IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3178 OF 2000

BETWEEN:

CHIKOKO TRADING LIMITED.....PLAINTIFF

and

FARMING AND TRADING CO. LIMITED.....1ST DEFENDANT

MRS M. CHAGWIRA.....2ND DEFENDANT

M. KAZOMBO.....3RD DEFENDANT

FARIDA SIKANDAR HAJI HAROON.....4TH DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Mbendera, of Counsel for the Plaintiff
Mhone, of Counsel for the Plaintiff
Mvalo, of Counsel for the 4th Defendant
Kaundama, Official Interpreter

RULING

On 6th October, 2000 the plaintiff through the Legal Firm M/s Mbendera, Chibambo and Associates commenced action against the four defendants herein. Basically the plaintiff in this action questions the passing of title in respect of property known as Title No. Bwaila 2/081 from the 1st defendant to the 4th defendant, with the second and third defendants purportedly executing the transfer on behalf of the 1st defendant, when the plaintiff himself claims title to the said property. In consequence the Plaintiff seeks the quashing of the transfer of title and along with that it is also seeking

a number of declarations and an injunction restraining the 4th defendant from ascertaining and taking over the premises in question.

On the same 6th day of October, 2000 Mr Mbendera, of Counsel, appearing on behalf of the plaintiff, pending the determination of the action, and to preserve the status quo until then, obtained from this court an ex-parte interlocutory injunction order valid for 21 days unless before then varied or discharged by further order of court. The injunction order in question restrains the 4th defendant whether by herself, her servants, or agents from entering and taking possession of the property in question herein, and from asserting property rights over the same by interfering with tenancy arrangements previously put in place by the plaintiff or its agents. The injunction order further directs the Lands Registrar for Lilongwe Lands Registry to enter a lis pendens against this title, forbidding any dealings regarding it without leave of the court and directs costs of the application to be in the cause. The injunction was granted on the usual undertaking as to damages in cases of this nature.

Following this on 12th October, 2000 the plaintiff through the same M/s Mbendera, Chibambo and Associates took out an inter partes summons to continue the injunction. The same was returnable on 20th October, 2000. This was well within the 21 day validity period given to the initial ex-parte order. On the same date however was made returnable a summons initially filed as ex-parte but which I directed to become inter-partes seeking the discharge of the interlocutory injunction granted on 6th October, 2000. This summons was filed by M/s Racane Associates, who also described themselves in the summons as Legal Practitioners for the plaintiffs in this case. Here was born a scenario where two legal houses were placing themselves on record as Legal Practitioners for the plaintiff, Chikoko Trading Limited, but pulling on opposite sides of the injunction granted as well as on opposite sides of the action commenced at the instance of the first set of lawyers.

The application filed on behalf of the plaintiff by M/s Racane Associates was premised on the basis that the injunction was obtained without the knowledge of the plaintiff and on a misrepresentation of the facts by the first set of lawyers. In the supporting affidavit it was deponed that Racane Associates are the Company Secretary and lawyers for the plaintiff, that the

plaintiff's Management and Board of Directors are not aware of this action, and that M/s Mbendera, Chibambo and Associates have commenced the action herein without any authority whatsoever to act on behalf of the plaintiff company. A number of exhibits are attached to the affidavit in support. The application to continue the injunction was between the plaintiff (M/s Mbendera, Chibambo and Associates appearing) and the 4th defendant, while the application to discharge the injunction was between the plaintiff (M/s Racane Associates appearing) and the plaintiff (M/s Mbendera, Chibambo and Associates appearing).

On 20th October, 2000 when the matter was called it was reported that Mr Mvalo of Mvalo and Company was to represent the 4th defendant. Mr Mvalo was said to be tied up in a trial in Lilongwe and I was advised that M/s Mvalo and Mbendera had agreed to have the matter adjourned and to have the interlocutory injunction order continued until the determination of that summons. That was done and the parties were to agree on a date and then approach the court at a later stage. In effect the summons to continue the injunction was adjourned sine die. As for the summons to discharge the injunction order filed by M/s Racane Associates, the Advocates competing to repeat the plaintiff, it was adjourned to 1st November, 2000 for hearing.

Before the next return date for the summons to discharge interlocutory injunction was reached and indeed before a fresh date had been secured to hear the summons that was adjourned sine die, a number of documents were filed in court. On 24th October, 2000 M/s Racane and Associates, the other set of lawyers for the plaintiff, filed a Notice of Appointment, to the effect that they had been retained by the 1st defendant, Farming and Trading Limited, to act for it as well in this action. On 26th October, 2000 an affidavit by one Zelifa Kazombo Mwale was filed in support of the summons to discharge the interim injunction. The affidavit is to the effect that the deponent is a director of the plaintiff company, that the said company neither instructed M/s Mbendera, Chibambo and Associates nor M/s Racane Associates to commence this action for it, that the plaintiff company (Chikoko Trading Ltd) denies being plaintiff in the case and can therefore not be beneficiary of an injunction order obtained without any instructions from it.

