



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 143 OF 2008**

**BETWEEN:**

**THE STATE**

**-AND -**

**THE MALAWI COMMUNICATIONS  
REGULATORY AUTHORITY.....RESPONDENT**

**EX – PARTE: JOY RADIO LIMITED.....APPLICANT**

**CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA**  
Mr R. Kasambara, of Counsel, for the applicant

Mr Ndau, of Counsel, for the respondent  
appearing with  
Mr Nyasulu, of Counsel  
Mr Chibwana, of Counsel  
Miss Mdolo, of Counsel  
Mr Chuma– Official Interpreter

Date of Hearing: 31 – 10 – 2008

Date of Ruling : 19 – 11 – 2008

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**RULING**

**Manyungwa, J**

## **INTRODUCTION:**

This is the respondent's summons to discharge the order of interlocutory injunction which the ex – parte applicant obtained ex – parte on the 18<sup>th</sup> day of October, 2008 restraining the respondents either by themselves, their officials or agents or howsoever otherwise from blocking or preventing the applicant from broadcasting until a further order of the court. In the same summons the respondent sought to stay proceedings pending arbitration. The summons were made under Orders 29 and 53 of the *Rules of the Supreme Court*<sup>1</sup> and also under Section 6 of the Arbitration Act<sup>2</sup> and inherent jurisdiction of the Court. The application is supported by an affidavit sworn by Mr James Chimera, the respondent's Director of Broadcasting and the respondent also filed its skeleton arguments. The ex – parte applicant opposes the summons and to that extent filed its affidavit in opposition sworn by Mr Ralph Kasambara, of Counsel, and also filed its skeleton arguments. I shall come to the affidavits shortly.

## **BACKGROUND:**

It must be mentioned that the ex – parte applicant obtained its radio licence from the respondent in 2002, as a matter of fact the respondent granted a radio licence to the ex – parte applicant on 1<sup>st</sup> April, 2004. The applicant's broadcasting licence was gazetted on 1<sup>st</sup> July, 2005. On 16<sup>th</sup> October, 2008 the respondent advised the ex – parte applicant that it had revoked the ex – parte applicant's radio licence and that it should cease operating its radio station. Following this closure, the ex – parte applicant on 18<sup>th</sup> October, 2008 obtained leave to move for judicial review and also an ex – parte order of injunction against the respondent and the ex – parte applicant's radio station went back on air. On 24<sup>th</sup> October, 2008 the applicant took out an inter – parties summons for the continuation of ex – parte order of injunction returnable on 20<sup>th</sup> November, 2008. However, the respondent on 27<sup>th</sup> October 2008 took out the present summons, which was heard by this court on 4<sup>th</sup> November, 2008.

## **THE RESPONDENT'S AFFIDAVIT:**

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<sup>1</sup> *Supreme Court Practice* (1999 ed)

<sup>2</sup> Arbitration Act, Chapter 6:03 of the Laws of Malawi

The affidavit in support of these summons was sworn by Mr James Chimera, who is the respondent's Director of Broadcasting. In his affidavit, Mr Chimera deposed that during a meeting held on or about the 4<sup>th</sup> day of June, 2008 between the respondent and the ex – parte applicant's, Station Manager, a certain Mr Peter Chisale who informed the respondent that the ex – parte applicant would as from that date not be complying with any future orders from the respondent including orders for production of broadcast material. The deponent deposes that on 19<sup>th</sup> June, 2008 the ex – parte applicant was ordered to deliver a specific broadcast material and he exhibited exhibit "M1" a copy of a letter from the respondent addressed to the ex – parte applicant dated 19<sup>th</sup> June, 2008. That letter read as follows:-

Malawi Regulatory Authority (MACRA)  
MACRA House, Salmin Armour Road  
P/Bag 261  
BLANTYRE

19<sup>th</sup> June, 2008

The Station Manager  
Joy Radio Station  
P/Bag 17  
LIMBE

Dear Sir,

**Re: REQUEST FOR A BROADCAST MATERIAL**

For the purposes of fulfilment of MACRA'S monitoring and enforcement functions under Section 54 of the Communications Act, and the terms of Article 10.8(1) – (3) of the Terms and Conditions of your broadcasting licence, we would like to request your organisation to provide us with a recording of the rally addressed by the Former President Dr Bakili Muluzi and others at Kawiriwita ground in Machinga on 15<sup>th</sup> June, 2008. We require the material in an unedited version, specifically direct from the master log.

We will be most grateful if you could comply with this request as soon as possible. We would also like to assure you that we will give feedback after the recording has been analysed.

Your usual cooperation is most appreciated.

Yours faithfully

Signed

Dr Allexion Chiwaya  
DIRECTOR GENERAL

The deponent further deposes that in response to the above letter, the ex – parte applicant wrote the respondent effectively refusing to comply with the respondent’s order exhibited exhibit “M2”, which is a copy of a letter from the ex – parte applicant addressed to the respondent dated 23<sup>rd</sup> June, 2008. That letter was in the following terms:

The Station Manager  
Joy Radio station  
P/Bag 17  
LIMBE

23<sup>rd</sup> June, 2008

Dr Allexion Chiwaya  
Director General  
Malawi Communications Regulatory Authority (MACRA)  
P/Bag 261  
BLANTYRE

Dear Sir

**REQUEST FOR A BROADCASTING MATERAIL**

We wish to make reference to your letter of 19<sup>th</sup> June, 2008, in which you requested us to provide MACRA with the recording of the rebroadcast material for the Machinga rally that was held by the Former President, His Excellency, Dr Bakili Muluzi with other political leaders during the week – end of 15<sup>th</sup> June, 2008.

Firstly, Joy Radio wishes to draw MACRA’s attention to the fact that as a regulatory authority you do have your own

monitoring mechanism and facilities. Please kindly indicate why you require our recording over and above what you already have. We are unable to appreciate your undertaking that you will this time around give us feedback on your assessment because the authority has not kept similar and numerous undertakings before.

