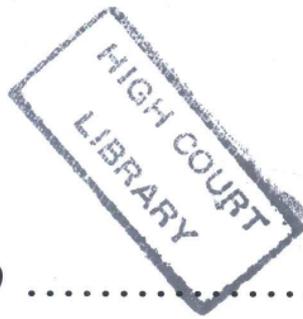




IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1750 OF 2001

BETWEEN:



HON. J.Z.U. TEMBO 1ST PLAINTIFF
HON. KATE KAINJA..... 2ND PLAINTIFF
HON. B.B.C. MAJONI..... 3RD PLAINTIFF

-and-

HON. GWANDA CHAKWAMBA..... 1ST DEFENDANT
B.B. MTAWALI..... 2ND DEFENDANT
S. MASALI..... 3RD DEFENDANT
K. NKHOMA..... 4TH DEFENDANT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr. Kalekeni Kaphale of Counsel for the Plaintiffs

Mr. Bazuka Mhango of Counsel for the Defendants

Mr. L. Beni, Official Interpreter/ Recording Officer

Date of hearing: 28th June 2002

Date of judgment: 14th November 2002

Kapanda, J



JUDGMENT

Introduction

Both parties in this matter are members of the Malawi Congress Party (MCP) - a political party registered under the Political Parties (Registration and Regulation) Act (No.15 of 1993). It is also common ground that the plaintiffs are all members of the National Executive Committee of the Malawi Congress Party holding the offices of Vice President, Secretary General and Regional Chairperson for the Central Region, respectively. As regards the defendants there is no dispute that the first defendant is the President of the Malawi Congress

Party and therefore a member of the National Executive Committee of the party. Further, it is not in dispute that the other three defendants are also members of the National Executive Committee. I must add that the plaintiffs and the defendants belong to two different camps of the same party. The first plaintiff and the first defendant are no strangers to these courts. They have appeared in this court before in respect of matters that deal with leadership of the party.

The parties are before this court principally because of the decision of the first defendant in dismissing the plaintiffs as members of the Malawi Congress Party. The dismissals of the plaintiffs were to be with immediate effect. The plaintiffs were obviously not happy with this decision. Thus, on 10th July 2001, the plaintiffs commenced legal proceedings against the defendants.

The legal suit was instituted by way of an originating summons where the plaintiffs want, *inter alia*, the following questions determined:

1. Whether the first defendant could lawfully dismiss the plaintiffs from the Malawi Congress Party.
2. Whether the second, third and fourth defendant could lawfully and rightly constitute a Disciplinary Committee of the Malawi Congress Party.

3. Whether the Malawi Congress Party Constitution permits the National Executive Committee and/or the President to remove the Vice President, Secretary General and
4. Regional Party Chairman without the sanction of the Annual Convention.
5. Whether there was a lawfully constituted meeting of the National Executive Committee of the Malawi Congress Party on 29th June 2001.

The questions enumerated above have not yet been adjudicated upon. The issues raised by the plaintiffs will have to be dealt with at the hearing of the Originating Summons. In order to hold the ring, whilst awaiting the determination of the said questions, the plaintiffs obtained an ex-parte order of an interim injunction against the defendants. The injunction was granted on the 10th of July 2001. It was to be valid until the hearing of the inter parties application for an injunction or until a further order. Further, the interlocutory injunction was susceptible to being discharged or varied at the instance of the defendants. The other relevant terms of the injunction, as appearing in the Order of the Court, were as follows:

"...The defendants must not either by themselves, their servants, followers or agents, or howsoever otherwise Implement the decision of dismissing the plaintiffs from the Malawi Congress Party;

- 0.1 *Bar the plaintiffs from enjoying the privileges and exercising powers given to them by the positions that they hold within the Malawi Congress Party;*
- 0.2 *Oust the plaintiffs from the positions that they hold within the Malawi Congress Party and elsewhere by virtue of being members of the Malawi Congress Party;
Until a further order of this Court or until after trial..."*

As it were the defendants are not pleased with the interlocutory injunction in this matter. To this end, on the 23rd day of July 2001, the defendants took out a Summons to discharge the injunction of 10th July 2001. The grounds for discharge will be given below when I am discussing the arguments of the parties. The plaintiffs are opposing the application to have the injunction vacated.