On the same date, however, M/s Racane Associates filed an affidavit by one Elinala Khumbize Kupingani Mwale who deponed the same in the

capacity of Director for Farming and Trading Limited, the 1st defendant. Much as by this time M/s Racane Associates had already placed themselves on record as both Legal Practitioners for the plaintiff (in a competing capacity) and also as Legal Practitioners for the 1st defendant, I think as so far there was no application involving the 1st defendant as either an applicant or a respondent, it is unsafe to deploy what I may call "volunteer affidavits" in the disposal of the summons before me. I will therefore duly omit to consider the affidavit of the said Elinala Khumbize Kupingani Mwale appearing to volunteer on behalf of the 1st defendant information in aid of the plaintiff in this case.

Come 27th October, 2000 M/s Mvalo and Company on behalf of the 4th defendant filed their own inter partes summons to discharge the interim injunction herein. The application was supported by three affidavits. Elinala Khumbize Kupingani Mwale and Zelifa Kazombo Mwale were again deponents, but at least this time round they both partly swore as Directors for a party before the court in these summonses. The third affidavit was by Mr Mvalo himself, of Counsel.

These three affidavits are essentially to the effect that the two Mwale women apart from some other capacity revealed, were directors in Chikoko Trading Limited and that they were aware of resolutions to sell the property in question herein to the 4th defendant. The affidavits go on to indicate that if M/s Mbendera, Chibambo and Associates in bringing this action were acting on instructions from the Interim Administrator of the estate of late Dr. H. Kamuzu Banda, those instructions should be treated as being invalid as the property in question does not belong to the said estate but to a Company with its own capacity to own property in its own right and name. The affidavit of Mr Mvalo simply then builds on the depositions in these two affidavits to emphasize the point that property of the plaintiff company cannot in anyway be part of the estate of late Dr. H. Kamuzu Banda as the company has a personality of its own and cannot be bequeathed, so that the Interim Administrator of the deceased estate has no capacity to deal with such company property.

On 31st October, 2000 M/s Mbendera, Chibambo and Associates filed a Notice of Motion for stay of proceedings questioning their authority as Legal Practitioners for the plaintiff. This motion they sought to be heard at the same

time set down for the summons to discharge the interlocutory injunction on application of M/s Racane Associates. The grounds offered in this motion for stay are to the effect that M/s Racane Associates got instructions from Directors improperly appointed, and that the said instruction were from Directors representing minority interests in Chikoko Trading Limited. In the alternative the grounds proferred are that M/s Racane Associates got their instructions from dissident Directors representing dissident Shareholders acting *mala fide* or, in the further alternative, that the authority of M/s Mbendera, Chibambo and Associates to act for the plaintiff had since been ratified. It was indicated that reliance in this motion would be placed on the affidavits of Dorothy Ngwira and of Mr Mbendera, of Counsel.

It turned out that the summons to discharge interim injunction by M/s Racane Associates and the motion to stay by M/s Mbendera, Chibambo and Associates could not be heard on 1st November, 2000 as previously set down. The two affidavits cited as filed in support of the motion for stay were neither on the court file nor served on M/s Racane Associates. Counsel who filed the motion needed two more days to either trace the affidavits originally prepared or to prepare, file and serve replacement affidavits. The matter was thus duly adjourned to 3rd November, 2000 with costs of that day's attendance granted to M/s Racane Associates in any event. On 3rd November, 2000 the summons and the motion were further adjourned to 21st November, 2000 owing to the lamented death of an up coming Advocate in Racane Associates. On that very day, however, M/s Racane Associates filed an affidavit with fourteen exhibits in opposition to the Notice of Motion for stay of their application. In short this affidavit in opposition is to the effect that the Directors of the plaintiff company from incorporation to date are Elinala Kupingani Mwale, Zelifa Kazombo Mwale, and the late Dr. H. Kamuzu Banda, that in May, 2000 the name of the Interim Administrator substituted that of the late Dr. Banda as a Shareholder, that since 1998 that the Interim Administrator has always worked against the interests of the Directors, that in reaction to the affidavit of Elinala Kupingani Mwale in support of the summons to discharge injunction the Interim Administrator convened a null & void extra - ordinary Shareholders meeting to lend legitimacy to appointments and dealings pertaining to the commencement of this action, and that it is wrong to allege malafides against the directors that dissociate the plaintiff company from this action or to call such directors a rebel faction of the company as they are the only directors and Shareholders of the company both in law and in fact.

It would appear that when the Civil Registry noted the anomaly that M/s Racane Associates summons to discharge injunction was set for 21st November, 2000 while a like summons by the 4th defendant was set down for 29th November, 2000 they took the wise step to combine them for hearing on the same day. Thus the summons for discharge by M/s Racane Associates was shifted to 29th November, 2000 along with the motion of M/s Mbendera, Chibambo and Associates to stay the said summons. This gave opportunity to M/s Mbendera, Chibambo and Associates to file a Notice to the effect that at the hearing of the summons for discharge they would refer to the Memorandum and Articles of association of Chikoko Trading Limited, which they attached.

