IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 984 OF 2004

BETWEEN:

DR CASSIM CHILUMPHA……..PLAINTIFF

and

CHENDAWAKA FAMILY…….……..1ST DEFENDANT

and

BLANTYRE PRINT AND
PUBLISHING COMPANY LTD…….……..2ND DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**

T.C. Nyirenda, of Counsel for the Defendants

Beni, Official Interpreter

RULING

As Interim Applications Judge, on 22nd March 2004 on ex-parte application in this matter came before me under Order 28 rule 1 of the Rules of Supreme Court. It was duly supported by an affidavit and a number of exhibits. Upon considering the application I granted an interim order of injunction on terms as to understanding in relation to damages on the part of the Plaintiff in case it should later turn out that the injunction had been

wrongfully obtained. (See: Note 29/1/12 under O29 rule 1 RSC). I also added the condition that within seven days of that order the Plaintiff should file an inter-parties application, should he wish to extend the application of the initial order. (See: Note 29/1/7 under O29 rule 1 RSC). Today is 26th March 2004 and the period I allowed for the filing of the Plaintiff's inter-partes application is due to expire on Monday 29th March 2004.

It is deliberate that the Rules of Supreme Court under Order 29 normally sanction an interim order of injunction granted on an ex-parte application to last only a few days. The aim is to ensure that what the Applicant has presented as an emergency situation on the ex-parte application is quickly revisited by the Court in the presence of both parties, who utilize that occasion to fully argue their sides of the matter to enable it, this time round come up with a more balanced and less hurried decision. The result of such an expected and early counter is that the Court either feels confirmed in the order it earlier made and so extends it or it discovers that it was either misinformed or misled during the ex-parte application and so it narrates or otherwise dissolves the order.

The position of the law, as I understand it, is that on an inter partes hearing the Applicant gets the opportunity in the face of his/her adversary to justify the need for injunctory relief he had so much to hurry for in the first place and to bargain for the continuation of that relied. He can succeed, but he can equally fail in this endeavour. Similarly on this occasion the affected party gets the opportunity to challenge, if he or she is so inclined, the step the Applicant took in his/her absence during the ex-parte application. The affected party thus has ample opportunity to demonstrate the property or otherwise of the Applicant's approach to the Court for the injunctory relief in question and to point out if it was improperly obtained, asking for its dissolution on that account.

The limited time normally accorded to the initial ex-parte order is deliberately so fixed so as to minimize the inconvenience, if any, the affected party might suffer by virtue of the order he/she was not heard on. In addition the understanding as to damages the Court requires of the Applicant is there for purposes that in case the affected party later demonstrates that he/she has suffered unjustifiably by virtue of the order and establishes that the order should not even have been made in the first place, it should be open to a Court of Law to make an order that he/she be compensated in damages for such inconvenience.

If is also the position of the law that if a party granted an injunction ex-parte does not fulfil the conditions attaching to the grant of the order, if he does not take out the directed inter-partes application within the period set by the Court or if he does not fulfil some other attached condition, the injunction so granted elapses automatically on non-fulfilment or on breach of condition. (See: Note 29/1/13 under Order 29 rule 1 RSC).

I must say that in this case the application that was presented to me ex-parte on 22nd March 2004, upon hearing in mind the principles that govern the consideration of such applications, as amply discussed at Note 29/1/2 under O29 rule 1 of the Rules of Supreme Court, I was amply satisfied that it was proper, pending the hearing of the Originating Summons filed along, to maintain the status quo by granting the application for injunction and I so granted the same.

The law, as must have already been seen, does not, when this happens, leave the Defendant in a helpless situation. As already indicated it asks the Courts to, as first step, limit the period of restraint arising from its order unless ratified by an inter partes hearing. It also at the same time asks the Court to guarantee that the affected party will be compensated in damages on strength of an understanding to this effect by the Applicant in event of the order being proved erroneous later and being shown to have done the affected party some harm. Over and above this, moreover, the law permits the affected party, if he or she is impatient about waiting for the Applicant's inter partes application, to if its own volition or motion challenges the injunction order served on it.

Now in the case at hand the injunction order herein having been issued on 22nd March 2004 with the necessary safeguarding conditions in place, the Defendants who were affected by the order, were assured of all available opportunities to challenge the order, of they were so minded.

The direction of the Court that the plaintiff take out an inter partes application within 7 days of the order meant that within a reasonably short period of time the Defendants would have their opportunity to comment on the Plaintiff's application for injunction and do all in their power to persuade the Court to dissolve it. Their opportunity to expose what they believe to be weaknesses in the Plaintiff's application was virtually guaranteed and they were going to be heard in full. In case, however, the Plaintiff did not take out the directed inter-partes Summons, the relief of the Defendants was equally well guaranteed. As earlier pointed out the order obtained by the Plaintiff was going to expire by mere virtue of that default.

Of course as already pointed out the Defendants were free to put in their own application by way of challenge of the order served on them. As it turns out this is the option they have settled for and so yesterday afternoon, 25th March 2004, they brought to Court an ex-parte application of their own to dissolve the injunction order herein.

