JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 495 OF 2016
BETWEEN

OUSMAN KENNEDY (On his own behalf and as
President of the Blantyre International University
Students' Union Representing all
Students of Blantyre International University) ..... PLAINTIFF

AND

BLANTYRE INTERNATIONAL UNIVERSITY ..... 1ST DEFENDANT NATIONAL COUNCIL FOR HIGHER EDUCATION ..... 2ND DEFENDANT
CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Domasi, of Counsel, for the Plaintiff
Mr. David Banda, of Counsel, for the 1st Defendant
Ms. Chigoneka, of Counsel, for the 2nd Defendant
Mr. O. Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J

This is an application brought under Order 29 of the Rules of the Supreme Court (RSC) whereby the Plaintiff seeks an order restraining the Defendants from closing, deregistering, discrediting or in any way interfering with courses offered to the Plaintiffs by the 1st Defendant pending the determination of the main action herein.

The application came before me on 28th December 2016, by way of an ex-parte summons, and there was filed along with the ex-parte summons an affidavit, sworn

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by the Plaintiff [Hereinafter referred to as the "Plaintiff's Affidavit". For reasons that will become clear in a moment, it is necessary to set out the material part of the Affidavit in full:

> *"3. The University is a private institution of Higher learning that offers different disciplines in accordance to the Laws of Malawi. Some of the Disciplines include, but not limited to:*
>
> *a. Bachelor of Accounting and Finance;*
>
> *b. Bachelor of Actuarial Science,·*
>
> *c. Bachelor a/ Business Administration;*
>
> *d. Bachelor of Counselling Psychology,·*
>
> *e. Bachelor of Entrepreneurship,·*
>
> *f Bachelor of Journalism;*
>
> *g. Bachelor of Banking and Finance;*
>
> *h. Bachelor of Economics;*
>
> *i. Bachelor of Information Technology; and*
>
> *j. Bachelor of Tourism and Hospitality Management;*
>
> *4. Further, the 2nd defendant has refused, neglected or avoided explaining if Bachelor of Laws programme is still accredited since students enrolled in it believing that it was duly accredited.*
>
> *5. In addition to the aforementioned, the 2nd defendant has refused to register or accredit the following programmes:*
>
> *i. Bachelor of Public Administration and Political Science;*
>
> *ii. Bachelor of Early Childhood Education;*
>
> *iii. Bachelor of Education in Mathematical Sciences;*
>
> *iv. Master of Arts in Community Development;*
>
> *v. Master of Science in Economics;*
>
> *vi. Master a/ Business Administration; and*
>
> *vii. Master of Science in Finance.*
>
> *6. Before enrolling with University, we took steps to establish if it was duly registered with the authorities and if indeed the above mentioned programmes were duly registered and accredited with the 2nd defendant. Our aim was to*

ensure that the degrees to be awarded to us will be recognized by the 2nd defendant as required by law and the society at large.

7. *The 1st defendant assured us that we are going to be awarded with recognizable degrees on completion of our respective academic cycles as it touted the institution and the aforementioned degrees as **'accredited '.** I attach and exhibit hereto the 1st defendant 's advert marked as **OU1** which clearly show that the 2nd defendant allowed the 1st defendant to enrol students to pursue studies at the 1st defendant institution.*

8. *The 2nd defendant also encouraged this belief by displaying in its website that the 1st defendant and the above mentioned programmes are accredited and this encouraged us to enrol with the university a copy of the said document is attached and exhibit hereto and is marked as **OU2.***

9. *I also exhibit hereto what I term as 'certificate of accreditation ' from the authorities marked **OU3** which also removed the doubts we had regarding accreditation of the 1st defendants and its programmes.*

10. *We were therefore surprised when the 2nd defendant released a statement in the local papers to the effect that the 1st defendant's aforementioned programmes were not accredited and that it is illegal for the 1st defendant to offer the above programmes/courses. The 1st defendant was also informed of the decision and I attach and exhibit hereto the said statement marked **OU4** in November, 2016.*

11. *We protested the 2nd defendant's decision and we were verbally informed that the decision will not affect students who graduated before the assessment but those graduating after the declaration.*

12. *This created confusion in all of us considering that some of us have just finished our programmes and we are awaiting award of degree certificates whilst others will be .finishing within a semester, a year, 2 years or 3 years.*

13. *Due to the 2nd defendant's decision, the 1st defendant, on 20th December, 2016, indicated to us that it has stopped offering the above listed courses in compliance with the 2nd defendant 's order and that we have been ordered to go home awaiting possible **'reaccreditation** ' or **'deregistration** ' of the institution at least after a year .*