On 29th November, 2000 the business of hearing the various applications herein truly started. Each Advocate that appeared had his own application to prosecute. It is to be recalled that M/s Mbendera, Chibambo and Associates had an outstanding inter partes summons to continue the injunction. This was between the plaintiff (as represented by them) and the fourth defendant. The 4th defendant herself had her own inter partes summons to discharge the very injunction M/s Mbendera, Chibambo and Associates had applied to continue. There was also due for hearing an inter partes summons to discharge the injunction granted to the plaintiff, by the plaintiff itself through the Legal house Racane Associates on the premise that M/s Mbendera, Chibambo and Associates had not obtained it on instructions from a genuine plaintiff. As against this version of plaintiff there was, awaiting to be heard, a motion to stay the Racane Associates summons for discharge.

To sort of simplify this complicated web of applications I directed that we would, as it were, handle all applications together. I treated the application for discharge of injunction by the plaintiff through M/s Racane Associates and the summons to discharge the same by the 4th defendant as falling in one category and basically as the main application in the matter. M/s Mbendera, Chibambo and Associates's motion to stay the plaintiff's summons for discharge via Racane Associates as well as their summons to continue the injunction against the 4th defendant, I basically treated as affidavits in opposition to the two applications for discharge. I thus finally directed that the order of addresses would take the format that M/s Mhone and Mvalo who were behind the summonses for discharge would address me first, that Mr

Mbendera would then address me next on the merits of staying the competing plaintiff's summons and of continuing the injunction as against the 4th defendant, and that finally the two Counsel advocating discharge of the injunction would reply. It turned out to be a long and laborious task. When we run out of time on 29th November, 2000 we adjourned to 5th December, 2000 for continued hearing. We again failed to complete the arguments that day and so hearing resumed on 6th December, 2000. We finally at the end of that day concluded the arguments.

It is important as I go into the exercise of resolving these multiple applications to appreciate that the various applications herein, their supporting and opposing affidavits, and exhibits as well as the arguments advanced on all concerned sides, display the existence of a bitter quarrel that has been going on for sometime among persons claiming association with the company Chikoko Trading Limited. A brief history of the development of this live quarrel, which per chance of this case found opportunity for open ventilation, will help to bring the issues in dispute herein into better focus.

It appears from the Memorandum and Articles of Association of Chikoko Trading Limited duly filed in court that at the time of incorporation in 1981 the company had only three Shareholders who were also its only directors in the persons of His Excellency Ngwazi Dr. H. Kamuzu Banda, Elinala Kupingani Mwale, and Zelifa Chendawaka Mwale who held one share each out of a total share capital of 10,000 ordinary shares of the value K1.00 each. The last two shareholders also respectively use the names Khumbize and Kazombo as parts of their names. There is nothing so far to suggest any upheavals or changes in the composition or operation of this company before the death of one of these Shareholders and Directors, namely, Dr. H. Kamuzu Banda. The said Dr. H. Kamuzu Banda was at all material times also Life President of the Republic of Malawi and I believe I can take judicial notice of the fact that he died at the end of November, 1997 although that point is not specifically addressed in any of the documents filed in this case. The picture painted in this case is that prior to and up to this event all was well and peaceful in Chikoko Trading Limited.

Now, Chikoko Trading Limited is a company Limited by shares. It is elementary company law per the celebrated case of **Salomon -vs- Salomon** (1897)A.C. 22 that a company enjoys a separate legal entity from its

Shareholders and/or Directors. It is thus moot point that when Dr. H. Kamuzu Banda died, the company did not die along with him. Of course the death of this one man who happened to be associated, as above referred, with this company brought in train a chain of it own events and consequences as regards his estate and its distribution many of which have no direct and immediate effect on this continuing company. In this case what emerges from the affidavit of one Dorothy Ngwira, sworn on 31st October, 2000, is that allegedly on 9th April, 1998 M/s Graham Car & Company were appointed Interim Administrators of the estate of Dr. H. Kamuzu Banda. In so far as this might be looked at as the installation of a substitute Dr. H. Kamuzu Banda that may be relevant for purposes of the company depending on the legal steps that followed installation. From the look of things, per the material disclosed by the filed documents and the arguments brought forth, for sometime still all appears to have remained quiet and peaceful in Chikoko Trading Limited following the death of Dr. H. Kamuzu Banda as had been the case during his lifetime. Turbulence, however, appears to have crept in when the Interim Administrator for the late Shareholder started flexing his muscles and claiming certain rights in this company.