I looked at the application and upon going through it formed the opinion that it should be heard inter partes. I therefore so ordered and recorded my direction on the file. Learned Counsel for the Defendants was not satisfied upon learning of my order and so he immediately came into my Chambers and asked that he be still heard in case I

might wish to revisit my stand. I then duly heard him on his complaint.

The first point I would like to make about all this is that the direction I made to have the application for discharge of order of injunction filed by the Defendants heard inter parties did not in any way mean that it had been rejected or otherwise found wanting. In fact each time an ex-parte application is passed on to a Judge, be it for grant of injunction or for its discharge, the first thing he does is to evaluate it. At least that is what I do. If on the face of it he finds it proper to determine it ex-parte he does so, and he can decide it on the papers or call upon Counsel to present it. If however on this preliminary consideration he feels that for some reason an inter partes application is more suitable, he so orders. This Plaintiff's application for injunction herein on 22nd March 2002, I can disclose, underwent the same evaluation. It is just that I after the evaluation decided to determine it ex-parte and to put in the normal conditions as safeguards. Therefore it is not accidental that I heard that application ex-parte just as it is also not accidental that on the current application I directed an inter partes hearing. In order to have the issue of the injunction fully and effectively addressed and resolved I decided that the application for discharge, just like the application for continuation, be subjected to an inter partes hearing which would accommodate full representations by both parties with authorities with arguments and counter-arguments well-traded.

The second point I ought to made is that I so made the it for inter parties hearing, not on a casual glance of the application papers, but after due perusal of the same. I thus took that decision well knowing that I was within the rules in deciding on the course the application should take for effective disposal. This direction was, therefore, a result of an exercise of a direction the law confers on me. Much as I appreciate that there are points the Defendants wish to make and that their passion and anxiety to so make those points is quite high, I also appreciate that matters concerning the law of business organizations are not as elementary or as commonplace as say bail applications are and that much as one party may feel so convinced about the correctness of its position, a more wholesome and encompassing evaluation, after heavy submissions even citing contradicting authorities from both sides, may be the best means of achieving justice between the parties. I therefore settled for an inter partes disposal of the Summons of the Defendants, precisely to allow for full exploration of the issue from all available angles and to give the parties a chance even to comment on each other's arguments and legal points. May I say that the Law of Moses of an eye for an eye is out of place here and so it does not have to be that an ex-parte application ought of necessity to be answered by an ex-parte application. The fact that I found the initial ex-parte application acceptable does not mean that the rest of the disagreements between the parties should all be settled in the same style.

Having thus exercised the discretion to direct how the Defendant's application should be processed and handled, basically and technically I became functus officio on this ex-parte appliction. As I must have already pointed out my order did not deprive the Defendants opportunity to be heard on their grievances. Chance to do so was merely being pushed to another day, and they were being given the opportunity on that occasion

to point out the shortfalls of the other party in his presence and to do so as fully as they desired. If however they felt so strongly against the postponement of their argument and if they felt that my discretion had not been exercised judiciously, the door for appeal against this order was readily available.

Be this as it may I had no desire to bar learned Counsel from conveying his displeasure to me on the order I had made. He thus went ahead and made his point. In particular he referred to Practice Note 29/1/8 under Order 29 rule 1 of the Rules of Supreme Court. This note indicates that the Court has power, on sufficiently cogent grounds, to discharge ex-parte an order of injunction granted ex-parte. Believing his clients to have such grounds, learned Counsel was asking me to use these powers ex-parte and he went further to pin-point the said cogent grounds in his address.

As I understand this Practice Note it does not make it compulsory that on request I handle such applications ex-parte without option. The announcement of the existence of such power to me connotes exercise of discretion whether to use the power or not to use it. If I am not correct in so construing this power let the Supreme Court correct me for guidance in future applications. I have always used this discretion whenever occasion has arisen and as I have said the opinion I reached was deliberate so that on the points raised there be open and wide canvassing in the presence of the very party the Defendants are alleging withheld material information in his ex-parte application for the order under challenge. I deliberately wanted that each side exhaust its arguments in the presence of the other party so that the issue of the injunction herein does not assume the quality of a gorilla warfare where each party takes the opportunity of the next available ex-parte application to stab the adversary in the back.

I am quite satisfied that in the manner the initial application was presented to me, using a uniform method for handling such applications, I came to the decision to grant it ex-parte with all safeguards the law allows me to put in. Now in regard to the application of the Defendants I equally had reasons that led me into making the order I made to have if proceed the inter partes way. I still feel that my decision was sound and not capricious. I am not convinced that I should change my decision just because learned Counsel insists that I should hear this application ex-parte. My initial order although ex-parte did take into account the interests of the Defendants. There is room for the Plaintiff's injunction to elapse in its own if he does not comply with the conditions of the order. Even if he does comply the Defendants have already been accommodated in the inter partes application that might follow and they will have full opportunity to air their grievances against the order. Besides there is an undertaking as to damages accompanying the order which they can take advantage of if they satisfy the conditions that would trigger its employment. Above all their present application has not been rejected. They are only being directed to argue it more openly with the opponent testifying to his alleged misdemeanours. All that point I am certain that the Court hearing the parties will duly condemn whichever of them is in the wrong. The order I made for this application to be made inter partes will stand and I so order.

Made in Chambers this 26th day of March 2004 at Blantyre.

A.C. Chipeta

JUDGE