14. *We believe the conduct of the defendants is in breach of the clear terms of the contract between the plaintiffs and the 1st defendant. It also violates our right to education as the defendants have not considered our interest by either stopping offering services to us and or declaring our potential degree certificates invalid.*

15. *Unless stopped by an order of this Honourable Court, the defendants will not allow us finish our studies and that the 211d defendant will continue publishing to the general public or potential employers that our qualifications are invalid.*

16. *The damage and inconvenience caused to us due to the closure of the University and/or the declaration of our qualifications worthless will be immeasurable in*

monetary terms as it is going to be impossible to command any respect with these qualifications and that the lost time and money will be irrecoverable.

Wherefore I pray for an order of injunction restraining the 1st defendant from refusing to offer the programmes that we are enrolled and that the 2nd defendant be restrained from deregistering or in any way interfering with the administration of the aforementioned programmes by the 1st defendant until further order of the Court. "

I granted the Plaintiff an interlocutory injunction, as prayed, subject to an inter partes hearing on 9th January 2016. The 2nd Defendant is opposed to sustaining the interlocutory injunction and it, accordingly, filed an affidavit in opposition, sworn by its Chief Executive Officer, Mathildah Chithila Munthali [Hereinafter referred to as the 2nd Defendant's Affidavit]. For purposes of parity of treatment, I will also set out in full the material part of the 2nd Defendant's Affidavit. It reads:

"4. THAT the second Defendant is a statutory body established under the National Council for Higher Education Act with the mandate inter alia to,· promote and coordinate education provided by higher education institutions, register and deregister higher education institutions, determine the minimum criteria and procedures for the registration, to develop a national qualifications framework which is compatible with regional and international standards and to accredit both public and private higher learning institutions.

5. THAT in pursuance of its mandate to determine minimum criteria and procedures for the registration and de-registration of higher education Institutions, the National Council for Higher Education (NCHE) called a stakeholder consultation meeting to discuss the standards promulgated for registration and accreditation, at which all the higher learning Institutions in Malawi were represented, including Blantyre International University (BIU). Attached hereto marked and exhibited as "MCM1 " is a copy of the invitation.

6. THAT following the stakeholder consultation meeting, minimum standards were set and an evaluation framework for accreditation developed and duly approved by the NCHE Council. I attach hereto, a copy of the minimum standards and the accreditation evaluation framework, marked and exhibited as "MCM2" and "MCM3", respectively.

7. THAT the said Minimum standards and the Evaluation framework were both disseminated to all Institutions of Higher Learning, including the first Defendant. I attach hereto a letter showing the same, marked and exhibited as "MCM 4":

8. THAT the accreditation Assessment process is conducted upon application of an Institution and submission of its own self-assessment report on the standards agreed and set out in exhibits MCM2 and MCM 3 above. BIU was informed of the same in a letter attached hereto, marked and exhibited as "MCM 5".

***9. THAT** Blantyre International University expressed interest to be accredited pursuant to Section 36 of the NCHE Act and an accreditation assessment was done from the 23rd day of May to 26th of May 2016. Attached hereto, marked and exhibited as **"MCM 6"** is a copy of the communication to that effect.*

***10. THAT** following the accreditation assessment visit, the Council noted that the*

several programs failed to meet the standards set for accreditation and communicated the same accordingly to the first Defendant. Attached hereto marked and exhibited as ***"MCM*** 7" *is a copy of the communication to that effect.*

11. ***THAT*** *apart from accreditation of the already registered programs, BIU applied to register new degree programs including Bachelor of Laws, Bachelor of Education in Mathematical sciences, Bachelor of Education in Early childhood, Bachelor of Public administration and Political Sciences, Bachelor of Laws, Master of Science in economics, etc. Attached hereto, marked and exhibited as* ***"MCM 8"*** *is a copy of the said application.*

12. ***THAT*** *it must be mentioned from the outset that these programs were never registered either before or after the establishment of the NCHE, a fact that the applicant's affidavit fails to mention. There never should have been any students enrolled at all.*

13. ***THAT*** *I refer to paragraph 4 of the affidavit in support and aver that the Applicant never at any point asked for an explanation as regards the law program such that it is misleading and untruthful to depone that the 2nd Defendant has neglected or failed to provide the same.*