It would appear per exhibit "RJM1" in the affidavit Mr R.J. Mhone sworn on 18th October, 2000 that on 1st September, 1998 an extra ordinary meeting of the Shareholders of Chikoko Trading Limited was held at Area 15, Lilongwe. There is no indication who convened the meeting, who was invited to it, what length of notice was given, how many Shareholders met, and who chaired the proceedings. It is to be recalled that by then, since Dr. H. Kamuzu Banda had already died, there were only two remaining Shareholders of the company. There is no indication that by this time anyone, let alone the Interim Administrator, had taken steps to register himself or had been registered as the holder of the share or shares Dr. H. Kamuzu Banda had held in the company prior to his death. It may be that indeed since April of that very year there was an Interim Administrator as regards the estate of Dr. H. Kamuzu Banda, but I much doubt if Chikoko Trading Limited was obliged to give him notice of this meeting per Section 111 (1)(b) of the Companies Act when his interest as new holder of Dr. H. Kamuzu Banda's shares was not yet registered under Section 54 (1)&(2) of the Companies Act. The appointment of the Interim Administrator was for purposes of the estate of the late Dr. H. Kamuzu Banda and not specifically for purposes of taking over the share/shares held by the late Dr. H. Kamuzu Banda in Chikoko Trading

Limited. To be legally recognized therefore as new holder of that share or those shares the Interim Administrator had to first put himself on record as a "substitute" or "replacement" of Dr. H. Kamuzu Banda as far as shares in that company were concerned. Indeed the Interim Administrator would be expected to go through the same legal formalities for any other company the late Dr. H. Kamuzu Banda may have held shares in before he could expect to be treated as one among shareholders in those companies. It thus appears to me that short of calling Dr. H. Kamuzu Banda from the grave to attend this extra-ordinary meeting, per Section 112 of Companies Act the quorum requirements of that meeting would be well satisfied if the two surviving Shareholders attended it. Of course Article 42 of the Articles of Association set the presence of 4 members as forming a quorum for a meeting, but this was an anomaly as at that time the very Memorandum and Articles of Association catered for only 3 members in the company. Further as regards 1st September, 1998 out of the 3 members of the company one was dead and only 2 were alive. It follows that Section 112 of the Companies Act had to govern the question of quorum in this case and the two, if present, must have sufficed.

There is suggestion and complaint that the extra ordinary meeting of 1st September, 1998 was invalid as it did not involve late Dr. H. Kamuzu Banda's personal representative in the person of the Interim Administrator. It has been further suggested that the Shareholders that attended it were nominee Shareholders as allegedly they only represented minority interests in the company. The leaving out of a Shareholder that claims to be a majority Shareholder, to wit the Interim Administrator, it is claimed, is a grievous fault that rendered all the appointments and the proceedings at that meeting incompetent and invalid.

As I have held, at that time only two of the original three Shareholders were alive. The company had to go on even if Dr. H. Kamuzu Banda was dead. The company was then in the hands of these two surviving Shareholders as no person or institution was yet registered as Shareholder in place of the late Dr. H. Kamuzu Banda. The Interim Administrator was then not yet born as a replacement Shareholder in this company and I think it is idle that he would expect the remaining Shareholders to feel inadequate and to embark on searching for a substitute for Dr. H. Kamuzu Banda before the company could go on. The cry of the Interim Administrator in this respect to the effect that he was neglected or slighted from this meeting is, in my view,

like a cry for recognition as a person from a foetus. Despite paucity of information as to the manner in which this extra-ordinary meeting was convened and transacted I believe the maxim " *Omnia presumuntur rite esse acta*" resolves my anxieties. In the absence of indications that anything went wrong at this meeting I have to presume that all was done well which ought to have been done well in the circumstances that prevailed. I therefore find myself compelled to hold that the meeting of 1st September 1998 was a proper and valid meeting of the Shareholders who were alive and that the appointments it produced must be accepted as valid appointments.

I think it matters not whether by then the issued shares of the company stood at one each for each Shareholder or whether there was a different distribution. It equally, I think, matters not what number of shares the Interim Administrator for the deceased Shareholder was hoping to step into upon taking formal and legal steps to register his interest. At that time he was an outsider *vis-a-vis* this company and he could not play any role until he had legally entered it. The company was in the hands of the surviving Shareholders who were also Directors and I see nothing wrong with the efforts they took to ensure that the affairs of the company continued even though one of them, Dr. H. Kamuzu Banda, had since died. It follows from my ruling above that a company which since inception and hereafter during the whole of the lifetime of Dr. H. Kamuzu Banda had maintained the initial set of three Shareholders who were also its three directors, for the first time and due to the death of one of their number, was from 1st September, 1998 having a new and different set of Directors. Dr. H. Kamuzu Banda was out, both as a Shareholder and a Director by virtue of death. His personal representative was yet to take over the Shares through formal and legal steps. At this meeting late Dr. H. Kamuzu Banda's two initial Co-directors also stepped out of the directorate of this company and they were duly replaced with a new team. The two directors who were still alive at the time of departure, however, remained Shareholders of the company as there is no indication that they transferred their shares to anybody else.

The documents on record and the arguments advanced further reveal that the Interim Administrator of the estate of late Dr. H. Kamuzu Banda chose to be a pain in the neck soon this new Board of Directors came into being, which Board he openly belittled and disrespected. Correspondence exhibited shows that the Interim Administrator despite lack of registration of

interest in the shares of the late Dr. H. Kamuzu Banda and despite the fact that he was still seeking a legal opinion on his status, if any, in the company, right from the time the board started operating, chose to pose big in the affairs of Chikoko Trading Limited. He is on record as doubting the new Board's legitimacy and locus standi and he is also on record as challenging steps taken by the Board as well as influencing bodies the Board tried to deal with on behalf of Chikoko Trading Limited to disregard the Board's requests and demands. It is quite clear to me that the message the Interim Administrator was actively projecting was that only he was entitled to call the tune around and that whenever he did so both the Board and the other institutions having dealings with Chikoko Trading Limited had to listen and obey. Frankly the manner and conduct of the Interim Administrator as disclosed in evidence was unduly overbearing and arrogant in my assessment. Thus from the peace and quiet of the preceding 16 years or thereabouts when Dr. H. Kamuzu Banda himself was alive suddenly life in Chikoko Trading Limited became hell with temperamental confrontations and conflicts by virtue of a substitute "Kamuzu" coming on the scene. This "replacement" of Kamuzu was a totally different being from the man he was claiming to represent. The shocking thing is that the Interim Administrator was causing all this havoc before he had even entered the records of this company. Exhibits "RJM5" and "RJM2" respectively in the 1st and 2nd affidavits of Mr R.J. Mhone show that it was only on 10th May, 2000 that the Interim Administrator was registered in Chikoko Trading Limited as a Shareholder in place of late Dr. H. Kamuzu Banda. It is my holding that prior to this day the Interim Administrator could not have pretended to have any role in the affairs of Chikoko Trading Limited which after all is no part of his primary business i.e. the estate of the late Dr. H. Kamuzu Banda. His efforts up to then were quite lacking in legal authority and deserve nothing less than total neglect.

Now the animosity thus created by the Interim Administrator in Chikoko Trading Limited having been laid bare it in time I turned to substantive issues in this case. The record shows that it is the Interim Administrator, this time round as a Shareholder in the plaintiff company who instructed M/s Mbendera, Chibambo and Associates to commence the action herein and to obtain the material interim injunction herein. The first to react was the Board of Directors appointed on 1st September, 1998. The claim is that since 1st September, 1998 the lawyers and company secretary for Chikoko Trading Limited are M/s Racane Associates, that the company has not instructed their

lawyers and certainly not M/s Mbendera, Chibambo and Associates to issue writ and obtain this injunction, and that not being interested in this injunction and therefore strictly not being a party to this case, Chikoko Trading Limited cannot just be forced into the action and the injunction on the decision of the Interim Administrator who is just a Shareholder and not even a director in the company. The prayer is thus that the plaintiff company would like this injunction to be dissoved as the company did not seek it out.

The 4th defendant who has been hit on the head by the injunction reacted a bit later. She has first tried to capitalize on the division between the Interim Administrator of Dr. H. Kamuzu Banda's estate as a Shareholder and other persons interested in Chikoko Trading Limited. She has unfortunately in so doing employed two former directors deponing as if they are continuing in that office. The truth is that the two ladies whose affidavits have been filed were replaced as Directors on 1st September, 1998 and if anything they should have sworn their affidavits merely as Shareholders if they have not since transferred their shares to anyone. Next after this the 4th defendant has banked on the juristic and separate personality of Chikoko Trading Limited to distinguish it from a species of the estate of late Dr. H. Kamuzu Banda and argued that the Interim Administrator of a deceased estate cannot employ his powers as such to direct commencement suits and the obtaining of injunctions for the company. In effect the argument was that by seeking to take charge and to command the affairs of Chikoko Trading Limited, the Interim Administrator who has only fallen into the company by accident of death of the original Shareholder is overreaching himself and is treating the company as if it were part of the bequeath able property of late Dr. H. Kamuzu Banda, which it is not. The scheme to sue and obtain the injunction being allegedly unknown to the directors of the plaintiff company and also being allegedly unauthorized by them, and the Interim Administrator displaying, as it were, tendencies of overstepping his bounds as an administrator of a deceased estate and delving into the affairs of an ongoing company, it is prayed, that the injunction he obtained herein purportedly on behalf of Chikoko Trading Limited should be discharged.

It has come to light that following this combined challenge to the injunction obtained at the behest of the Interim Administrator of the estate of the Shareholder Dr. H. Kamuzu Banda and especially after service of affidavits of former directors of the plaintiff company, the Interim

Administrator took urgent steps to fortify his position. He claims that as replacement Shareholder of late Dr. H. Kamuzu Banda, he holds 99.998% of the shares in Chikoko Trading Limited. When and how late Dr. H. Kamuzu Banda increased his shareholding capacity and diminished the shareholding capacity of his two Co-Shareholders from the original position of one share a piece is not indicated. Article 3 of the Articles of Association, I note, requires special resolution before existing members get additional shares and no such resolution has been exhibited. It appears certain that this meeting was convened by the Interim Administrator. It is not shown who empowered him to call for a Shareholders meeting and when this empowerment took effect. It is not clear which Shareholders were invited to the meeting and which ones attended. Further, although the date of the notice of meeting is not quite certain despite suggestion that it was probably dated 26th October, 2000, the meeting having taken place on 30th October, 2000, the time required for notification of meetings per Section 108 of the Companies Act appears to have been severely abridged. When and by whom the abridgement was achieved is not clear. Further, appreciating the convener's attitude towards the Board that came into being on 1st September, 1998 it is not clear if notices of the meeting were extended to those directors and to M/s Racane Associates who were at the time the Company Secretaries in line with Section 111(1)(c) and (d) of the Companies Act. There is equally inadequate information as to whether quorum requirements were fulfilled at this meeting.

