly v R, [1964] AC 1254, Lord Devlin stated thus:
"Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

104. In the Sierra Leonean Supreme Court decision of S v. Abraham Lavaly Others [2020] SLSC 10, at paragraph. 4, the Court made the following very illuminating remarks on the concept of abuse of the court process:

"*The genesis of abuse of process is in fact the common law, which empowers the court to use its discretionary power to ensure a fair trial. The courts have a duty to ensure that all who appear before it, are treated fairly and suffer no injustice (See Donelly v DPP (1964] AC 1254). Similarly, the courts must protect the law and its processes and procedures from abuse. I say at the outset that there*

cannot be a single definition of abuse of process nor a single example that covers all instances of abuse. (see Rhett Allen Fuller (Appellant) v The Attorney General of Belize (Respondent) (2011] UKPC 23 per Lord Phillips)."

105. Further, in the American case of Brock v. North Carolina 1953) 344 U.S 424 at 429, the US Supreme Court, per Frankfurter J, pointed out that:
"*The state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or* ***prevents a trial from proceeding to a termination in favour of the accused merely in order for a prosecutor who has been incompetent or casual or even ineffective to see if he can do better a second time****...*" [Emphasis added]

106. Again, in Green v. United States (1957) 355 U.S 184, the Supreme Court of the United States, per Black, J, stated at pages 187-188 that:

"*The underlining idea, one which is deeply ingrained in at least the Anglo - American system of jurisprudence, is that the state with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty*."

107. In the Nigerian case of Clarke & Another. v. Attorney General of Lagos State (1986) 1 QLRN 119., Johnson CJ, stated that:

"*Experience of the practice and procedure in our courts and in fact in the law under which we practice in this country show that a trial is regarded as a complete ...**where a party with full opportunity to present its case fails in the course of the proceedings to do so***."

108. In the Indian case of Krishna Lal Chawla and Others vs State of U.P. and Another, Criminal Appeal No. 283 of 2021 (arising out of S.L.P. (Crl.) No. 6432/2020), the Supreme Court of India, per M.M.Shantanagoudar, J, at Para. 26, stated that:

"*the trial courts and the Magistrates have an important role in curbing injustice. They are the first lines of defence for both the integrity of the criminal justice system, and the harassed and distraught litigant. We are of the considered opinion that the trial courts have the power to not merely decide on acquittal or conviction of the accused person after the trial, but also the duty to nip frivolous litigations in the bud even before they reach the stage of trial by discharging the accused in fit cases. This would not only save judicial time that comes at the cost of public money, but would also protect the right to liberty that every person is entitled to under Article 21 of the Constitution. In this context, the trial Judges have as much, if not more, responsibility in safeguarding the fundamental rights of the citizens*."

109. The Court went on to state, at paragraph 30, that:

"*it is the constitutional duty of this Court to quash criminal proceedings that were*

instituted [in abuse of] its processes of law…"

110. The concept of staying criminal proceedings on grounds of abuse of court process has even been embraced by supranational tribunals or courts. Thus, in the case of Prosecutor vs Mićo Stanišić Stojan Župljanin, Case No. IT-08-91-A, judgment delivered on 2nd April 2014, the ICTR (Residuary Mechanism), stated at Para. 35, that:

"*The question in cases of abuse of process is not whether it is "necessary" for a court to issue an interlocutory decision terminating proceedings..., but whether a court should continue to exercise jurisdiction over a case in light of serious and egregious violations that would prove detrimental to the court's integrity. The discretionary power of a court to stay or terminate proceedings by reason of abuse of process applies during the trial phase of a case, and is mostly concerned with prosecutorial misconduct, since its main purposes are to prevent wrongful convictions and preserve the integrity of the judicial system*."

111. The Court went on to clarify, at paragraph 45, that:

"*the jurisprudence of the Tribunal has relied in several instances on the common law rooted doctrine of abuse of process...the doctrine of abuse of process may be relied on by a court, as a matter of discretion, in two distinct situations: (i) where a fair trial for the accused is impossible...; and (ii) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct*."

112. The Courts have proceeded to state that courts have the discretion to stay criminal proceedings even where it may be argued that a fair trial is possible, as long as they form the definitive conclusion that the process of the court is being abused. Thus, in the case of R v Latif [l996] l WLR 104, Lord Steyn stated, at page 112, that:

"*In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed*."