14. ***THAT*** *having considered the application for the registration of the new programs, the Council noted that the requirements for the new programs had not been met and rejected the application for registration with recommendations for improvement on the same. Now shown to me, marked and exhibited* ***"MCM 9"*** *is a copy of the communication to that effect.*

15. ***THAT*** *by virtue of Section 27(4) of the National Council for Higher Education Act, the 2nd Defendant is mandated to publish the results of the accreditation process in the gazette or the media which it did through the Nation newspaper publication of Monday, 21st November, 2016, now shown to me marked and exhibited as* ***"MCM 10".***

16. ***THAT*** *I refer to paragraph 5, 8 and 10 of the affidavit in support and aver that NCHE never at any point misrepresented the status of any qualifications nor did it enter into any contracts with the students of BI U or students of any Higher Learning Institution at all.*

17. ***THAT*** *it is not disputed that BIU is a registered institution of Higher learning and that it also has several program s registered as per exhibit* ***"OU2"*** *of the affidavit in support. NCHE never at any point ordered or directed the first Defendant to stop teaching or offering those courses as they have not even been*

deregistered. BIU provided an improvement plan to ensure the accreditation of the same.

18. ***THA T*** *I refer to Paragraph 8 of the affidavit in support and aver that the same is misleading as at no point whatsoever has the 2nd Defendant ever declared the Applicant's potential degrees invalid.*

19. ***THAT*** *the accreditation standards and the publication of the results of the accreditation assessments thereof is in the best interest of all Malawians including and especially the Applicants whose very interests are at the heart of the pro cess.*

20. ***THAT*** *the right to education cannot be realized if the education standards are poor and fall below accepted regional and international standards and it is NCHE 's mandate to take any all steps to ensure that Institutions of Higher learning offer high quality education. There has been no violation of the right to education at all.*

21. ***THAT*** *I refer to exhibit* ***"OU****3" and note that the accreditation referred to therein was meant to be valid for 5 years which time lapsed on 1st June, 2015 after which the Institution had to be reaccredited as per the provisions of the NCHE Act.*

22. ***THAT*** *furthermore, the NCHE Act in section 36(3) provide s that every Institution in existence at the time of coming into force of the Act has to apply for accreditation within 6 months. If indeed the Applicants had taken sufficient steps to ascertain accreditation, they would have been aware of the status of the accreditation and all the standards and the evaluation framework thereto as all that information is published and readily available and accessible on the NCHE website.*

23. ***THAT*** *in further pursuance of its mandate not only to establish but also to maintain high quality standards of Education in the Country, the Council is mandated to evaluate and assess Institutions of Higher learning every academic cycle to renew the accreditation certificate if the minimum requirements are met.*

24. ***THAT*** *the 2nd Defendant stands by the NCHE Act and repeats that it is illegal for anyone to offer or purport to offer higher education in programs that have not been registered with NCHE or its predecessor.*

25. ***THAT*** *the 2nd Defendant has followed the procedures as laid down in the National Council for Higher Education Act to the letter and has only done what is in the best interests of Malawi, including the Applicants herein, to promote and ensure high quality standards of education.*

26. ***THAT*** *I refer to paragraph 10 of the affidavit in support and aver that it is misleading and untruthful as the 2nd Defendant never at any point argued that it was illegal to offer registered programs. Further, by generalizing all the*

programs offered by the 1st Defendant, the applicant has misled the court into believing that all the programs referred to are registered.

27. ***THAT*** *the affidavit in support fails to show cause as to why the 2nd defendant should be ordered not to perform its mandate under the NCHE Act or indeed why the Council is party to the proceedings at all.*

28. ***THAT*** *furthermore, the Applicants failed to disclose material facts in their application for the injunction and attempted to mislead the Court.*

WHEREFORE *I pray that the injunction against the 2nd Defendant be discharged and the application herein dismissed with costs.* "

The Plaintiff filed an affidavit in reply [Hereinafter referred to as the "Affidavit in Reply"]. The Affidavit in Reply is relatively very brief and it as follows:

"3. I have read the affidavit of Mathilda Chitila Munthali and wish to respond accordingly.