Now at this meeting as per exhibit "MRM1" to the affidavits of both Mr M.R. Mbendera and Madam Dorothy Ngwira sworn just the day after the said meeting, a new Board of Directors came into office. The only director retained from the Board of 1st September, 1998 is Mrs J. Dzanjalimodzi. The other 4 directors were all new and one of them was the man who signed most of the correspondence from the office of the Interim Administrator of the estate of Dr. H. Kamuzu Banda challenging the authority of the Board of 1st September, 1998. The meeting also proceeded to appoint M/s Mbendera, Chibambo and Associates as lawyers for the company in place of M/s Racane Associates, and also to appoint KPMG Peat Marwick as Company Auditors and Company Secretaries. As Secretaries KPMG Peat Marwick replaced M/s Racane Associates to whom at the command of the same Interim Administrator they had not handed over any necessary documents for the office of Secretary since 1998. Inter-alia and further this meeting also ratified

all action undertaken by M/s Mbendera, Chibambo and Associates in relation to this case and they were directed to proceed therewith.

The starting point, I believe, is Article 63 of Chikoko Trading Limited's Articles of Association. It appears to direct that the affairs and business of the company shall be under the entire control and Management of the Directors of the Company, except where the Act or the Articles reserve such power to the Company in a general meeting. This is well in line with Section 140 of the Companies Act which refers to directors as persons appointed to direct and administer the business and affairs of a company. In all the arguments presented in this case there has been no suggestion to the effect that specifically the power to sue in Chikoko Trading Ltd was either by Act or by some other article in the Articles of Association reserved to the general meeting. Different cases among those cited in this court have held differently depending on the applicable articles, whether amended or not, but in this case I do not see the need to complicate what appears to me to be plain on the Articles under consideration. In the absence of a different Article or a provision in the Companies Act reserving the power to sue to Shareholders, I think I must find that in this case as per the wide mandate in Article 63 power lay with the directors of the company and not with the Shareholders of the company.

Given the fact that the initial instructions to M/s Mbendera, Chibambo and Associates to sue and obtain an injunction in this case came from the Interim Administrator of the estate of late Dr. H. Kamuzu Banda, it is significant that he, although a Shareholder at the material time, was not a director. It eludes me where he harnessed the power to give instructions for M/s Mbendera, Chibambo and Associates to sue and obtain an injunction in the name of the company. I here entertain no difficulty in concluding that in proceeding to commence action and obtain the injunction as the instructed Legal Practitioners managed to do, M/s Mbendera, Chibambo and Associates were acting on instructions that were devoid of true company authority and sanction.

Be this as it may the position taken by the plaintiff (as represented by M/s Mbendera, Chibambo and Associates) at the hearing was that want of authority is capable of cure and that in this case the want of authority, if any, in the Interim Administrator giving instructions was rectified and ratified by

resolutions of the meeting of 30th October, 2000 which ushered in a new set of directors and sanctioned the lawyers to proceed with the action. The Court of Appeal decision in the case of **Danish Mercantile Co. Ltd. And Others -vs- Beaumont and Another** (1951) All E.R. 925 is as good an authority as could have been found on the subject and I have no misgivings about accepting that it was possible in this case to remedy the defect in the instructions of the Interim Administrator by ratifying the instructions he illegally issued.

The question that now begs an answer is whether in fact in this case such ratification was achieved. The Interim Administrator was only registered as a substitute Shareholder on 10th May, 2000. Since before his registration it is clear that he viewed the existing board of directors with contempt and disrespect, there is no suggestion that he liaised with them in calling for this ratification meeting or that he was delegated by them to call for the said meeting. I have already earlier wondered from whom and when he got the authority as a Shareholder to exercise director's powers. I have also wondered at the abridgement of time for the notification of the meeting. There has been argument to the effect that under the proviso to Section 120(2) of the Companies Act as a Shareholder with more than 95% of the shares the Interim Administrator was capable on his own to abridge time as the other Shareholders could not, with such massive voting power on his part, defeat him even if they had to vote on the subject. It seems to me that this proviso fails to provide the Interim Administrator with an escape route in this case.