113. The foregoing is a snapshot of a rich body of jurisprudence that exists of this subject.

114. Pausing there, the Court now proceeds to a determination of the present matter.

115. First, the Court wishes to point out that unfortunately, despite the Court's clear direction that the State had to file both an affidavit and Skeleton Arguments in response to the 4th accused person, and particularly in response to the issues raised by the Court, the State did not file any Skeleton arguments. No explanation was provided during oral hearing as to why the State failed to file the Skeleton Arguments as directed by the Court. The importance of the State filing

Skeleton Arguments articulating the Sate's stance so as to assist the Court in coming up with a better-informed decision on the matter, cannot be overemphasised.

116. Secondly, the Court wishes to join in Senior Counsel Dr. Kaphale's expressed concerns about the filing of an affidavit without numbered paragraphs, which made it very difficult for the Court to make reference to specific parts of the said affidavit. The idea of simply making broad references to page numbers of an affidavit rather than to specific numbered paragraphs is quite troubling. The general and desirable practice in the drafting of affidavits, with regard to the problem at hand, is pretty much well settled. First, it is important that every page of the affidavit be numbered consecutively. Secondly, it is important, probably more important than the first, that each paragraph should, as much as possible, address a separate aspect of the subject matter, and that each paragraph be numbered consecutively. This general practice helps to ensure that the affidavit is well-organized and easily understood. The Court wishes, in this regard, to urge such distinguished Counsel of very senior standing at the Bar as Counsel for the State in the instant case, to help taking the lead in setting the qualitative bar of the standards of practice at the Bar very high. The Court hopes that the State will, in future, significantly improve on the quality of the affidavits filed with the Court.

117. The Court also wishes to agree with Senior Counsel Kaphale's observation that, as shown earlier in this Ruling, the Court invited the State to demonstrate the evidential material in the present matter that justifies the fresh charges preferred. As shown above, the Court stated, in its decision of 3rd February, 2025, that the State must show:

"*what it is, in summary, that they have found linking the 4th Accused Person to the available evidence herein, vis-à-vis the charges now preferred against him, and also on why the State proceeded to make the categorical statements it made in Court leading to his earlier discharge, and why this time around the same State has decided that it is appropriate that they prosecute him on the same facts they earlier found categorically wanting*."

118. In stating this, the Court did not require or expect that the State had to prove the 4th accused person's guilt ahead of his trial as the State sought to argue. The Court simply required that the State identifies the items of evidence pointing in the direction of establishing a nexus with the charges preferred. In other words, the State was to provide a demonstration that there are facts available that show a probable cause for bringing the charges. Facts that show that there is at least a realistic prospect of securing a conviction. The words "in summary" should have made it clear to the State that the Court was not expecting a comprehensive statement or analysis of evidence at this stage.

119. Regrettably, as it is, the State has failed to identify even a single item of evidentiary material that shows a nexus between the charges and the information contained in the disclosures.

120. The Court has made a painstaking attempt to explore by itself the disclosures made to the Court by the State in order to determine whether there is any demonstrable nexus between what is contained in the disclosures and the present charges, that makes the present situation distinctly different from what it

was under the proceedings that were previously discharged.

121. In exploring the disclosures, the Court, in particular, has had occasion to look at an offer letter from Afrexim Bank to Reserve Bank of Malawi dated 23rd November, 2018 in respect of the U$350 million facility herein, The letter is headed "*Proposed facility for up to US$350 million in respect of financing to the Republic of Malawi represented by the Reserve Bank of Malawi*." In the opening words of the offer letter, Afrexim Bank wrote:

"*We, African Export-Import Bank ("Afreximbank"), are pleased to provide you with an indicative proposal to arrange a facility to the Government of Malawi represented by the Reserve Bank of Malawi ("RBM", "Risk Party" or "Issuer") to finance various trade and trade enabling initiatives of the Government for an amount of up to US$ 350 million (the "Facility")*."

122. Thus, under the agreement, the "*Risk Party/ Issuer*" was the "*Reserve Bank of Malawi ("RBM")*". The "*Mandated Lead*" was the "*African Export Import Bank.*" The "*Arranger ("MLA")*" was "*Afreximbank*." The "*Guarantor*" was "*Afreximbank*." The "*Noteholder(s)*" was/were "*Afreximbank and/or any other Financial Institution acceptable to Afreximbank*." The "*Guaranteed Noteholder(s)*" was/were "*Financial Institutions)/investors acceptable to the Guarantor.*" The "*Facility/Security Agent*" was "*Afreximbank*." The "*Custodian of local security (where applicable)* was "*FDH Bank*."