Secondly, we shall appreciate your authority's indication as to who are the complainants and the nature of the complaints levelled against us which have necessitated your request.

We wish to assure MACRA of Joy Radio's commitment to cooperate with your office in your efforts of being an independent and impartial media regulator.

I remain.

With thanks

Signed

Peter Chisale  
STATION MANAGER

CC: Mr Ralph Kasambara  
Managing Partner  
Ralph &, Arnold Associates

It is further deposed by the deponent that the ex – parte applicant has, to date, deliberately refused to comply with the respondent's order and this fact was never disclosed to the court when the ex – parte applicant obtained leave to move for judicial review and an order of interlocutory injunction before Potani, J on 19 – 10 - 2008. The deponent contended that in its application for the order of interlocutory injunction, the applicant's legal practitioners Messrs Ralph & Arnold Associates, exhibited a letter dated 18<sup>th</sup> September, 2008 alleging that the ex – parte applicant had complied with the respondent's order to produce broadcast material and they further informed the court that the said order had been complied with, thereby misleading the court. The deponent therefore contends that the ex – parte applicant has deliberately refused to comply with the respondent's order

stated above and made pursuant to the Communications Act<sup>1</sup>. As a matter of fact the deponent contended that the ex – parte applicant in paragraph 5.8.2 of the affidavit of Mr Tailosi Bakili sworn in support of the application for judicial review misrepresented to this court that it in fact complied with the respondent’s order. To this extent, so the deponent contends, the ex – parte applicant does not have clean hands to have the equitable remedy it seeks.

The deponent also referred to paragraphs 5.9 and 6.3 of the ex – parte applicant’s Grounds for relief and stated that the respondent revoked the ex – parte applicant’s radio licence on the grounds of non – compliance by the ex – parte applicant to provide the required broadcast material and that it was not therefore correct to say that the respondent has revoked the ex – parte applicant’s broadcasting licence. The deponent exhibited exhibit “M3”, is a copy of the Radio Licence dated 1<sup>st</sup> April, 2002. The said Radio Licence is, in part, reproduced as follows:-

MALAWI COMMUNICATIONS REGULATORY AUTHORITY  
Licence No. 00726  
**RADIO LICENCE**

For FM Radio Broadcasting

In compliance with the provisions of the Communication Act No. 41 of 1998 (The Act) this licence is issued by the Malawi Regulatory Authority (MACRA) to Joy Radio company registration No. 6329 Registered under the Malawi Companies Act CAP 46:03 of:  
P.O. Box 159B  
Blantyre  
MALAWI

For operating	:	An FM radio Broadcasting Station
For the purpose of	:	Carrying out commercial radio Broadcasting
Located at	:	Everest House, off Blantyre Mosque
Operating on	:	94.600 MHZ Broadcasting frequency
Valid for the period of	:	Five years
Effective date	:	1 <sup>st</sup> April 2002

<sup>1</sup> Communication Act 1998 Laws of Malawi

Expiry Date : 31<sup>st</sup> March, 2007

Under the terms and conditions specified in the Annex hereto attached and to the provisions of the Act, and Regulations made thereunder.

...

The licensee shall at all times display the licence in a conspicuous place at the Licensee's offices.

Issued at Blantyre 1<sup>st</sup> day of April, 2002

Signed

Signed

REV DR L. G. Namwera  
Chairman

E. J. Namanja  
DIRECTOR GENERAL

The deponent also contends that the respondent is entitled to revoke the ex – parte applicant's radio licence for non – compliance with its orders or failure to furnish information and has fully complied with the procedure thereof and that the respondent gave the ex – parte applicant an opportunity of being heard and sought representations on the alleged breaches of the Communications Act, including the failure by the ex – parte applicant to comply with the respondent's orders for production of broadcasting material. The deponent therefore states that the ex – parte applicant duly made its representations to the respondent as is evident from the ex – parte applicant's letter dated 18<sup>th</sup> September, 2008 contained in document 4 in exhibit 'TB' in its application for leave, and that it was not therefore correct to allege that the ex – parte applicant was never accorded an opportunity of being heard.

Further, the deponent contends that the ex – parte applicant stated in its application for leave at paragraph 3 of Grounds for Relief that there was no alternative remedy to its claim for breach of the broadcasting licence, and states that this matter ought to have been referred to arbitration. To this extent therefore the deponent contends that the ex – parte applicant has not exhausted all the available remedies and that the ex – parte applicant's main injury, if at all, is pecuniary in nature and that such damage, is therefore capable of being assessed, as such damages would therefore adequately compensate for any financial loss. Further, the respondent states that the Constitutional rights which the ex – parte applicant alleged were infringed by the closure are not absolute and can therefore be limited according to law.

Furthermore the respondent undertook to pay damages should it later transpire that the respondents were wrong in law.

It is also contended on behalf of the respondent that the respondent was perfectly entitled to revoke the applicant's radio licence under the powers granted to it under the Communications Act, and that the respondent therefore duly exercised its statutory and administrative powers in revoking the applicant's radio licence. Further, it is contended that at the time the ex – parte applicant applied and was issued with a radio licence on 1<sup>st</sup> April, 2002, the principal shareholders were Multi – Media Communications Limited, a company originally incorporated in Lesotho and that in 2005 the ex – parte applicant changed its principal shareholding to Atupele Properties Limited owned by His Excellency Dr Bakili Muluzi and Patricia Muluzi, the former First Lady, the former being a politician contrary to statutory prohibition. It is further contended that even in respect of the broadcasting licence, it is not correct to say that the respondent was informed of the ex – parte applicant's share transfer nor that the same was transferred to a politician.

### **THE EX – PARTE APPLICATION AFFIDAVIT:**

In his affidavit in opposition to the summons to discharge the injunction, Mr Kasambara, of Counsel deposed on behalf of the ex – parte applicant as follows:- That on several occasions the respondent had been demanding recorded broadcasting material from the ex – parte applicant without stating the reasons thereof and that on all occasions the ex – parte applicant had been complying with such demands by the respondent. The deponent stated that subsequently, in May 2008 the ex – parte applicant became incensed when it discovered that the respondent was collecting these recordings for purposes of passing them on to Honourable Patricia Kaliati MP, Minister of Information and Civic Education, the Malawi Broadcasting Corporation (MBC), and the Democratic progressive Party (DPP). The deponent further stated that at no occasion did the respondent give feedback to the ex – parte applicant on the recorded broadcast material collected from the ex – parte applicant. Consequently at a meeting held on 4<sup>th</sup> June, 2008, the ex – parte applicant advised the respondent that in future it would only produce to the respondent recorded broadcasting material for which lawful cause is shown as required by its broadcasting licence. It is therefore contended on behalf



of the ex – parte applicant that it was for the respondent to show the lawful cause as was required by the broadcasting licence. The deponent therefore states that when the respondent by way of a letter dated 19<sup>th</sup> June, 2008 resorted to its tactics of wanting to collect recorded broadcasting material of the United Democratic Front’s (UDF) Presidential speech in respect of a rally held in Machinga so as to pass it on to the said Honourable Mrs Patricia Kaliati, MBC and the DPP, the ex – parte applicant refused in writing by way of a letter dated 23<sup>rd</sup> June 2008 (exhibit “M2”) to honour such an abuse of power by the deponent. The deponent further states that subsequent to the commencement of these proceedings, the General Counsel of the respondent advised the deponent that the respondent wanted the recordings for a legitimate cause and that the deponent should persuade the applicant to resend the recordings. The deponent states that he took word of General Counsel and he accordingly advised the ex – parte applicant to produce the recordings which was done. The deponent exhibited exhibit “RK1” as evidence of this. The said exhibit “RK1” was however not attached. The deponent therefore contended that it was not therefore correct to say that as of October 16<sup>th</sup>, 2008 the ex – parte applicant had deliberately refused to comply with the respondent’s order albeit unlawful.

The deponent further contends even if it were to be said that the ex – parte applicant had not complied with the respondent’s request; one would then wonder why the respondent remained quiet on such an issue from September 19<sup>th</sup>, 2008 to October 16<sup>th</sup>, 2008 when the respondent decided to revoke the ex – parte applicant’s radio licence. It is further contended on behalf of the applicant that the conduct of the respondent demonstrates that it is acting in bad faith especially when the revocation of the said licence is done by Management of the respondent and not its Board of Directors. Furthermore, the deponent contended that Mr Tailosi Bakili only stated facts as they were and that this was borne out by exhibit “TB4” in the ex – parte application for leave for judicial review. That document “TB4” was in the following terms:

Ralph & Arnold Associates  
P.O. Box 2074  
Blantyre  
Malawi  
18<sup>th</sup> September, 2008

The Director General

Malawi Communications Regulatory Authority  
P/Bag 261  
Blantyre

Dear Sir,

**Re: BREACH OF LICENCE CONDITIONS AND  
PROVISIONS OF THE COMMUNICATION ACT**

With reference to the above matter and your letter of 28<sup>th</sup> August, 2008 directed to the Station Manager of Joy Radio Limited. The said letter has been passed on to us with instructions to respond which we hereby do.

Joy Radio Limited did communicate and did furnish the Authority with all relevant documentation on the transfer of shares to new shareholders. We would not want to believe that the said information was not received or indeed suggest that MACRA did not comply with its legal mandate by not acting on the information. Joy Radio Limited did not therefore withhold or suppress any information before the change.

Our view is that a Limited Company remains separate and distinct from its shareholders. The company has its own personality. While we agree that some of the shareholders, who only hold as little as 1 share, may not hold a Broadcasting licence because they are practising politicians, their company can, in our view, hold one. To hold otherwise would be unconstitutional and be in unnecessary restraint of trade. Joy radio Limited is not in an alliance of any kind. It is, simply put, a limited company with its own personality as said before.

We note that the coverage of Joy Radio is no worse than that of other comparable radio stations; and specifically Joy Radio complies, in our view, with the requirements of the Code of Conduct for Broadcasting Services contained in the third schedule of the Communications Act. Joy radio also complies with Section 45 of the said Act. With respect, therefore, the accusations of violation of licence conditions and the Act are not well founded.

Finally we note that all broadcasting material requested by you in your letter of 19<sup>th</sup> June, 2008 were supplied and there is no non – compliance by Joy Radio Limited.

Unless there are some cogent reasons, we see no reason why MACRA should revoke the licence of Joy Radio Limited.

Yours sincerely

Signed

Ralph Kasambara

For: RALPH & ARNOLD ASSOCIATES

CC: The Station Manager  
Joy Radio Limited

The deponent further stated that todate the respondent has not justified why it needs the said recordings as required by Clause 10.8.3 of its Broadcasting Licence. It is therefore contended that the ex – parte applicant approached the court with clean hands. Further, the deponent contends that there are very stringent conditions that need to be followed before a licence is revoked under the terms and conditions of the ex – parte applicant’s Broadcasting licence as is evident by Clause 21 of the said Licence, which requires that the licence may only be revoked subject to the provisions of the Act and Licence Conditions i.e. if the licensee has been in substantial and perpetual breach of the conditions and has not within a reasonable period, after having been notified in writing of such breach by the Authority, and having had reasonable opportunity to make representations, remedied the breach, or where a penalty was imposed, failed to oblige to the penalty so imposed. The licence may also be revoked if the licensee has been declared bankrupt or insolvent; or if the licensee took steps to de – register itself or de – registered.

It is therefore contended by Mr Kasambara, that the ex – parte applicant has neither been in substantial let alone perpetual breach of any provisions of the terms and conditions of the said Broadcasting Licence, nor has the respondent at any time advised the ex – parte applicant to remedy any breach

of any provisions of the terms and conditions of the said Broadcasting Licence.

Further, the deponent contends that the respondent gave several reasons for the revocation of the radio licence, but simply stated that the ex – parte applicant had breached the Communications Act and the terms and conditions of its licence without specifying which licence they meant whether it was the radio or broadcasting licence. The deponent further contends that the ex – parte applicant can not broadcast without a radio licence automatically led to the revocation of the broadcasting licence. The deponent further contends that in any event the only licence that had terms and conditions attached to it was the broadcasting licence, and that a *fortiori*, the respondent could only demand broadcast material under Clause 10.8.3 of Broadcasting licence and not under the Radio Licence that has no attached terms and conditions. The ex – parte applicant further contends that the respondent has no powers of revoking a radio licence for the alleged breaches of the broadcasting licence. Further it is averred that under Section 42 of the Communications Act, the respondent can only revoke a radio licence when any person has failed to furnish information required by MACRA in accordance with the conditions of a radio licence issued to him or regulations made under PART IV of the said Act. It was therefore contended on behalf of the ex – parte applicant that thus far, there are no conditions attached to the radio licence granted to the applicants and that no regulations have been made under Part IV of the Act. The ex – parte applicant also argues that once the broadcasting licence has been revoked by the respondent, there is no alternative remedy that can ensure that the *status quo* is maintained pending a resolution of the matter, and that in revoking the ex – parte applicant’s licence when there are factual dispute between the respondent and the ex – parte applicant it clearly meant that the respondent was not prepared to proceed to arbitration. Further that at no stage did the respondent show that he wanted to have this matter resolved by way of arbitration.

As regards the shareholding, the ex – parte applicant contends that there is no statutory prohibition in respect of transfer of shares by an owner or control of a radio licence. The deponent further states that the effective date of the Broadcasting Licence herein was 1<sup>st</sup> July 2005 and that the alleged changes of ownership or control took place on 23<sup>rd</sup> February 2004 not 2005

as alleged by the respondent in paragraph 9.3 of the affidavit of James Chimera. The deponent exhibited exhibit “RK2” which purported to be a true copy of the transfer of shares but were in fact two letters, dated 23<sup>rd</sup> and 24<sup>th</sup> October, 2008. The letter of 23<sup>rd</sup> October, 2008 was from the ex – parte applicant and it read:

Joy Radio Limited  
P/Bag 17  
Limbe

23<sup>rd</sup> October, 2008

The Director General  
Malawi Communications Regulatory Authority  
P/Bag 261  
Blantyre

Through: Messrs Ralph & Arnold Associates  
P.O. Box 2074  
Blantyre

Dear Sir

**RESUBMISSION OF THE BROADCAST MATERIAL  
REQUESTED IN YOUR 19<sup>TH</sup> JUNE, 2008 LETTER**

We are pleased to resubmit the broadcast material you requested in your 19<sup>th</sup> June, 2008 letter of the rally His Excellency the Former President, Dr Bakili Muluzi addressed in Machinga on 15<sup>th</sup> June, 2008.

The enclosed CD contains the material in question.

Yours faithfully

MJF Chapuma  
FOR: JOY RADIO LTD

The second letter dated 24<sup>th</sup> October, 2008 from Ralph & Arnold Associates read as follows:

Ralph & Arnold Associates  
P.O. Box 2074  
Blantyre  
24<sup>th</sup> October, 2008

The General Counsel and Board Secretary  
MACRA  
P/Bag 261  
Blantyre

Dear Sir

**RESUBMISSION OF THE BROADCAST MATERIAL  
REQUESTED IN YOUR 19<sup>TH</sup> JUNE, 2008 LETTER**

Refer to the telecon of 22<sup>nd</sup> October, 2008 that you had with the undersigned in relation to the above captioned matter.

As per your request, we send herewith our client's letter of 23<sup>rd</sup> October, 2003 that is self – explanatory.

Please acknowledge safe receipt of the same.

Yours sincerely

Signed  
FOR: RALPH & ARNOLD ASSOCIATES

On the issue of damages being adequate as submitted by the respondent, the deponent contended on behalf of the ex – parte applicant that the rights that the respondent intends to curtail are constitutional rights and such that the enjoyment of the said constitutional rights can not be curtailed by the respondent on the premise that the respondent can afford to compensate the ex – parte applicant, as the revocation of the radio licence and or broadcasting goes to the root of the existence of the ex – parte applicant, and that this therefore is much more than an issue of financial loss.

Mr Kasambara therefore prayed on behalf of the ex – parte applicant that based on the foregoing the respondent’s summons to discharge the order of interlocutory injunction be dismissed with costs.

### **SUBMISSIONS:**

Both Counsel for the respondent Mr Nda and the ex – parte applicant Mr Kasambara presented to the court their well researched written submissions which were enriching and enlightening. Equally, during the hearing of this summons Counsel made powerful and thought provoking oral submissions for which the court is ever grateful. I must however state that whilst I have spared no effort in looking up the law with regard to the said submissions, it is not possible, due to reasons of brevity, to recite all that they said in their submissions in the course of this ruling. I shall however endeavour to bear them in my mind, throughout this ruling.

### **ISSUE(S) FOR DETERMINATION:**

The main issues for the determination of the court in this matter is whether to discharge the ex – parte order of interlocutory injunction obtained by the ex – parte applicant on and stay the proceedings as was submitted or prayed by the respondent and its legal practitioners or indeed whether to dismiss the summons as was prayed by the ex – parte applicant and its legal practitioners.

### **THE LAW:**

The Order of interlocutory injunction herein was obtained by the ex – parte applicant on 19 – 10 – 2008 when the said ex – parte applicant applied and obtained before my learned brother Potani, J leave to move for judicial review of the respondent’s decision revoking the ex – parte applicant’s radio licence. The law is such that an interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive judicial review application, or, if the urgency of the case justifies it, pending the hearing of the leave application. The learned authors of **Rules of the Supreme Court**<sup>1</sup> at practice note 53/14/49 have stated that the approach to applications for interlocutory injunctions in judicial review

<sup>1</sup> Supreme Court Practice (1999) Vol. 1

proceedings is similar to that adopted in the case of applications under order 29 or an interlocutory injunction in an ordinary action. In ***R V Kensington & Chelsea Royal London Borough Council ex p Hammell***<sup>1</sup> the court of Appeal held that:

- 1) The jurisdiction to grant interim relief in judicial review proceedings arises on the grant of leave to move for judicial review. An application for an interlocutory injunction or other interim relief can be made ex – parte with the application for leave. In deciding whether to grant interlocutory relief at the ex – parte stage, the judge should consider whether the urgency and the other circumstances of the case warrant the grant of ex – parte relief and should have regard to the approach adopted in the case of applications under Order 29 for ex – parte relief. Unless the judge is satisfied that the urgency and other circumstances of the case justify the grant of an ex – parte relief, he should adjourn the application for interlocutory relief for the inter – parties hearing.
- 2) With a view to avoiding two hearings the ex – party applicant should give notice to the respondent(s) of any ex – parte application for interim relief so that the respondents can consider whether to attend the ex – parte hearing and make representations.

It must be understood that the power to grant an interlocutory injunction or other interim relief in judicial review proceedings is ancillary to the application to move for judicial review or the substantive application for judicial review. The judge can grant an interlocutory injunction or other interim relief on granting leave to move for judicial review or subsequent to the grant of leave.

Similarly, if an interlocutory injunction or other interim relief is granted by the judge, a respondent can apply to the court below for the discharge of that order (if it was made ex – parte) or appeal to the Court of Appeal, in our case Supreme Court (if the order was made inter – parties). See Order 53/14/46 of the rules of the Supreme Court.

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<sup>1</sup> ***R V Kensington & Chelsea Royal London Borough Council ex – parte Hammell*** [1989] 1 All ER 1202



Further, it must be appreciated that Order 32 rule 6 of the rules of the Supreme Court provides:

Order 32 r 6 “The court may set aside an order made ex – parte”.

Thus the court has inherent jurisdiction to set aside orders, including orders granting ex – parte injunction pending judicial review which have been made without notice being given to the defendant. See *R V DPP Ex. P Camelot*<sup>1</sup>. Thus the jurisdiction to set aside leave is generally regarded as having its origin in Order 32. I shall come back to this issue later in the course of my ruling, as it appears to me that the duty placed on an ex – parte applicant at the leave stage in judicial review proceedings is similar to that placed on an ex – parte applicant at the interlocutory injunction stage in ordinary actions.

The court is vested with powers to discharge an order of interlocutory injunction. The law is that an injunction granted ex – parte may on sufficiently cogent grounds be discharged or vacated or waived on an application itself made ex – parte. See *London City Agency (JCD) Ltd V Lee*<sup>2</sup> and Practice Note 29/1A/33<sup>3</sup>. In *London City Agency (JDC) Ltd V Lee*, Megary J had this to say:

“In my judgement the court has ample jurisdiction to make such an order, and there is no established rule of practice to prevent the court doing so in a proper case.

Furthermore, the law is that if on the hearing of motion by a plaintiff for an injunction or in the alternative, to continue an interim injunction already obtained ex – parte, it appears that the interim order was irregularly obtained, by suppression of facts the court may discharge the ex – parte order without any cross notice of motion for that purpose by the defendant.

See also *Boyce V Gill* [supra]

<sup>1</sup> *R V DPP Ex. P Camelot* [1997] 10 Admin L Rep 93

<sup>2</sup> *London city Agency (JCD) Ltd V Lee* [1970] Ch. 597

<sup>3</sup> *Supreme Court Practice* (1999) Ed. Vol. Par 29/1A/33

The law is therefore that a court has power, on application, by the defendant either on motion or summons to discharge an injunction which the plaintiff has obtained i.e. if it subsequently becomes clear or apparent that the injunction was founded on a principle which was wrong in law. In the case of *Regent Oil Company V J T Leaversley (Linchifield) Limited*<sup>1</sup> Stamp J, said:

“[I]f the plaintiff company were today applying for an interlocutory relief, I should be constrained reluctantly to refuse it, - reluctantly because this court is reluctant on an interlocutory application not to hold a party bound to the very words of his covenant, and I would have to hold that there ought not be an injunction from today until the trial. Taking the view I do, that the plaintiff has no built – in right to the continuance of the injunction it obtained, after it has become apparent that it was founded on a decision wrong in law, I ought in my view to discharge the injunction”.

There are many authorities in our own jurisdiction, and in the case of *B M Kasema V National Bank of Malawi*<sup>2</sup> my brother judge, Mwaungulu, J said:-

“The court has wide powers particularly with ex – parte interlocutory injunctions to discharge, vary or vacate an interlocutory injunction. This magnanimity does not extend to interlocutory injunctions obtained inter – parties. The defendant in that scenario should appeal. The case of *London Underground Ltd V National Union of Railway - men*<sup>3</sup> is the authority, if that is necessary. This court will vary, waive or vacate injunctions obtained ex – parte. It does so on several grounds, some raised by the defendant’s counsel. Generally the court dissolves ex – parte injunctions obtained when facts are suppressed to the court. This court has done so following *Boyce v Gill*<sup>4</sup>. Courts discharge or waive ex – parte injunctions if according to *Regent Oil Company Limited V J L Leaversley*

<sup>1</sup> *Regent Oil Company V J T Leaversley (Linchified) Limited* [1966] 1 WLR 1210

<sup>2</sup> *B M Kasema V National Bank of Malawi* Civil Cause Number 2299 of 2001 (unreported)

<sup>3</sup> *London Underground Ltd V National Union of Railway – men* [1988] 1 RLR 341

<sup>4</sup> *Boyce V Gill* (1891) 64 LT 824.

*(Inchifield) Ltd*<sup>1</sup> the injunction was founded on a decision wrong in law. The authors of Supreme Court Practice suggest circumstances where a court might discharge an ex – parte injunction:

‘Examples of such circumstances are where the injunction has been obtained ex – parte or ex – parte on notice, the defendant not having filed any evidence, where the sole or main basis of the application to discharge is that there has been material change of circumstances since the injunction was first granted, or where, after the injunction has been granted, it has become apparent that it is founded on an erroneous view of the law. The foregoing list of examples is not exhaustive.

A court may discharge an ex – parte injunction, if unknown to the plaintiff, the matter the plaintiff wants to enjoin the defendant has occurred. A court should discharge the ex – parte injunction. It will not serve any purpose, if for example, to restrain a defendant to pursue a course of action that has already occurred and concluded. Consequently, if unknown to the plaintiff, the substratum of the application is affected in this way, on notice of fact, the plaintiff should withdraw the injunction if that fact was not known to the applicant until at the hearing of the inter – parties application. A court will on application vacate the injunction”.

Moreover, this court has jurisdiction to discharge an injunction, if it transpires later on after the injunction was obtained that it was so obtained by suppression of material facts. The law is that where there is suppression of material facts by the plaintiff, the court has power to discharge the injunction so obtained on the defendant’s prayer for a discharge. An illuminating statement on the point was made by Warnington L J, in the case of *R V Kensington Income tax commissioners ex – parte Princes Edmond de Polignac*<sup>2</sup> when he said:-

“It is perfectly well settled that a person who makes an ex – parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court

<sup>1</sup> *Regent Oil Company Limited V J T Leaversley (Inchifield) Ltd* (supra)

<sup>2</sup> *R V Kensington Income Tax Commissioners ex – parte Princes Edmond de Polignac* [1917] KB 486

to make the fullest possible disclosure of all material facts within his knowledge and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be relieved of any advantage he may have already obtained by means of the order which has thus been wrongly obtained by him”.

Thus the law requires that where the ex – parte applicant obtains or is granted an order of injunction, there must be full and frank disclosure of all material facts otherwise as was held in ***Phiri V Indefund***<sup>1</sup> the order of injunction may be set aside without having regard to the merits of the case at hand. This is so, and in my view, the rationale of the requirement is not difficult to see because the remedy of an injunction is an equitable remedy and the principle is therefore that he who seeks the aid of equity must do so with clean hands. In ex – parte applications, the principle of ***‘utmost good faith’*** applies. The party coming to court must therefore make full and frank disclosure of all material facts. Thus as it was stated by Chitty J, as he then was, in ***Schmittens V Faulkers***<sup>2</sup> that the ex – parte applicant must proceed ***‘with the highest good faith’***. And in the case of ***Beese V Woodhouse***<sup>3</sup> similar sentiments were made as per the dictum of Davies L. J, which I find necessary for purposes of my ruling in which the learned Lord Justice said:

“[T]he party making an ex – parte application for an injunction should show ‘utmost good faith’ and that the doctrine of ***uberrimae fidei*** in effect applies to such cases”.  
(emphasis supplied by me)

In the case of ***Surtee V Leyland Motor Corporation (MW) Ltd***<sup>4</sup> the court refused to grant an injunction to Mrs Surtee, the plaintiff, because as Mtegha J, observed she was clearly in breach of her contractual obligations to the defendant and therefore the court held that she had approached the courts with tarnished hands.

<sup>1</sup> ***Phiri V Indefund*** 13 MLR 519

<sup>2</sup> ***Schmittens V Faulkers*** (1893) W. N. 64

<sup>3</sup> ***Beese V woodhouse*** [1907] 1 WLR 531

<sup>4</sup> ***Surtee V Leyland Motor Corporation (MW) Ltd*** [1990] 13 MLR 427

In *Brown Mpinganjira and Others V The Speaker of the National Assembly and The Attorney General*<sup>5</sup> my learned brother Kapanda J after extensively considering the principles on suppression of material facts, he said:

“It is trite law and I need not cite an authority for it that a court can discharge an injunction obtained ex – parte if there was non – disclosure of a material fact when the ex – parte application was made. As I understand it, the position at law is that the failure to disclose a material fact must be deliberate if the injunction obtained ex – parte is to be discharged”.

Further Tembo J, as he then was in *Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of the National Democratic Alliance (NDA) Chiumia & Others*<sup>2</sup> succinctly stated the principle(s) as follows:

“Where, like in the instant case it is sought that an ex – parte order be dissolved the court hearing an application, in that regard, may grant the application if it appears to the court that the ex – parte order of injunction under review was irregularly obtained by suppression of material facts. Besides, the court may discharge an ex – parte order of injunction if it becomes apparent to the court that the injunction was founded on a decision wrong in law”.

Now I did say that I was going to revert to the issue of setting aside leave for judicial review, the quick point that I wish to make is that although the summons herein are not couched as desiring to set aside the leave that was obtained by the ex – parte applicant, and it no doubt being not my duty at this juncture to do so, nevertheless it would appear that the principles applicable to setting aside leave where there has been material non – disclosure equally apply where there is non – disclosure of material facts, in

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<sup>5</sup> *Brown Mpinganjira and Others V The Speaker of the National Assembly and The Attorney General* Miscellaneous Civil Cause Number 3140 of 2001

<sup>2</sup> *Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of National Democratic Alliance* Civil Cause Number 58 of 2003

a case like the present summons, to discharge an interlocutory injunction obtained ex – parte. In the instant case the ex – parte applicant was applying for leave to move for judicial review and at the same time an order of interlocutory injunction. A quick run through the principles will demonstrate the point.

The law is such that an ex – parte applicant for leave is under an important duty to make full and frank disclosure to the court of all material facts and matters, including matters against the grant of leave or relief. In the case of *R V Leeds City Council ex – p Hendry*<sup>1</sup> it was stated that it is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the applicant. Latham J, in that case had this to say:

“[T]his is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure: failure to do so will result in appropriate cases in the discretion of the court being exercised against an applicant in relation to the grant of the relief”.

One may ask as to what is meant by the expression ‘full and frank disclosure’ and what facts should be considered material. The answer can perhaps be found in what the court in *R V Lloyds of London ex – p Briggs*<sup>2</sup>, in applying the requirements summarised by Gibson L J, in *Brinks Mat Ltd V Elcombe*<sup>3</sup> essentially stated that:

1. The duty of the ex – parte applicant is to make a full and fair disclosure of all material facts.
2. The material facts are those which it is material for the judge to know in dealing with the application as made; and materiality is to be decided by the court and not by assessment of the applicant or his legal advisors.

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<sup>1</sup> *R V Leeds ex – p Hendry* [1994] 6 Admin LR 439

<sup>2</sup> *R V Lloyds of London ex – p Briggs* [1993] 5 Admin LR 698

<sup>3</sup> *Brinks Mat Ltd V Elcombe* [1988] 1 WLR 1350

3. The applicant ex – parte must make proper enquiries before making the application ...The duty of disclosure therefore applies not only to material facts known to the ex – parte applicant but also to any additional facts which he would have known if he had made such enquiries.
4. The extent of the enquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case.
5. If material non – disclosure is established the court will be astitute to ensure [deprivation of an ex – parte injunction obtained thereby].
6. Whether the fact not disclosed is of sufficient materiality to justify or to require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues and that non – disclosure was innocent is an important consideration but not decisive.
7. It is not for every omission that the injunction will be automatically dismissed...the court has discretion”.

In my considered opinion the reasons for requiring an ex – parte applicant to make a full and frank disclosure are not difficult to see. This is so because it is going to affect the judge’s decision one way or the other. In the case of *Fitzgerald V Williams*<sup>1</sup> Sir Thomas Bringham M R, talking about the importance of the need for a full and frank said:

“In seeking ex – parte relief an applicant must disclose to the judge any fact known to him which might affect the judge’s decision whether to grant the relief or what relief to grant. It is no answer for an applicant who falls down on his duty to show that the relief would have been granted even had he complied with his duty. The courts have traditionally insisted on strict compliance with this rule as affording essential protection to an absent defendant and as applications for ex – parte relief have multiplied so the importance of complying with this duty has grown...the judge has then to exercise his own judgement whether in all circumstances the interest of justice are best served by discharging or maintaining or varying the order. In making this judgement he will have regard to the importance of securing compliance with the fundamental principle but he

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<sup>1</sup> *Fitzgerald V Williams* [1996] 2 WLR 447 at 454 F - H

must have regard also to the significance in the context of the particular case of the facts which had not been disclosed when they should have been”.

This dictum by Sir Thomas Bringham M R as quoted above was applied with approval in *R V General Medical Council ex – p Chadba*<sup>1</sup>. See also *R V Darlington Borough Council ex – p Association of Darlington Tax Owners*<sup>2</sup> for failure to disclosure or to make factual disclosure. The duty extends to disclosure of legal principles and authorities. In *R V Secretary of State for the Home Department ex – p LiBin Shi*<sup>3</sup> leave was set aside for failure to disclose legal authorities and principles. Latham J, in that case commented that counsel should not expect even experienced judges to be seized of all relevant legal principles and authorities and should cite cases relied upon and adverse to the application. See also *R V. Crown Prosecution Service ex – p Hogg*<sup>4</sup> Auld J commented that it would be wiser in paper applications for leave to draw the judge’s attention to any body of authority against the applicant and explain how it is to be distinguished.

The duty also extends to drawing attention of the court to delay, and further to disclose existence of an alternative remedy. In the case of *R V The Law Society ex – p Bratsky Lesopromyshlenny Complex*<sup>5</sup>, the leave was set aside because the alternative remedy was not disclosed by the ex – parte applicant at the time of obtaining leave.

And in *The State V Ministry of finance Ex – p SGS*<sup>6</sup> quoted with approval in the case of *The Director of Public Prosecutions and the Lilongwe Magistrate Court Ex – p Dr Cassim Chilumpha*<sup>7</sup> the court stated:

“Where [leave] is given the other party may apply to have the leave set aside because the application discloses absolutely no arguable case or because the applicant has

<sup>1</sup> *R V General Medical Council ex – p Chadba* 17<sup>th</sup> May 1996 (unreported)

<sup>2</sup> *R V Darlington Borough Council ex – p Association of Darlington Taxi Owners* [1994] COD 424.

<sup>3</sup> *R V Secretary of State for the Home Department ex – p LiBin Shi* [1995] COD 135

<sup>4</sup> *R V Crown Prosecution Service Ex – p Hogg* [1994] COD 237

<sup>5</sup> *R V The Law Society ex p Bratsky Lesopromyshlenny Complex* [1995] COD 216

<sup>6</sup> *The State V Minister of Finance Ex – p SGS* Miscellaneous Civil Cause 40 of 2003

<sup>7</sup> *The Director of Public Prosecutions and the Lilongwe Magistrate Court ex – p Dr Cassim Chilumpha* Miscellaneous Civil Cause No. 315 of 2005



not frankly disclosed material facts or material aspects of the law. A statement made for non – disclosure on an interlocutory injunction by Gibson L J in *Brinks Mat Limited V Elcombe and Others* (supra) and cited with approval by Kapanda J in *Mpinganjira and Others V The Speaker of the National Assembly and the Attorney General* is apposite to non – disclosure for leave for judicial review.

‘Finally, it is not every omission that the injunction will automatically be discharged. *A locus poenitetic* may sometimes be afforded as per Lord Denning M R in *Bank Meliat V Nikpour*<sup>1</sup>. The court has discretion notwithstanding proof of material non – disclosure which justifies or requires immediate discharge of the ex – parte order nevertheless to continue the order or to make a new order on terms.

‘When the whole of the facts including that of the original non – disclosure are before the court, it may well grant... a second injunction if the original non – disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.

From the principles laid down in *R V Jockey Club* Licencing Committee ex – p Wright<sup>2</sup> the applicant must bring all matters of law materials to the granting of leave...”.

Turning to the instant case before me it has been deposed that at a meeting of 4<sup>th</sup> June 2008 held between the respondent and the ex – parte applicant, the ex – parte applicant’s General Manager a Mr Peter Chisale plainly told the respondent’s representatives that effective that date, the ex – parte applicant would not be complying with any future orders from the respondent including orders for production of broadcasting material. Subsequently the respondent on 19<sup>th</sup> June 2008 in accordance with its mandate under Section 54 of the Communications Act ordered the ex – parte applicant to deliver specific broadcast material namely a recording of the rally addressed by the Former Head of State, Dr Bakili Muluzi and others at Kawiriwira ground in Machinga on 15<sup>th</sup> June, 2008. To this order or request

<sup>1</sup> *Bank Meliat V Nikpour* [1985] FSR 87, 90

<sup>2</sup> *R V Jockey Club* Licencing Committee ex – p Wright [1991] COD 306.

the ex – parte applicant did not yield, and so the requested broadcast material was never given or sent to the respondent. It would appear according to the deposition made by Counsel Kasambara, that the reason for the non – compliance was, as alleged, in the affidavit in opposition that it was due to the fact that the ex – parte applicant had discovered prior to the 4<sup>th</sup> June meeting that the respondent was in the habit of collecting the requested broadcasting or recorded materials for purposes of passing them on to Honourable Mrs Patricia Kaliati, Minister of Information and Civic Education, the Malawi Broadcasting Corporation (MBC) and the Democratic Progressive Party (DPP).

Now it is not my duty at this point to ascertain whether these allegations are true or not as I am not a trier of these facts at this juncture suffice to say that when the ex – parte applicant applied for leave before my learned brother Potani J on 19<sup>th</sup> October, 2008 it never disclosed that the ex – parte applicant refused to comply with the said request and yet as is borne out by letter from the ex – parte applicant dated 23<sup>rd</sup> June, 2008 exhibited as document “2” in the exhibit ‘TB’, the ex – parte applicant instead wanted to know why the materials were being requested and it never supplied them. Yet, in my view, and I think it is clear, that under Section 54 of the Communications Act, the respondent has powers to monitor compliance with the terms and conditions of the broadcasting licences. This fact that the request broadcast material was never submitted, which was in my view material, was not disclosed to Potani J when he granted the leave for judicial review and consequently an order of interlocutory injunction. In failing to inform the learned judge that the ex – parte applicant had not complied with the said request, the ex – parte applicant had suppressed a material fact.

Secondly, it should be noted, as is evidently clear, that in their application for leave the ex – parte applicant had stated at paragraph 5.8.2 that the requested broadcasting material was subsequently surrendered to the respondent when the same had not been done, and went on to exhibit a letter from Ralph & Arnold Associates dated 18<sup>th</sup> September 2008 addressed to the Director General of the respondent in which it was alleged that the ex – parte applicant had complied with the respondent’s order of 19<sup>th</sup> June, 2008 to produce the broadcast material had been complied with. Quite to the contrary, it is clear, that this had not been done by the time that the respondent wrote to the ex – parte applicant on 28<sup>th</sup> August, 2008.

Thirdly, the ex – parte applicant alleged before Potani J that the respondent did not afford them an opportunity to be heard but instead proceeded to revoke the ex – parte’s broadcasting licence as narrated at paragraph 5.9 of the grounds for relief. However it would appear and this is heavily contended by the respondent that from the 28<sup>th</sup> August, 2008 when the letter, document 3 in exhibit ‘TB’ was written, the ex – parte applicant was given the opportunity to make representations as to why the said licence should not be revoked or challenge the allegations so made. The ex – parte applicant had 28 days in which to do this. The ex – parte applicant replied on 18<sup>th</sup> September, 2008 and it is therefore surprising when the ex – parte applicant alleges as they did before my learned brother Potani J that they were not given an opportunity to be heard. In my view that opportunity arose by the letter of 28<sup>th</sup> August, 2008 and was satisfied when the ex – parte applicant through the legal practitioners responded in their letter of 18<sup>th</sup> September, 2008. This too was not disclosed to the learned judge when the ex – parte applicant obtained leave.

In *Ridge V Baldwin*<sup>1</sup> Lord Morris of Both – Y – Gest said:

“My Lords,...It is well established that the essential requirements of natural justice at least include that before someone is condemned, he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charges, allegations or suggestions which he has to meet”.

In these premises and on the basis of the foregoing I do find that the non – disclosure of these facts at the time that the ex – parte applicant applied for leave amounted to suppression of material facts, such that had these been disclosed the court could not have perhaps granted the injunctive relief as it and I so find.

On the issue of the alternative remedy, although what the respondent revoked was the ex – parte applicant’s radio licence, it is clear that under the regulations made under the Act gazetted in 2005, it is provided under regulation 22 that any disputes in relation to the licence shall be settled amicably. Here too, the ex – parte applicant should have disclosed that there was another avenue to wit, arbitration.

<sup>1</sup> *Ridge V Baldwin* [1964] AC 40 HL

In these circumstances and by reason of the foregoing I am satisfied that this is proper case in which the order of interlocutory injunction that was granted to ex – parte applicant should be discharged, and I accordingly discharge it with costs.

*Pronounced in Chambers* at Principal Registry this 19<sup>th</sup> day of November, 2008.

Joseph S Manyungwa  
**JUDGE**