4. *I refer to para graphs 4 to 9 of the affidavit and state that the said process of making or coming up with standards a complete nullity as the minister responsible has not promulgated the rules as required by law.*

5. *I also refer to paragraphs 11, 12, 13 and 14 of her affidavit and categorically deny that we suppressed material facts as all we did was to tell the Court that in addition to issue of accreditation, the defendant has refused to register some programmes.*

6. *Further, the defendant never gave its opinion on the Bachelor of Laws programme and has failed to attach the said response despite filing an affidavit in oppositio .*

7. *I refer to paragraph 17 and 18 and state that the said Mrs Matilda Chitila Munthali published to the nation and indeed to potential employers that as much as they are to recognize degrees from our institution prior to the declaration of disaccreditation, degrees to be awarded after the declaration which is 1st November, 2017, will not have the same effect. I recorded what the said Mrs. Munthali told a journalist of a local radio station, ZBS, and the recording is contained in the attached CD marked* ***GG.***

8. *I also attach and exhibit newspaper articles marked FF and* ***HH*** *in which the defendant clearly stated that we should find alternative universities and that degrees to be awarded after the declaration will not be recognized.*

9. *We strongly believe that the decision by NCHE in declaring or publishing that our degrees are of no effect is so damaging to us no potential employer will be interested in recruiting us.* "

The Main Action

The injunction was obtained shortly after the Plaintiff had commenced an action against the Defendant by originating summons wherein the Plaintiff seeks the following declarations and orders:

"1. A declaration that the 1st' defendant University where the plaintiffs enrolled in various degree programmes is a duly registered and an accredited institution;

2. A declaration that the conduct of the 1st defendant in refusing to render services to the plaintiff'; following the 2nd defendant's purported declaration of the 1st defendant's programmes on which the plaintiffs "enrolled" "unaccredited" amounts to breach of contract;

3. A declaration that the Minister responsible never promulgated standards for accrediting higher education institutions and that the decision of the 2nd defendant in revoking the 1st defendant's 'accreditation certificate' for failure to meet non-existent requirements is wrong and unlawful;

4. A declaration that the 2nd defendant's conduct in forcing the 1st defendant to suspend offering programmes before the end of the academic cycle is unlawful.

5. A declaration that the 2nd defendant failed to follow procedures laid down in the NCHE Act before revoking the 1st defendant's accreditation certificate.

6. An order that the r' defendant continue offering the accredited programmes to the plaintiffs.

7. An order that the 2nd defendant suspends its order declaring the J51 defendant and/or its programmes not accredited.

8. Alternatively, an order that the order declaring the 1st defendant not accredited should not apply retrospectively to us who enrolled with the 1st defendant before the declaration.

9. Any order of declaration the Court will deem fit.

10. An order of costs. "

Application for an Interlocutory Injunction

The main issue for determination in this application is whether this Court should order continuation of the order of interlocutory injunction, as was argued by the Plaintiff through his Counsel, or dismiss the application, as was argued by Counsel for the 2nd Defendant.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see 0. 29, r. 1(2) of the RSC, **Series 5 Software Ltd v. Clarke & Others [1996] 1 ALL ER**

853 and Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003. In the latter case, Justice Tembo, as he then was, observed as follows:

"The usual purpose of an interlocutory injunction is to pre serve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, thus to restrain the defendant from doing some act. The principles to be applied in applications for injunction have been authoritatively explained by Lord

Diplock in American Cyanamid Co. v. Ethicon Limited [19 75*j A.C. 396* ".

Is there a serious question to be tried?

In any application for an interlocutory injunction, the first issue before the court has to be *"Is there a serious issue to be tried?".* Indeed this must be so because it would be quite wrong that a plaintiff should obtain relief on the basis of a claim which was groundless. It is, therefore, important that a party seeking an interlocutory injunction has to show that there is a serious case to be tried. If he or she can establish that, then he or she has, so to speak, crossed the threshold; and the court can then address itself to the question whether it is just or convenient to grant an injunction: R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No .2), supra. If the answer to the question whether there is a serious issue to be tried is *"no",* the application fails in *limine* (see C.B.S. Songs v. Amstrad [1988] AC 1013.

In the present case, the Plaintiff is questioning, among other matters, whether (a) the minimum requirements on which the accreditation by the 2nd Defendant is meant to be based were ever promulgated by the Minister, (b) the 2nd Defendant could lawfully order the 1st Defendant to suspend offering programmes before the *end of the academic cycle and (c) the 2nd* Defendant's declaration that the 1st Defendant is not accredited could have retrospective application, that is, apply to students who enrolled with the 1st Defendant before the declaration.