123. The facility type was segregated into:

(a) Facility 1 - Guarantee facility

(b) Facility 2 - Direct note purchase facility.

124. In respect of the purpose for the U$350 million facility, the Agreement provided that:

“Proceeds of the Facilities will be used to support the financing of various trade and trade enabling initiatives being undertaken by the Government of Malawi (the "Projects") as well as to finance eligible finance costs. List of projects identified to be partly supported from the Facility include:

- *Rehabilitation of the Kamuzu International Airport and Chileka Airport. US$200,000,000.*
- *Road works on Lake shore road - linking the sugar factories in Salima and Dwangwa to the rail line in Balaka -USS136,000,000.*
- *Rehabilitation of the Blantyre - Marka and Mkaya – Mchinji Railway line which links Zambia and partly linking Mozambique, - US$400,000,000.*
- *Any other trade enabling investments in the area of agribusiness, manufacturing, and energy sectors amongst others acceptable to Afreximbank.”*

125. The RBM accepted the offer, on the Malawi side, by signing the same. The facility, on the Malawi side, according to the disclosed documents, was signed by Mr. Rodrick Wiyo, who was at the material time the RBM’s Director of Financial Markets, on 27th December, 2018.

126. The Court has shown this level of detail about the U$350 million facility herein because, first, the said facility is what lies at the core of the whole matter herein. Thus, the details provide a proper foundational and factual context for a

proper understanding of the whole matter. Secondly, whilst the same does purport to show that it was being concluded by the RBM either for "*the Republic of Malawi*" or, in another passage, as "*the Government of Malawi represented by the Reserve Bank of Malawi*," the agreement, when read as a whole, clearly shows that it was really an Afrexim Bank and RBM Agreement, signed by the two as parties, and spelling out the respective rights and obligations of the two parties.

127. Obviously, the RBM being the State's principal instrument for managing the country's net import reserves, the Government was intended by the RBM to be a major beneficiary of the facility herein, by way of accessing the foreign currency reserves that the Bank had secured thereunder. Indeed, the indicated purposes for securing the said funds from Afrexim Bank, as shown above, show that the funds were to be used to finance very important Government projects including Rehabilitation of the Kamuzu International Airport and Chileka Airport, Road works on Lake shore road linking the sugar factories in Salima and Dwangwa to the rail line from Balaka, Rehabilitation of the Blantyre - Marka and Mkaya – Mchinji Railway line which links Zambia and partly also linking Mozambique, and other trade enabling investments in the areas of agribusiness, manufacturing, and energy. This notwithstanding, a scrupulous reading and analysis of the said agreement shows no indication that the Minister of Finance was behind, or had any evident role or involvement, in the conclusion of the agreement.

128. As a matter of fact, in the Minutes of the RBM's Fourth Board Meeting for 2018 held on 18th December, 2018 at the RBM, Blantyre, it is clear that the formal approval for the RBM to access the Afrexim Bank facility was granted by the RBM Board and not the Malawi Government. On Minute number 49/04/18, it

was recorded in the Board minutes that:

"***The Board noted that it approved, through a round robin method on 17 December 2018, two facilities between the Bank and African Export - Import Bank (Afreximbank), amounting to USD 350 million****, being a Secured Treasury Note Facility worth USD 100 million and a Treasury Note Guarantee Facility for USD250 million. These resources would enable the Bank to adequately accommodate the country's foreign exchange requirements, without negatively affecting the foreign exchange reserves position and the stability of Malawi's foreign exchange*." [Emphasis added]

129. This information goes to further buttress the point that at the material time and in the circumstances, it was the RBM, through an approval by a resolution of its Board of Directors, that arranged the facility with Afrexim Bank, rather than the Minister of Finance.

130. The Board's decision-making authority finds expression in sections 185(2) of the Constitution and 7(6) of the RBM Act. Section 185(2) of the Constitution provides that:

"***The Bank shall be controlled by a Board which shall consist of a chairperson and members of the Board*** *who shall, subject to this Constitution, be appointed in accordance with the Act of Parliament by which the Bank is established*." [Emphasis added]

131. Section 7(6) of the RBM Act, in turn, provides that:

“The Board shall be responsible for the formulation of the policies of the Bank other than monetary policy, and shall oversee the operations, administration and management of the Bank and the exercise of the powers and functions of the Bank.”

132. Further, according to the Second Schedule to the RBM Act which provides for “Additional Powers and Duties of The Board”, the Board is granted powers to:

“*(b) approve all determinations, guidelines and instructions of general application that are to be issued by the Bank;*

…

(n) approve the Bank’s budget;

(o) determine the accounting policies of the Bank and to approve the annual reports and financial statements of the Bank;

(p) determine and ensure the establishment of an effective risk management structure; and

(q) ensure good corporate governance of the Bank.”

133. The point here is that, unless expressly provided to the contrary under the Constitution or an Act of Parliament, all the important approvals that relate to the functions and duties of the RBM are approved by the RBM Board and not by the Minister or the National Assembly.

134. In any event, the parties herein are agreed that the Minister at the time the facility was negotiated was certainly not the 4th accused person herein. It was

the late Hon. Goodall Gondwe. Under the circumstances, if he were to be linked to the charges herein, there must be specific pointers to his conduct between the time that he assumed office as Finance Minister in July 2019 and September 2020, that at least connects him to the allegations in the charges.

135. The disclosures herein show that the Bank's Financial Statements were, at all material times being signed by "*Dalitso Kabambe (PhD), Governor & Chairman of the Board" and "Ms. Maria Msiska, Chairperson, Board Audit Committee.*" After changes in the composition of the Board, in the period outside the period to which the charges herein relate, the disclosures show that the signatories subsequently became "*Dr. Wilson T. Banda, Governor & Chairman of the Board*" and "*Dr. Maxwell Mkwezalamba, Chairperson, Board Audit Committee*." This again shows that the financial statements were a matter for the RBM rather than the Ministry of Finance.

136. The disclosures reveal various swap currency arrangements, including attendant draw downs, all between the RBM and the Afrexim Bank during the period to which the charges herein relate. Again, there is no indication of the involvement of Ministry of Finance officials, let alone the 4th Defendant herein, in the documentation in order to make a potential case for his involvement in expenditure of the said funds by the Bank.

137. The only document that the Court could identify from the disclosures, which involves the 4th accused person, is an Appendix to an IMF Report on Malawi of November 7, 2019.

138. The Appendix, which appears at pages 154 -155 of the disclosures is a "*Letter of Intent*" signed by "*Hon. Joseph M. Mwanamvekha, M.P, Minister of Finance, Economic Planning and Development*" and "*Dr. Dalitso Kabambe, Governor of the Reserve Bank of Malawi*." Attached to said Letter of Intent was a "*Memorandum of Economic and Financial Policies (MFFP)*" and a "*Technical Memorandum of Understanding (TMU).*"

139. When one goes through the entirety of this Report, that runs into 75 odd pages, it is again not immediately apparent, or at all, as to how it relates to the charges that the 4th accused person is facing.

140. The Court recalls that Counsel Liwimbi in his affidavit, stated, as shown earlier, that the 2020 report to the IMF, allegedly signed by the 4th accused and the 2nd accused, Dr. Dalitso Kabambe, fraudulently excluded the US$350 million loan, its proceeds, and their derivatives. Senior Counsel Kaphale indicated in his oral submissions that the defence did not find this alleged document in the disclosures. The Court likewise could not locate this document anywhere in the disclosures. This goes to further show why, if at all the said document perhaps lie hidden somewhere, it was important for the State to have heeded the Court's order and clearly brought such information to the Court's attention. This could probably have included exhibiting such a report to Counsel Liwimbi's affidavit. In the absence of such a document in the disclosures, the assertion of its existence and, in addition, the purported signature thereof by the 4th accused person remain, in this Court's view, merely speculative averments.

141. Simply put, an examination of the disclosures, which Mr. Nyasulu argued the Court should treat as being available to it, and that there was no need for Counsel Liwimbi to have attached any exhibits or made specific references to items of evidence contained in the disclosures linking the 4th accused person to the charges, does not provide the Court with an immediate clue on how the said disclosures contain evidential material that may, in any way, point to the possibility or probability of implicating the 4th accused person so as to warrant the reinstatement of charges.

142. Examining the charges, it indeed emerges that they place the locus of the commission of the alleged offences at the Reserve Bank of Malawi, but nothing in the disclosures seems to provide any hint on the placement of the 4th accused person herein at the said locus during the period the said offences are alleged to have been committed.

143. Further, it has already been demonstrated above that section 5 of the RBM Act guarantees independence to the RBM, members of the Board and staff from outside interference. It is clear from both Malawi's constitutional design as well as the statutory design under the RBM Act, that there are clear functional demarcations between the RBM and the Ministry of Finance. Among other things, the functional independence of the RBM as provided for
under section 5 of the RBM Act was intended to ensure decision making autonomy by the RBM and to shield the Bank from the influence of, among others, political figures with a keen interest in the affairs of the Bank such as the Minister of Finance. It is this Court's considered opinion that to hold a former Minister of Finance such as the 4th Accused person herein criminally responsible

for decisions, omissions or reporting failures within the RBM, without any evidentiary material that shows the giving of directions or instructions, or any collusion or knowledge, is to collapse the very institutional safeguards that the law intended to preserve.

144. It is noteworthy that all the three counts herein allege that the alleged offences were committed between September 2018 and 24 September, 2020 at the Reserve Bank of Malawi in the City of Lilongwe. One would therefore have expected that, in their explanations and justifications as directed by the Court, the State would have identified relevant documents or material relating to the said charges that indicate a probable link with the conduct of the 4th accused person.

145. In short, the State should have taken heed of the Court's order and direction in relation to the issue at hand. The Court directed the State to identify and point to the Court the items of evidence in the disclosures that show a link to the fresh charges preferred. To be clear, the Court here was requiring the State to identify items in the disclosures that would at least show a link between the 4th accused person and the fresh charges. The Court was not requiring the State to demonstrate how the disclosures would prove the guilt of the accused person, as such proof would only be expected after full trial.

146. Regrettably, the State, after being given at least two opportunities, instead of doing precisely what it had been called upon to do, only decided to refer the Court back to the disclosures without providing any proper indication as to what items of evidence the Court should be looking at.

147. In other words, after the Court required the State to demonstrate what it is in the disclosures that they had found which at least linked or would link the 4th accused person to the charges herein, the State's response has been, effectively, to state to the Court that the answers are available to the Court through the disclosures and that the Court might wish to find those answers from the same by itself. Dutifully, this notwithstanding, the Court, as mentioned earlier, felt obliged by the invitation and explored the disclosures for possible evidential material showing some probable link to the 4th accused person, all without success.

148. The Court is of opinion that this was clearly a lost opportunity by the State. As Senior Counsel for the 4th Accused person correctly pointed out, it seems the Prosecution pre-occupied itself with addressing the Court on theoretical issues whilst the Court was looking for real evidential pointers to justify the argument that there was a nexus between the information in the disclosures and the charges, and a fundamental change of circumstances that would warrant the bringing of fresh charges, notwithstanding the unusual manner in which the 4th accused person herein was initially discharged.

149. The Court does not have an endless well of opportunities for the State to explain itself. A time must come when those opportunities come to an end. Such a time is now. It is evident to the Court that the State has failed to provide a convincing explanation as demanded by the Court under the circumstances.

150. Finally, the Court wishes to emphasise that whilst the State has a very wide

margin of discretion when it comes to the making of prosecutorial decisions, the State also bears a heightened duty of both due diligence and candour to the Court. Such duty, in this Court's view, was triggered in the instant matter when the State admitted, under oath, that it had no evidence linking the 4th accused person herein to the previous charges. In the absence of a demonstrable and credible foundation, and a statement as to what has fundamentally changed, that admission cannot simply be disregarded by the State deciding to change tune without a sound explanation.

151. The Court recalls its earlier statement (above) that it would appear from the State's own representations, that this is a matter that was characterised by uncoordinated reviews within the State's Chambers, leading to diametrically opposite conclusions and decisions. The totality of the circumstances of the matter, in the Court's view, reflect a good measure of prosecutorial indecision as to the case against the 4th Accused Person. It is this Court's view that such prosecutorial indecision could potentially unfairly lead to successive and even multiple criminal proceedings being brought against an accused person on the same facts with no new evidential material, or a demonstration of better prospects to secure a conviction shown. Such successive prosecutions against the same accused person under these circumstances could be abusive and could serve to vex or oppress the accused person. It is the responsibility of the Court to uphold fairness for both the prosecution and the accused person, and to ensure the preservation of the integrity of its own processes and of the criminal justice system as a whole, by stopping proceedings that tend to abuse these systems and processes.

152. In the result, in the circumstances of the present matter, the Court opines

that this matter seems to be emblematic of the situation described by the Court in Brock vs North Carolina, namely that it seems to be the case where the prosecution seeks to prevent a trial from proceeding to a termination in favour of the accused person merely in order for the prosecution, who have been casual and ineffective in their handling of the case against the 4th accused person, to see if they can do better a second time. Two opportunities afforded to the State to provide a preliminary indication that they could indeed do better a second time, if permitted to do so, has been met with another wholly unsatisfactory attempt at a proper explanation.

153. The Court reiterates that allowing the State to proceed with the prosecution under these circumstances, with no demonstrable link between the disclosures and the 4th accused person, following an earlier discharge by the Court based on the same facts, and with the State having refused to discontinue the case by themselves but also having urged the Court to discharge the 4th accused person, would be to allow the State to abuse this Court’s process. The Court will not proceed along that path

Conclusion

154. The Court wishes to emphasise that the general rule when it comes to a discharge of an accused person, whether upon a discontinuance by the DPP in terms of section 99(2)(c) of the Constitution as read with section 77(1) of the CP & EC, or upon discharge by the Court under section 247 of the CP & EC, is that the State can recommence the criminal proceedings so terminated. The periods prescribed for recommencement are six months and twelve months from the date of the discharge, respectively.

155. However, in some instances, circumstances may compel the Court to cause the State to explain the decision to recommence proceedings so as to satisfy the Court that the law and the procedures the law has laid down are not being abused to the detriment of accused persons or of the court system.

156. Courts will be especially slow to intervene where the DPP exercises the executive constitutional power of discontinuance as compared to instances where the Court has, by its own decision, such as in the present case, been called upon to discharge an accused person under section 247 of the CP & EC on grounds that the prosecution is unable or unwilling to proceed with a prosecution. In instances where the Court makes its own decision, particularly where such decision is a reasoned one, the Court would be more readily amenable to call for a prior explanation justifying recommencement of proceedings, as contrasted with instances where the constitutional executive power of discontinuance has been exercised.

157. Where the Court, upon calling for explanation, as in the instant case, comes to the conclusion that there is abuse of the Court process, the Court has the discretion to stay the criminal proceedings with no possibility of recommencing the proceedings based on the same facts.

158. The Court must emphasise, however, that this power to permanently stay proceedings and permanently discharge an accused person on grounds of prosecutorial abuse of the court process is only exercisable in rare and exceptional cases, where compelling and convincing grounds exist. The instant decision does not create and should not be viewed as creating a general practice

of accused persons in criminal cases bringing applications for permanent stays of prosecution based on trifling or flimsy grounds. Such applications would equally amount to abuse of the court process and the courts will be duty bound to deal firmly and sternly against such abuse. The present decision must therefore be viewed on the totality of its own peculiar facts and circumstances, and in the light of the authorities herein cited. As was stated by Fitzgerald J in the case of R v Johannsen & Chambers, (1996) 87 A Crim R 126, at page 135, as a general rule:

"*A stay should not be granted if the prosecution can proceed, uninfluenced by improper purpose, without unfairness to the accused, with a legitimate prospect of success and, in the event of conviction, no significant risk that, because of delay or other fault on the part of the prosecution, an innocent person will have been convicted.*"

159. In the present case, however, such an exceptional circumstance has arisen, given the history of the State's conduct throughout the matter, its failure to take heed of the directions of the Court, and indeed based on the evidential substance or lack thereof in the disclosures that do not show any discernible link to the accused person in order to establish a probable cause for bringing him back to trial. No plausible and convincing explanation has been provided to the Court for the reinstatement of the criminal charges against the 4th Accused person. No demonstrable link has been shown

between the current fresh charges and the available facts in the disclosures. No material difference in terms of the relationship between the current charges and the information contained in the available disclosures, and the relationship

between the charges in the previously discharged proceedings and the information contained in the disclosures has been shown.

Final Order

160. In the light of the foregoing analysis and findings, and having found that the State has failed to provide any plausible and convincing explanation for the reinstatement or reinstitution of criminal charges against the 4th accused person, and further having found that the disclosures herein reveal no demonstrable link whatsoever between the evidentiary material and the charges now preferred against him; and also having, under the circumstances concluded that the present prosecution constitutes an abuse of the Court's process, the Court, in its inherent jurisdiction and powers, hereby orders that:

(a) The prosecution of the 4th Accused Person herein on the charges currently before this Court, based on the present set of facts, is permanently stayed.

(b) That the 4th Accused Person is accordingly hereby permanently discharged from the said proceedings.

(c) That the discharge herein is final, and shall operate as a bar to any further prosecution of the 4th Accused Person if based on the same set of facts.

161. It is so ordered.

Delivered in open Court this 8th Day of May, 2025 at Lilongwe.