To begin with how the late Dr. H. Kamuzu Banda jumped from owning one share just like the other Shareholders to owning 99.998% has not been demonstrated. Secondly even if this were accepted as the case, the wording of the proviso still indicates that to abridge time for a general meeting it must be a result of an agreement by a majority in number of the members having the right to attend and vote at any such meeting, together representing not less than 95% of the total voting rights. This presupposes that even if the Interim Administrator by virtue of his shareholding surpassed the minimum percentage of voting rights set here, he could not affect to achieve such vote within his own mind. He would still need to team up with other Shareholders and seek to agree with them on abridgement of time. Of course if they tried to be difficult I appreciate that he could override them by using his massive voting rights. This however is not the same as leaving them out altogether and

dictating the abridgement and calling it an agreement by Shareholders representing not less than 95% total voting rights. Of course in effect such dictation would be the same as the defeat he would no doubt achieve with 99.998% voting rights, if he has that, but in the one case there is respect for procedure and in the other there are only pretentions that somehow the Interim Administrator is a law unto himself.

I have also already wondered what other Shareholders were at the meeting and whether any quorum was formed. Besides the manner and speed with which he organized the meeting herein and the extent of overhauling achieved in that feat suggests nothing less than fire-fighting gymnastics on the part of the lnterim Administrator. It is obvious that all this ado was solely geared at defeating a challenge that he was already facing in court and at trying to lend some legitimacy to all he had been doing wrong since before registering his interests as Shareholder in place of the late Dr. H. Kamuzu Banda. Of course under Section 146 of the Companies Act a company can by ordinary resolution remove from office all or any of its directors, but this was no such general meeting as contemplated under that provision. Upon taking into account all these shortfalls I am not in a position to make any favourable presumptions as regards this meeting. Certainly it would be a mockery to presume that all was done correctly which ought to have been so done correctly under the maxim I used earlier regarding the meeting of 1st September, 1998. I am not convinced that the Interim Administrator as a Shareholder was acting in good faith in calling for this meeting. I am equally not convinced that he could call for a valid ordinary or extra-ordinary meeting of Shareholders. The priority it appears was for him to save face and avert the pressure that had mounted against him. It seems to me that he has carried forward the same overbearing and arrogant attitude he displayed even before being registered as a Shareholder in this company. The purported meeting the Interim Administrator hurriedly organized was in my view invalid and I likewise declare its resolution including the appointments and ratifications invalid. I am satisfied in this case that both at the time he instructed M/s Mbendera, Chibambo, and Associates in person and at the time he purported to have those instructions ratified through an emergency meeting of Shareholders, the Interim Administrator misled his Legal Practitioners into believing that he had authority to commit the company to sue and obtain an injunction as happened in this case.

As I have had occasion to indicate earlier the summonses taken out by the Plaintiff (as represented by Racane Associates) and the 4th defendant are for discharge or dissolution of the injunction I granted herein. Their main reason for seeking this relief was that the plaintiff company is ignorant of this action and has not sanctioned it and that in truth its name has been employed as plaintiff through machinations of a Shareholder representing the interests of the late Dr. H. Kamuzu Banda who has no mandate to usurp Directors powers. I have in my above conclusion agreed with the Applicants that this action and its injunction were indeed unauthorized by the branch of the company competent to authorize suits. The question is whether these two applicants have erected a sound base to obtain the relief they seek.

The plaintiff (as represented by M/s Mbendera, Chibambo, and Associates) which obtained the injunction has forcefully argued that the two Applicants have gone astray in their application. Mr Mbendera argued that a look at Note 29/1/17 of Order 29 rule 1 of the Rules of Supreme Court indicates that discharges of injunctions are based on merits and not technicalities. He indicated that for a court to dissolve an injunction it has granted, it has to weigh whether it made a wrong decision in law, whether it appears that there was inadequate evidence to support the order, or whether since the grant of the order there has been any material change in circumstances. He claimed that there was no case cited in the practice note which could suggest that an injunction can be discharged just on basis that a party was not before the court. He added that to apply for discharge merely has the effect of confirming the proceedings. In this case to seek to show that the injunction should be discharged just because the plaintiff company did not sanction the proceedings and that it is therefore not a party to the case, he argued, is to raise a technicality. He indicated that the correct way of employing such a technicality in a case of this sort is to apply to either stay or dismiss the proceedings under a procedure covered in volume II of the Rules of Supreme Court under the summary jurisdiction of courts over solicitors. In particular he referred to para. 3874 of the 1997 edition of Rules of Supreme Court on this jurisdiction which is said to be inherent, and on the authority of **Reynolds and Another -vs- Howell** (1872-73)89 QBD 398 he emphasized that such application for stay or dismissal ought to be prompt otherwise the complaining party will be taken to have ratified the action so commenced without authority. Further it was argued, that lack of authority to commence a suit cannot be pleaded as a defence and that it is only supposed to lead to

stay or dismissal of action and often has the consequence that the solicitor who commenced the unauthorized action is condemned in costs.

Since the plaintiff (as represented by Racane Associates) and the 4th defendant have not applied for stay or dismissal of action, it has been argued that their summonses for discharge should be dismissed. In their turn M/s Mbendera, Chibambo, and Associates have on behalf of their version of plaintiff utilized the procedure they have advocated by seeking stay of the summonses for discharge of injunction. In their notice of motion for stay of proceedings questioning their authority as Legal Practitioners for the plaintiff in the matter, apart from seeking a stay, they added a prayer which they indicated they were not much pressing for as its result would be foregone that the court should direct an inquiry for the wishes of the Shareholders to be ascertained in this case.

In as far as I understood the procedure M/s Mbendera, Chibambo and Associates were banking on, it was providing a remedy to the party that was challenging the authority of the other side, to stay or dismiss the proceedings so commenced. In this case I so understood the procedure to be available to the plaintiff (as represented by M/s Racane Associates) or to the 4th defendant to stay or dismiss the proceedings commenced by the plaintiff (as represented by M/s Mbendera, Chibambo, and Associates). I certainly did not understand it that those whose authority was under query could use the same procedure to stay the applications of those questioning their mandate. At some point it appeared as if the procedure in question was being relied upon by M/s Mbendera, Chibambo and Associates to stay their own proceedings so as to allow for the wishes of Shareholders to be ascertained before the case could proceed. It is my understanding and belief that on the procedure in question it is only those that are doubting the authority to sue and obtain injunction in this case, to wit the Racane Associates version of plaintiff and the 4th defendant, who can avail themselves of the opportunity to apply for stay or dismissal of action. I hold the view that M/s Mbendera, Chibambo, and Associates cannot so turn around the procedure as to apply either for stay of the query raised against their authority to act in this case or to volunteer to stay proceedings they themselves commenced upon belief that they had been correctly mandated to so commence them.

On the authorities M/s Mbendera, Chibambo and Associates cited, it is indeed clear that a party believing that an action has been commenced without authority of the correct plaintiff, either because he thinks the person that has sued him is a pretending plaintiff and has no power to start the suit or because he thinks it is he or somebody else who ought to sue and not the one posing as plaintiff, he ought to promptly point that out either through summons or motions to stay or to dismiss the action. This the Racane Associates plaintiff and the 4th defendant have not done although I must say they were prompt in pointing out that the wrong person was driving the plaintiff into the action. The question now teasing my mind is whether application for stay or dismissal is the one and only remedy to the grievances of such party. In other words the question is whether a party finding itself in the position of the applicants who have applied for dissolution of the injunction herein has no other option of expressing his bewilderment about the twist in a case like this. I am not convinced that it is so cut and dry that unless you apply to stay or dismiss such proceedings, any other application is bound to fail. The plaintiff represented by Racane Associates and the 4th defendant did not apply for stay or dismissal and so I cannot grant them that relief even if they were entitled to it.

What I now have to explore is whether the fact that they failed to make that application completely bars them from success in the applications they made. I recall to mind argument that Note 29/1/17 envisages a discharge of injunction on basis of merit and not technicality and that no example will be found in the White book of a discharge on technicality. I am not sure whether the list of occasions where injunctions have been dissolved as appear in practice notes in the White book are meant to be exhaustive and closed lists. I for one would tend to think that they are open ended and that suitable cases could surface where an injunction is discharged on a basis hitherto not yet reported in the practice notes. Even if I were mistaken in this view I am not so certain that it is so fixed and settled that technicalities can never amount to a cause for discharge of injunction.

When this matter was first brought before me I was quite convinced that Chikoko Trading Limited in the case it projected through its application had raised serious questions for trial. Without wishing to decide the issue on the affidavits, I decided that the balance of convenience lay in preserving the status quo by granting the injunction sought until the serious questions raised were tried. At that time the impression I had was that Chikoko Trading

Limited was taking steps to protect its interests through this action. Now after hearing these multiple applications it has become clear that it is not Chikoko Trading Limited that is trying to protect its interests, but a sympathizing substitute Shareholder without mandate to sue who thinks Chikoko Trading Limited is not being prudent enough with the protection of its property that is posing as Chikoko Trading Limited. If this discovery does not amount to a material change in circumstances then I do not know what category of material changes in circumstances is legally acceptable. It is one thing for X to have a cause of action and for him to sue on it, but it is quite another thing for him to have a cause of action but to have his cousin or neighbour suing on it instead without being clothed with any legal authority for doing so. Really should I in the circumstances maintain an injunction obtained in these circumstances just because the correct application should have been to stay or dismiss the action? Although the grounds that led me to grant the injunction remain intact in my view, the mere fact that they are grounds which an unauthorized Shareholder tried to make appear as if they were genuinely coming from the plaintiff when in fact they were not, changes the whole scenario and renders the injunction evil and foul in the circumstances. Under the same Note 29/1/17 I am allowed where I observe a material change in circumstances since the grant of the injunction to discharge the same. In this case what appeared to me at first as genuine Chikoko Trading Limited, a plaintiff with a cause of action, has turned out to be a false Chikoko Trading Limited in the person of the Interim Administrator for the estate of a deceased Shareholder without a cause of action but borrowing the name that has the cause of action. I accordingly allow the two applicants to discharge the interim injunction herein and dismiss the motion for stay. The pretending plaintiff, to wit, the Interim Administrator in the estate of Dr. H. Kamuzu Banda will bear the costs of these proceedings.

Made in Chambers this 22nd day of February, 2001 at Blantyre.

A.C. Chipeta
JUDGE