In essence there are two applications before me. There is an application to discharge the interim injunction and another application for the continuation of the temporary injunction of 10th July 2001. Both applications are supported by affidavit evidence. I do not wish to set out in full the contents of the numerous affidavits that are on record. I will only give a concise summary of the matters of fact as obtaining from the said affidavits.



The Facts Of The Case

The pertinent matters of fact in this case, as disclosed in the affidavits mentioned above, may be summarized as follows:

It is an undisputed fact that there has been bad blood between the first plaintiff and the first defendant. The cause of this has been an ongoing battle for leadership of the Malawi Congress Party. A manifestation of the problems between the two was the holding of two different conventions where the two factions of the party purported to elect leaders of the party. The matter of the two conventions finally ended up in the courts. On 4th June 2001 the Malawi Supreme Court of Appeal ruled both conventions unlawful.

Following the judgment of the Malawi Supreme Court of Appeal the first defendant called for a meeting of the National Executive Committee of the Malawi Congress Party where, among other things, the members of the Committee were to discuss the judgment of the said Malawi Supreme Court of Appeal. The meeting was to be held on the 29th of June 2001. There is a dispute as to whether this meeting actually took place. The parties are also not in agreement about whether there was a quorum formed at this meeting that was called by the first defendant. This ruling does not attempt to answer the question whether a quorum was formed. That should, and will, be dealt with at the hearing of the Originating Summons. Be that as it may the affidavits show that a meeting did take place although

not at the appointed venue as disclosed in the notices of the meeting. The plaintiffs did not attend this meeting. The reasons for their non-attendance are varied.

The disputed meeting culminated into the formation of a Disciplinary Committee of the Malawi Congress Party. This Disciplinary Committee was to inquire into some alleged behaviour and actions of the plaintiffs. The plaintiffs were invited to appear before the said Disciplinary Committee but they did not. However, in response to the letter inviting them to the Disciplinary Committee, the first plaintiff, in his letter dated the 4th of July 2001, questioned the status and jurisdiction of the said Committee. The contents of the letter form the core of the plaintiffs' attack of the defendants' actions. I hereby reproduce the relevant parts of the letter that was addressed to the National Executive Committee of the Malawi Congress Party:

"Dear Sirs,

RE: CHARGES AGAINST ME

I acknowledge receipt of your letter dated 1st July 2001.

The letter contains several allegations against me, and I am summoned to appear before a disciplinary sub-committee on the 8th day of July 2001 to answer the allegations.

I have difficulty in recognizing the constitutionalism of the committee before which I am being called to appear in that the mandate for the establishment of that committee seems, to me, to have come from an irregular and invalid

meeting. The meeting where it was resolved to set up a disciplinary sub-committee, like any other meeting, was subject to principles of natural justice. Among them are:

- 1. Where a meeting is charged with a quasi-judicial function, that function must be discharged honestly, and*
- 2. It is contrary to natural justice for a person to be judge in his own cause*
- 3. The accused must have notice that he or she is to be charged with that offence*
- 4. Was the meeting properly constituted? Was due*
- 5. notice given? Was a quorum obtained?*
- 6. Nonetheless the proceedings have flouted the above stated principles of natural justice in that*
 - a) This being a meeting which had assembled to discharge a quasi-judicial function on the allegations leveled against me, it ought to have taken steps to ensure that the function was discharged honestly. I was not given the opportunity to present myself for the meeting whose venue was secret.*

- b) The charges which I am being called upon to answer have been formulated by what is called the National Executive Committee which appointed a panel of three persons from its membership as a disciplinary sub-committee. I am therefore, being required to be judged by the framers of the charges. The panelists are therefore both prosecutors and judges in a*
- c) matter in which they, themselves have an interest, contrary to the above named principles of natural justice.*

The panelists are known to entertain animosity against me. This has been manifested in their public utterances.

- d) It is not clear who attended the National Executive Committee meeting. Validity of the decisions of that meeting cannot be determined. The President of the Party is known to have appointed categories of Party Leaders unconstitutionally and some have featured at National Executive Committee. Decisions of National Executive Committee cannot be made by an improperly constituted Forum.*

In the circumstances it is not possible to avail myself before this sub-committee because it was unlawfully constituted at a meeting which was itself invalid by being conducted in breach of principles of natural justice.

Yours faithfully,

Hon. J.Z.U. Tembo, MP"

It would appear that, notwithstanding the protestations from the plaintiff, the Disciplinary Committee convened and made some recommendations to the first defendant. As matter of fact the first defendant deposed that the plaintiffs, on being given the opportunity to be heard, deliberately avoided to avail themselves of the opportunity to be heard. The first defendant, in his letters to the plaintiffs, advised that the three were being dismissed from the Malawi Congress Party. The first defendant, in his said letters to the plaintiffs, intimated that the decision to dismiss the plaintiffs was made on advice from the said Disciplinary Committee of the National Committee of the Malawi Congress Party. The members of the said Disciplinary Committee comprised the second, third and fourth defendants.

The plaintiffs state that the defendants have no authority to dismiss the plaintiffs. It is further deposed by them that it is only the National Executive Committee that can dismiss or suspend them. In this case, they aver, there was no meeting of

the National Executive Committee that could pass, or passed, such a decision. The plaintiffs moreover put it in their sworn statement that the Disciplinary Committee that advised the first defendant to dismiss them was irregularly set up in that the National Executive Committee meeting that appointed the Disciplinary Committee was null and void as it lacked the requisite quorum.

It was on the basis of the foregoing facts that the plaintiffs obtained the temporary injunction, and they want the said injunction to continue, so that their dismissals should be put on hold until the determination of the questions put forward in the Originating Summons.

As stated earlier the defendants want the interim injunction discharged. The principle ground advanced, in the affidavits in support of application for wanting the interim injunction vacated, is that the plaintiffs managed to get the temporary injunctive relief by suppressing material facts. In summary, the defendants have alleged that the following facts, which they say were material, were deliberately suppressed:

- a) that the Disciplinary Committee gave the plaintiffs an opportunity to be heard but that they deliberately defied the said Committee;

- b) that the Constitution of the Malawi Congress Party empowers the National Executive Committee to suspend any member;
- c) that the plaintiffs did not disclose that the defendants are all members of the National Executive Committee of the Malawi Congress Party;
- d) that the first plaintiff organized his supporters to frustrate the holding of the meeting of the National Executive Committee that was to map out a political strategy of amicable resolution of the differences within the Malawi Congress Party leadership.

I must observe that I do not accept the averment that the matters stated above were suppressed or that they were material to the application for the interlocutory injunction. The plaintiffs never suppressed the fact that they were summoned to appear before the Disciplinary Committee. The allegation of fact that the first plaintiff organized his supporters to frustrate the meeting of the National Executive Committee is only the opposite of the assertion by the plaintiffs. On the one hand the plaintiffs allege that there was no meeting at the announced venue of the meeting. On the other hand the defendants contend that the venue was changed because people belonging to the first plaintiff's faction allegedly stopped members of the National Executive Committee from meeting at the announced venue. As regards the issue of the powers of the National Executive

Committee I find that that is not a question of fact but rather a matter of opinion, and/or a matter of interpretation of the law governing the Malawi Congress Party. I am saying this because there appears to be a difference of opinion between the parties as regards who has the power to dismiss or suspend a member. This has come out clearly in the affidavits on record. On the question of the plaintiffs not disclosing the fact that the defendants are members of the National Executive Committee my observation is this: membership of the defendants to the National Executive Committee of the Malawi Congress Party was not material. Indeed, I do not think that in not stating that the defendants are members of the National Executive Committee the plaintiffs deliberately suppressed a fact. If anything what the plaintiffs did was that they failed to introduce the defendants as members of the said National Executive Committee of the Malawi Congress Party. I will come back to this issue of non-disclosure of material facts later in this ruling.

As stated above, the depositions of the parties were bulky but the aforesaid are the salient facts of this case. As a matter of law I have left out matters of opinion and law that were attested to by the parties in their affidavits. I must now sum up the issue(s) that require this court's determination in this matter.

Question(s) For Determination

The court is of the view that there is one principle issue that has arisen in this matter that requires determination. The question is whether or not the ex-parte order of an interlocutory injunction of 10th July 2001 should be discharged on the grounds as argued by the defendants or on any other ground. I will also, in the process of answering this fundamental question, deal with ancillary questions that were raised by Counsels in their submissions.

I will now proceed to examine whether the interim order of injunction herein should be vacated or not.

Consideration of the issues

Principles upon which an interlocutory injunction will be granted or refused:

The defendants, through learned Counsel, have argued that this court prematurely granted this interlocutory injunction. Mr. Mhango has submitted that, since the provisions of the Malawi Congress Party Constitution bind all members of the party, the plaintiffs should have first exhausted the mechanism for resolving disputes as set out in the said Constitution. It is the view of Mr. Mhango that the plaintiffs should have first appealed, against the decision to dismiss them from the party, to the National Executive Committee instead of taking these out the proceedings herein. In support of this argument learned

Counsel defendants cited Articles 14(2) and 66 of the said Malawi Congress Party Constitution. Article 14(2) provides that:

" Dismissal or suspension of Members

— Any dismissed or suspended members shall have the right to appeal to the Annual Convention"

And Article 66 is in the following terms:

" Interpretation of Constitution

All disputes regarding [the interpretation] of this Constitution shall, on the advise of the Legal Advisor be referred to the National Executive Committee for settlement provided that the aggrieved person may appeal to the Convention against such a settlement." [words in brackets supplied by me]

It is the contention of the defendants that the court ought not have granted the injunction in view of the stipulations in the above quoted Articles. They further submit that the plaintiffs wrongly brought this matter before this court.

The submission of Mr. Mhango, if seen in the light of the law of injunction, is untenable as well as a new phenomenon that does not have support at law. The principles on which an interlocutory injunctive relief will be granted or refused are clearly spelt out in the famous and celebrated case of **American Cynamid Company Vs. Ethicon Ltd.** [1975] 1 All E.R. 504, [1975] A.C. 396. I had the benefit of extensively reading the *American Cynamid*

case

[supra] and exhaustion of remedies available is not one of the principles that a court must consider before granting or refusing an interim injunction. As I understand it, the position at law is that an aggrieved party will not be allowed to apply for judicial review where there is an alternative avenue of getting redress and that remedy has not been used. It is a fact that the temporary injunction in this matter was not obtained in judicial review proceedings. The interlocutory relief herein was obtained pending the hearing of an originating process. In any event, the plaintiffs are not seeking remedies in judicial review proceedings. It is therefore wrong to import the principle of exhaustion of remedy and apply it in the originating proceedings before this court.

Further, I want to agree with Mr. Kaphale that the convening of the Malawi Congress Party is illusory. The Malawi Supreme Court has ruled that the convention can only be called by the President of the Malawi Congress Party. The President of the Party happens to be an interested party in these proceedings. It will be foolhardy on the part of this court to believe that the first defendant will be interested in calling for a convention of the Party so that the plaintiffs could appeal against the decision dismissing them from the party. The interests of justice will not be served if we accept the argument that the plaintiffs should first appeal to this illusory convention to be summoned by the first defendant.

Moreover, it must be realized that the courts will not allow that parties should be denied access to courts on the ground advanced by the defendants. This is more so where there is an allegation that principles of natural justice have been breached and an aggrieved party wants redress. Indeed, what the defendants want to do is to attempt to oust the jurisdiction of the courts to resolve disputes between individuals. Furthermore, it is important to note that the Constitution of the Republic Malawi, in Chapter IV-Section 41(2), has provided that every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues. This right of access to the courts will be rendered meaningless if this court accepts Mr. Mhango's argument that the plaintiffs were wrong in bringing their dispute to court so that the latter should make a determination on the issues raised in the Originating Summons. The plaintiffs have raised legal issues in their Originating Summons that are yet to be determined. The plaintiffs are entitled to have those legal issues determined in a court of law. As they are awaiting such determination the plaintiffs are, at law, entitled to have their purported dismissals put on hold. If the only means of putting on hold the dismissal of the plaintiffs is by way of an interlocutory injunction then I do not see how the court erred when it exercised its discretion to grant such temporary relief.

I will shortly come back to this issue of non-exhaustion of remedies when I am dealing with the question stated below.

Should the interlocutory injunction of 10th July 2001 be discharged?

As stated above, the question issue for consideration in this matter is whether the relief, albeit temporary, which the plaintiffs obtained should be vacated. The decision on this issue will depend on whether the defendants have demonstrated that there are cogent grounds necessitating its discharge. I have already shown above that the arguments advanced by the defendants have fallen short of convincing this court that the injunction herein was wrongly granted. I will now go a step further to demonstrate that the balance of justice, or what others prefer to call the balance of convenience, has tilted in the direction of continuation of this interim injunction.

This court's verdict is that its discretion in this matter must be exercised in favour of the continuation of the temporary injunction of 10th July 2001. Why has the court exercised its discretion this way? The court has arrived at this decision because of the following points: to begin with, the interim injunction, as the name implies, is only provisional. As such the remedy by interlocutory injunction should be left flexible and discretionary. The relief is intended to preserve the status quo ante of the plaintiffs until the court adjudicates on the serious legal questions put forward in the Originating Summons. This injunction will not stop the first defendant from implementing his decision if at the end of hearing the Originating Summons the

court decides in favour of the defendants. In point of fact, the temporary relief given to the plaintiffs will only delay implementation of the decision. As already mentioned the decision may be executed if the court decides against the plaintiffs. Further, there is a risk of doing injustice to the plaintiffs if this injunction were to be vacated and it later turns out, after the hearing of the Originating Summons, that the plaintiffs were wronged. If this injunction is lifted, and the decision of the first defendant left to stand there will be irreparable damage to the plaintiffs. The lifting of the injunction means that the plaintiffs will have to stop exercising their powers as Vice President, Secretary General and Regional Chairman respectively. Furthermore, the plaintiffs will stand to lose enjoying the privileges that they have by virtue of being members of the Malawi Congress Party. The foregoing consequences are clearly spelt out in the letters of dismissal written by the first defendant. There will be irreparable damage, because damages for loss of privileges and exercise of power will be difficult to assess. Indeed, it is important to note that the remedies that the plaintiffs want are declaratory in nature. The plaintiffs are not seeking damages. Thus damages will not be an effective remedy should they succeed in their application for the said declaratory orders. As a matter of fact declaratory orders cannot be quantified in pecuniary terms. Since damages would be an ineffective relief it goes without saying that there is a risk of doing injustice to the plaintiffs if this injunction is discharged before the court has made its determination on the application made by the plaintiffs in the Originating Summons. The plaintiffs might be prematurely and permanently denied protection from

the courts thus a denial of justice.

To the contrary, there is no such risk of doing injustice to the defendants. If the court later determines that the defendants were not in the wrong in what they did there is a fall back position. The first defendant will simply put into effect his decision to dismiss the plaintiffs.

For the reasons given above this court finds that the balance of justice was in favour of granting the interim injunction on 10th July 2001 and it is still tilting in the direction of continuing the said injunction until the hearing of the Originating Summons. I must observe that this finding does not dispose of this application. The court wants to consider if, at law, this interim injunction ought to be vacated on the ground that there was non-disclosure of a material fact. This is in view of the fact that I had earlier on intimated that I would come back to this issue of non-disclosure of material facts.

Non-disclosure of material facts as a ground for discharging the injunction herein

The defendants' counsel has submitted that the interim injunction herein should be discharged on grounds of suppression of material facts. I have already outlined the facts that the defendants say are material but were allegedly not disclosed at the time of the application for an interlocutory injunction. I will not, therefore, spell them out again. Further, this court has already found that the facts, which the defendants allege were



material and not disclosed, were neither suppressed nor in point of fact material. Now assuming that this finding was wrong it will be necessary that I consider whether the injunction should be vacated because of non-disclosure of the said material facts.

It is settled law that an injunction, that is obtained on a without notice summons, can be vacated if it is shown that at the time it was obtained the claimant had deliberately suppressed material facts. I find that it has not been proven that the plaintiffs deliberately failed to disclose the alleged material facts. Moreover, it must be noted that even if it were the case that there was suppression of material facts this court would still exercise its discretion in favour of continuing the injunction where doing so would not cause injustice to the defendants. This is the position because it is not every omission that would entail the discharge of an injunction. There must be more than just non-disclosure if an exp-arte interim injunction is to be lifted. (See the case of **Hon. B.J.Mpinganjira and Six Others vs. The Speaker of the National Assembly and The Attorney General** Miscellaneous Civil Cause No. 3140 of 2001 [High Court decision of 27th November 2001] [unreported]).

In the matter before me it has already been determined that this court is of the view that there will be no injustice occasioned to the defendants if this injunction is maintained. Actually, there is no evidence on record to demonstrate that the injunction of 10th July 2001 has caused, or caused any or will cause any injustice to the defendants.

Finally, I must mention that the position at law is that the court still has discretion, regardless of proof that there was material non-disclosure, which justifies the immediate discharge of an ex-parte order of injunction, to continue the order of injunction if same could properly be granted even had the facts been disclosed. (See the case of **Hon. B. J. Mpinganjira and Six Others vs. The Speaker of the National Assembly and The Attorney General**. [supra.]). This court now has the whole facts of this case and is of the opinion that it would still have exercised its discretion in favour of granting an injunction. In the premises the interim order of injunction of 10th July 2001 will continue until the determination of the Originating Summons herein or until a further order is made.

Conclusion

This court is alive to the fact that the injunction herein is only temporary and that it must remain so. It should not be seen as giving a permanent relief to the plaintiffs. Accordingly, there is need to have the process of adjudicating on the questions raised by the plaintiffs expedited. In order to achieve this I order that the plaintiffs must file, and serve on the defendants, the affidavits on which they intend to rely on, at the hearing of the Originating Summons, within the next 14 days. For the avoidance of any doubt the plaintiffs' said affidavits must be filed and served before close of business on 28th November 2002. The defendants, if they wish to offer affidavit evidence,

must file and serve their affidavits by close of business on 13th

December 2002. The parties shall attend court for the hearing of the Originating Summons on the 27th of December 2002. Both parties shall see to it that the deadline stated above are complied with. If the hearing of the Originating Summons shall fail to take place on the appointed day of 27th December 2002 because of the actions or inactions or omissions on the part of the plaintiffs then the interlocutory injunction herein might be dissolved at the instance of the defendants.

The costs of, and occasioned by this application, shall be costs in the cause.

Made in Chambers this 14th day of November 2002 at the Principal Registry, Blantyre.



F.E. Kapanda
JUDGE

Civil Cause No. 1750 of 2001