On the other hand, the 2nd Defendant takes the position that that there is no serious issue to go for trial. Counsel Chigoneka submitted that the Plaintiff s case is premised on the allegation that it is the 2nd Defendant who withdrew the 1st Defendant's accreditation as an institution of higher education. Counsel Chigoneka argued that the allegation lacks merit in that, as per the "certificate of accreditation" marked OU3, when the 1st Defendant was being recognized and accredited in 2010 as a learning institution for purposes of higher education, it was made clear that the recognition and accreditation was subject to review after five years. It was thus contended that the Applicant misled the Court to believe that it was the 2nd Defendant who forced the 1st Defendant to stop its operations when in fact there was no such order in force at all. The contention was framed as follows:

4.1.3 The first point to note is that the certificate of accreditation was never revoked by the second defendant but rather lapsed by affluxion of time as well as by section 36 of the National Council for Higher Education Act.

4.1.4 …

4.1.8 The Applicants seek an order that the first Defendant Institution is accredited regardless of the fact that the certificate lapsed all by itself and also in spite of their own assertion that there are no known accreditation standards. We find that claim a contradiction in itself and as raising very little or no arguable claim at all.

4.1.9 If indeed the students had made the inquiries as to the accreditation status of the 1st Defendant, they would have been aware of the fact that the certificate was only valid f or 5 years.

4.1.10 In any event, with or without the intervention of the Council, the accreditation certificate had lapsed in itself and unless an assessment is done, it cannot be declared as valid.

I have carefully read and considered the affidavit evidence and the submissions by Counsel. To my mind, the case raises, for the first time, for the determination of the High Court the question when and how the 2nd Defendant's power to deregister or accredit institutions of higher education has to be exercised. Further, it is clear to me that the facts in the present case are very much in dispute. The Plaintiff s Affidavit was followed by the 2nd Defendant's Affidavit. Thereafter, the Plaintiff challenged the averments in the 2nd Defendant's Affidavit by filing an Affidavit in Reply.

In light of the contestation on both factual matters and the legal questions arising therefrom, I really doubt, and I do not think that Counsel expects, that this case can be resolved at an interlocutory stage before the factual landscape of the case unfolds during the hearing of the substantive case: see **John Albert v. Sona Thomas (Nee Singh), Sukhdev Singh, Samsher Singh and Hellen Singh, MSCA Civil Appeal No. 46 of 2006 (unreported).** As was aptly put in **Mwapasa and Another v. Stanbic Bank Limited and Another, HC/PR Misc. Civ. Cause No. 110 of 2003 (unreported),** *"a court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can avoid and unravel ".*

In the result, there can be no question of the present application being decided at the first stage of Lord Diplock's approach in **American Cyanamid Co. v. Ethicon Limited,** supra, and it is necessary to proceed at once to the second stage.

Are damages an adequate remedy?

Having dealt with the first hurdle regarding the question whether the Plaintiff has an arguable case, it is time to turn to compensability, that is, the extent to which damages are likely to be adequate remedy for each party and the ability of the other party to pay .

Counsel Domasi submitted that damages would not be an adequate remedy. The submission was put thus:

> *"If the University closes today, the students will be forced to find another institution to continue with their studies. However, f or them to be admitted at another University, public or private, the established practice requires that the applicants should have sat for M.S.C.E within the last 3 years. Otherwise, no University will allow the plaintiffs who sat for M.S.C.E over 3 years ago. Further, the plaintiff will have to pay a lot of money to start all over. In our view, there is great inconvenience arising due to the defendants ' decision."*

I agree with Counsel Domasi that the potential inconvenience and damages to be suffered by the Plaintiff cannot be calculated in monetary terms: they would be difficult to assess. In the premises, it is unnecessary to consider whether or not the parties will be able to pay damages. In the result, it is my finding, and I so hold, that damages would be an inadequate remedy in the application before me.

Balance of Convenience

In terms of the guidelines in **American Cyanamid Co. v. Ethicon Limited,** supra, it is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. In the words of Lord Diplock at 408F and G:

> *"It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached them. These will vary from case to case. Where other factor s appear to be evenly balanced it is counsel of prudence to take such measures as are calculated to preserve the status quo.* "

The rationale is that if the defendant is enjoined temporarily from doing something that he or she has not done before, the only effect of the interlocutory injunction in

the event of his or her succeeding at the trial is to postpone the date at which he or she is able to embark upon a course of action which he or she has not previously found it necessary to undertake. On the other hand to interrupt him or her in the conduct of an established enterprise would cause much greater inconvenience to him or her since he or she would have to start again to establish it in the event of his or her succeeding at the trial.

As already determined hereinbefore, the Defendants' action has potentially disastrous effect on the Plaintiff. In the circumstances, justice demands that the interlocutory injunction must remain intact until the main action is determined one way or the other. It is so ordered.

Pronounced in Chambers this 6th day of February 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE