IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 98 OF 2007

BETWEEN:

THE STATE

AND

INSPECTOR GENERAL OF POLICE……....1ST RESPONDENT
THE COMMISSIONER OF POLICE…… .2ND RESPONDENT

EX-PARTE

KENNEDY MAKWANGALA……....1ST APPLICANT
HOPHMALLY MAKANDE……...2ND APPLICANT

CORAM: **CHIMASULA PHIRI J,**
Kasambara of counsel for the applicants
Kanyuka Chief State Advocate for the Respondent
Mrs Matekenya, court official
Mrs L. Kasasi - typesetter

ORDER

Chimasula Phiri J

On 25th March 2007 I heard this application and delivered my Order on the very same day. However, I undertook to deliver a formal order on 30th March 2007. Due to illness I failed to do so.

In the substantive matter for judicial review the applicants are Messrs Makwangwala and Makande. On 23rd March 2007 they obtained leave for judicial review on ***ex-parte*** application. The

Judge also granted an injunction that until the hearing of the ***inter partes*** application for an injunction or until a further order, the respondents must not either by themselves, their officials or agents, or howsoever otherwise, block or prevent the applicants and/or UDF Party from holding a rally at Chisitu in Mulanje on 25th March 2007.

The respondents made two applications on 24th march 2007 after being served with the Order for leave for judicial review. The applications are inter-related. The first application was to abridge time to hear an application to vacate an injunction and is made under Order 3 Rule 5 of the Rules of the Supreme Court. The Order reads as follows –

Extension, etc., of time

3/5 5 - (1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The court may extend any such period as is
referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the court being made for that purpose.

(4) *In this rule references to the court shall be construed as including references to the Court of Appeal, a single judge of that court and the registrar of civil appeals.*

Abridging of time is explained in note 3/5/2 of this Order and reads as follows:

3/5/2 ***Abridging time***

> *There is the same power under the rule to abridge as to extend time, and where necessary to avoid an injustice, time will be abridged; but such orders are rare, except by consent, and, in practice almost limited to leave to serve short notice of certain urgent proceedings where no injustice would thereby be caused to the other party. For example, it is not likely that a summons under O.14 would ever be made returnable in less than the 10 clear days required by O.14, r.2.*

The application to abridge time was prompted because the injunction order expressly provided that it would only be varied or discharged on 48 hours notice. Therefore, service having been done on 24th March 2007, there is no way a rally proposed for 25th March 2007 could have been stopped unless time was abridged. The application is supported by an affidavit of Rosemary Kanyuka which reads as follows –

> *THAT the respondents were served with an injunction herein at around 4.30 p.m. yesterday 23rd March 2007 restraining them or their officials or agents, or agent from blocking or preventing the applicants or UDF Party from holding a rally at Chisitu in Mulanje on the 25th day of March 2007.*
>
> *THAT I have been informed by the respondents that the applicants were not denied from holding any rally at all except that on 25th March the day was already booked for a Presidential rally at Njamba Freedom Park and that they do wish to have this injunction vacated before the due dates of the events tomorrow.*
>
> *THAT prior to the application to holding the rally on the 25th March 2007, the applicants had notified the police of their intention to hold the rally on 18th March 2007 to which the respondents had no objection.*

THAT the court was not given this information at hearing of the application for the injunction and this amounts to suppression of a material fact to the situation of security.

THAT in view of the points raised above, namely, that the injunction was served on the respondents at 4.30 p.m. yesterday and which does not give them enough time tomorrow to prepare for an ***inter partes*** *hearing as ordered before the meetings tomorrow and in view of the fact that this is a serious matter concerning public security it would be in the expediency of justice that the 48 hour time factor herein abridged and the court allows the* ***inter partes*** *application to vacate injunction be heard this afternoon.*

WHEREFORE I hereby pray to this honourable that the order for a 48 hour notice to the other party herein be vacated and the court permits the parties to abridge the time and hear an ***inter partes*** *application this afternoon.*

This was served on the applicants' lawyers at 19:10 hours on 24th March 2007. The second application was ***inter partes*** summons to vacate the injunction order and was made under Order 29 of the Rules of the Supreme Court which provides as follows: -

Application for injunction (O.29, r.1)

1. - (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ***ex-parte*** *on affidavit but, except as aforesaid, such application must be made by motion or summons.*

> *(3) The plaintiff may not make such application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the court thinks fit.*

This is supported by affidavit of Mathew Justus Martin Augustus Chimalizeni, Commissioner of Police, Southern Region, the 2nd respondent. It states as follows:-

> *1. THAT on 13th March 2007, we received a letter from the Secretary General of the United Democratic Front notifying us that the United Democratic Front party (UDF) shall hold a mass rally at Chisitu Ground in Mulanje on Sunday, 25th March 2007.*
>
> *2. THAT on 21st March 2007, I did write the United Democratic Front informing them that due to security constraints the rally should be rescheduled to either Saturday the 24th March 2007 or any other day rather than the 25th March 2007.*
>
> *3. THAT on the 25th March 2007, His Excellency the President of the Republic of Malawi, Dr Bingu wa Muntharika will be holding a meeting at Njamba Freedom Park, Blantyre.*
>
> *4. THAT in view of the fact that Dr Bakili Muluzi lives in BCA Hill, Limbe and that he will be travelling to Mulanje on that same day and in view of the fact that there will be masses of people travelling from Bvumbwe to Blantyre and Blantyre to Mulanje (and also to and from other places of Malawi) to attend these meetings which attract huge crowds, would be a threat to public safety and security.*
>
> *5. THAT to hold both meetings on the same day would be a threat to supporters of DPP and UDF parties.*

6. *THAT an example of this is that on 21st March 2007, when His Excellency the President of the Republic of Malawi, Dr Bingu wa Muntharika was travelling from Lilongwe to Blantyre and making whistle stop tours there was conflict between DPP supporters and UDF supporters at Chingale turn off and we fear that if such a thing can happen then what would happen if the supporters met on their way to attend rallies of their interests.*

7. *THAT earlier on the UDF did notify the police of the their intention to hold a rally at Chisitu on the 18th of March 2007 and the police had no objection to them doing so. Despite the permission, the UDF did not hold the said rally.*

8. *THAT the above-mentioned fact was not disclosed to the court and this is a serious suppression of fact which impinges on security issues as it would seem that the dates were changed so that the new date coincides with the date the Head of State wants to hold a rally.*

9. *THAT the police have no intention of denying the UDF from holding rallies. (In fact in this event they have not been denied holding a rally but asked to reschedule) but the police who are the custodians of preserving peace and providing public safety and security have to exercise their discretion when considering the repercussions of such events in the interest of the public security and also security to the President of the country.*

10. *THAT to allow a presidential and UDF rally, both of which attract huge crowds and masses of people travelling to and from the venues, to coincide, would be overstretching security personnel as both rallies require public safety and security attention.*

11. *WHEREFORE in view of the above I pray to this honourable court that the injunction herein and any stay of execution be vacated.*

This too was served on the applicants' lawyer on 24th March, 2007 at 19.07 hours.

The applicants oppose these applications and have prepared affidavits in opposition. Basically these affidavits contain similar evidence as follows: -

Lack of violence or security break down in the past

a. At all the political parties that we have been having in the past, notwithstanding due notification to them, the police do not attend our rallies to ensure security.

b. At all our rallies we manage our own security system as a result there are no incidents of violence, public disorder let alone security concerns.

c. The rally scheduled to take place at Chisitu will be held at a distance of over 100 kilometres away from the scheduled venue of the State President Dr Bingu wa Mutharika's rally.

d. I fail to appreciate how rallies held at such distance from each other can pose a risk to peace or public security.

e. Indeed two weeks ago the State President and Dr Bakili Muluzi held rallies on the same day at different places, and the police did manage the situation.

Advancement of Human Rights

f. Interests of justice and advancement of human rights will dictate that the police should ensure that there is peace and security by allocating enough policemen at both rallies simultaneously.

Evidence of Ability to Police 2 Rallies

g. In the past, the police have managed to police 2 rallies held in the same vicinity unlike the case in point.

i. *for instance, on 14th day of May 1993 (which was a Kamuzu Day), former Head of State late Dr Banda was holding Kamuzu Day Celebrations at Kamuzu Stadium while Dr Bakili Muluzi then an opposition leader was holding a rally at Njamba Freedom Park which is less than two kilometres apart.*

ii. *Again, in 1995 at Bangula Township in Nsanje district, the former Head of State Dr Bakili Muluzi held a rally a kilometre away from one being held by Gwanda Chakuamba then leader of opposition.*

h. *That on 14th March 2007, the police did not have a problem with the holding of a rally at Chisitu on 18th March 2007. The apparent sudden change of heart clearly means that the police are dancing to the dictates of some politicians if not the Head of State himself as we are reliably informed.*

Change of dates of venue and collision of dates of venue

3. *It is indeed correct that on 12th March 2007, UDF did notify the Mulanje Police of our intention to hold a rally on 18th March 2007 but on the very same day we came to learn that the rally could not take place due to logistical problems.*

a. *Hence, the decision to postpone the rally from 18th to 25th March 2007.*

b. *All along up to this date the State President Dr Bingu wa Mutharika let alone his political party the Democratic Progressive Party (DPP) did not inform the police let alone the public of its intention to hold any rally in the Southern Region on 25th March 2007.*

c. *It was only sometime after 20th March 2007 that the State President decided to hold a rally at Njamba Freedom Park on the same day that we scheduled ours in Mulanje.*

d. It is thus clear there was no intention to hold rally on the same day with the rally of the State President.

e. If anything at all, it was the State President that chose to hold a rally on a day that he well knew Dr Bakili Muluzi had earmarked for Mulanje.

Violence by DPP supporters

4. It is common knowledge that DPP is a party that loves and thrives on violence be it intra party and/or inter-party.

a. Hence, it is immaterial that the presence of police would prevent violence at Njamba Freedom Park or on all routes taken by its supporters going to the aforesaid rally or not.

b. Indeed, the incident cited by the 2nd respondent at paragraph 6 shows that for DPP's supporters presence of the State President or not does not stop them from unleashing violence.

Application by respondents in bad faith

6. Indeed, if the respondents were genuine in their application to vacate the injunction, they would have done the following -

a. Either direct the said police officers to go and police Chisitu area in Mulanje district so as to ensure that there is peace and no security breakdown; or

b. Wait for the outcome of this application before issuing directives to the police to stop a rally at Chisitu in Mulanje district.

WHEREFORE I respectfully invite the court to dismiss the application to vacate the injunction.

On 25th March 2007 at the hearing of these applications, Mr Kasambara indicated that had serious objection to the abridgement of time.

In her address to the court Mrs Kanyuka indicated that she initially wanted to bring an ***ex parte*** application but Mr Kasambara had phoned her that he wanted to be present at the hearing of these applications and had no objection to ***inter partes*** application contemplated by the respondents. Mrs Kanyuka thought that this was consent to abridgement of time and filing of summons was mere formality. Her argument was that it was necessary to abridge time in order to avoid injustice and the matter at hand would be rendered useless if time was not so abridged. She argued that there were safety and security issues surrounding the matter. She further contended that the applicant suppressed material facts when obtaining the injunction order and did not come to court with clean hands.

Mr Kasambara admitted he communicated with Mrs Kanyuka that he would come to court at any time upon being served with court documents but that the issue of abridgement was not agreed. He stated that the idea of coming to court was to oppose any application made by the respondents in relation to this case. In his opposition Mr Kasambara firstly relied on Order 32 rule 3 of the Rules of the Supreme Court which reads as follows –

Service of summons (O.32,r.)

3. A summons asking only for the extension or abridgement of any period of time may be served on the day before the day specified in the summons for the hearing thereof but, except as aforesaid and unless the court otherwise orders or any of these rules provides, a summons must be served on every other party not less than two clear days before the day so specified.

He argued that service and issuance were irregularly done and this court was not competent to hear the respondent's application for abridgement of time. He said this provision is intended to avoid injustice to the other party. I rejected the argument because there was equal delay on the part of the

applicants in bringing the *ex parte* application for judicial review order just to ensure that the date of the planned UDF rally at Chisitu fell outside the purview of the allowable 48 hours for variation or discharge. The applicants could have made their application earlier. Therefore, the injustice intended to be cured by Order 3 rule 5 fell within my discretion.

The second argument made by Mr Kasambara was that judge who made the judicial review order and granted an injunction should have been the one dealing with the matter and not myself. He argued that it was desirable that the judge who granted the order should be given an opportunity to correct his own decision unless that judge was not available. He contended that Justice Kapanda was available on the previous day which was Saturday 24th March 2007 and had waited from 14 hours to 17 hours for Mrs Kanyuka to bring this application but to no avail. Mr Kasambara indicated that Mrs Kanyuka did not want to appear before Justice Kapanda hence her failure to bring this application on Saturday.

Indeed a matter of good practice would demand an application of this nature being dealt with by the judge who made the order. However, it is not a rule of thumb that it should be like that all the time. It is clear in this matter that the judge who made the order would not be available on Sunday 25th March 2007. The Deputy Registrar sought instructions from me as a judge in charge of the Principal Registry. No any other judge would be available on Sunday and it is when I scheduled the matter for hearing at 7.00 hours on Sunday 25th March 2007. I considered it as my responsibility which I could not neglect or abdicate as judge in charge. There was an insinuation that this was judge shopping and perhaps there was an arrangement with the judge to 'help' the respondents. I wish to state clearly that the sense of duty and responsibility that was shown should not be seen in the negative manner. It must give pride to litigants that courts are prepared to sit every day of the year and even at odd hours, despite losers of such cases crying foul. I wish to state that there was nothing irregular about my hearing of this application instead of Justice Kapanda and on a Sunday.

The third argument by Mr Kasambara was that the summons for abridgement was irregular in that it did not show the reasons on the face of it. I fully agree with him that Mrs Kanyuka was sloppy in the preparation of the summons. I have no doubt that she had

panicked because of the nature of the matter and the limited time available to her. However, whatever should have appeared as ground in the summons is what she stated in her affidavit in support of the application. Mr Kasambara and the court must have been in no doubt as to the exact nature of the application and the relief that was sought from the court. In my view the irregularity was cured through information in the affidavit.

The fourth point advanced by Mr Kasambara is that equitable maxim of he who comes to equity must come with clean hands applies. He has contended that according to the affidavit evidence of the applicants, the Police have demonstrated behaviour which is not in accord with the Constitution and the law. Some utterances by senior policemen at the Southern Region Police headquarters were deliberately annoying and lacked respect for the laws of this country. Suffice to state that the justice of the matter compels this court to abridge time so that full arguments for or against the substantive application be considered. If indeed the applicants were abused and that the court order was flouted, the applicants should not have waited for an opportunity to raise their concern in this application but should have moved contempt of court proceedings against such policemen.

51/1/12 Effect of party in contempt

The court has a discretion whether to hear a contemnor who has not purged his contempt, and in deciding whether to bar a litigant the court should adopt a flexible approach; accordingly, here a contemnor not only fails to comply with an order of the court, but, for example, makes it clear that he will continue to defy the court's authority whatever the outcome of an appeal, the court is entitled to exercise its discretion to decline to entertain his appeal. ***(X. Ltd. v Morgan-Grampian (Publishers) Ltd*** *[1990] 2 W.L.R. 1000; [1990] 2 All E.R. 1, H.L.). The court will exercise its discretion to hear contemnors who have not purged their contempt where the contemnors are trustees, and it is in the interest of beneficiaries under the trust that the application should be heard (****Clark v. Heathfield*** *[1985] I.C.R. 203, C.A.) Moreover, a contemnor who appeals against an order committing him for contempt on the ground of lack of jurisdiction in the court to make the original order, has, of*

*course, a right to be heard (**Gordon v. Gordon** [1904] P.163, C.A.*

Mr Kasambara asked for an adjournment to continue with the preparation of the matter and indicated he needed three hours. This time would effectively have allowed the UDF Chisitu Rally to have started. I refused to grant him the prayer as I could see the bad faith in his application.

Adjournment of trial (O.35, r.3)

35/3 *3. The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.*

35/3/1 ***Inherent power to adjourn***
*As to the inherent power of the court to adjourn the hearing of any matter in order to do justice between the parties, see **Hinckley and South Leicestershire P.B.S. v Freeman** [1940 Ch.32. The adjournment of a proceeding under this rule or under the inherent jurisdiction is a judicial act which may be reviewed on appeal, but as it is a matter of discretion the Court of Appeal will be slow to interfere **(Maxwell v Keun** [1928] 1 K.B 645, C.A.; **Re Yates Settlement Trusts** [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619, C.A.; **Dick v Piller** [1943] K.B. 497 adjournment on production of bona fide medical certificate) applied in **Priddle v Fisher & Sons** [1968] 1 W.L.R. 1478; [1968] 3 All E.R. 506 (adjournment on bona fide telephone message of inability to attend hearing).*

I must state also that even at that time it was clear that Mr Kasambara was deliberately slowing down the proceedings just as a matter of tactic to ensure that time was wasted. I admonished him on such conduct and wish to remind him that he is an officer of the court and has a duty to assist it. Mrs Kanyuka stated that she came to court on the previous day but that the judge had already left. She indicated that she was in constant touch with the Deputy Registrar. She also stated that Mr Kasambara had told her that he was ready to come to court to oppose the application and that is

why she took out ***inter partes*** summons and not ***ex-parte*** summons.

I delivered my order there and then allowing the abridgement of time as I did not find any merit in the objections raised by Mr Kasambara. He already had brief from his clients. He did not require any further brief on application for abridgment. In my view it was purely an application based on legal arguments. In fact I was surprised that such a respected lawyer could not consent to such an order being made without going into hearing and deal with the substantive application only. I wish to state that I will not take it kindly when lawyers employ tactics of wasting time and they will be told in no uncertain terms as I did to Mr Kasambara.

The second application was ***inter partes*** summons to vacate injunction taken out under Order 29 of the Rules of the Supreme Court. It is supported by affidavits sworn by Mr Kumbambe (Inspector General of Police) and Mr Chimalizeni (Commissioner of Police). In his affidavit Mr Kumbambe stated as follows –

1. *THAT I am vested with duties of preservation of peace, security and public order among other duties.*

2. *THAT my office does not have a personal interest of denying UDF to conduct rallies and such rallies have been denied before.*

3. *THAT on 21st March 2007 my office asked the UDF to reschedule their intended rally of 25th March 2007 to either the day before, Saturday the 24th March 2007 or any other day other than the 25th March 2007. As appears by the document exhibited hereto marked OMCK 1.*

4. *THAT one of the duties of the Police is to see to it that when such meetings are brought to their attention they weigh the scenarios and see whether they coincide with other meetings or whether there will be enough security or likelihood of breach of the peace or public security, hence the law requiring that members of public wishing to hold such meetings should notify the Police.*

5. *THAT on 25th March 2007 the President of the Republic of Malawi, Dr Bingu wa Mutharika will be conducting a rally at Njamba Freedom Park, Blantyre and it was considered that to have two big rallies on the same day would not be in the interests of public security and would be a threat to peace and security.*

6. *THAT to hold both meetings on the day would be a threat to supporters of DPP and UDF parties and we would be failing in our duty if that was permitted.*

7. *THAT in view of the above, to therefore stop the Police from performing their duty would be undermining their legal powers vested in them as custodians of preservation of public order and security.*

8. *WHEREFORE in view of the above I pray to this honourable court that the injunction herein and any stay of execution be vacated.*

The affidavit of Mr Chimalizeni has already been quoted as it was in support of both applications.

The applicants oppose the application and I have earlier quoted the affidavit in support of that opposition.

ISSUES FOR DETERMINATION

On the part of the applicants it has been stated that the issue is that the respondents want this court to discharge order for leave to apply for judicial review and vacate the order of stay of proceedings that the respondents obtained in the matter. On the part of the respondents it has been stated that the issue is whether or not the injunction order which was obtained ***ex-parte*** in the order for leave for judicial review be discharged or varied.

I think Mr Kasambara misguided himself on the real issue before this court. The issue of judicial review is dealt with under Order 53 of the Rules of the Supreme Court.

Grant of leave to apply for judicial review (O.53, r.3)

3. (1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.

*(2) An application for leave must be made **ex-parte** to a Judge by filing in the Crown Office -*

(a) a notice in Form No. 86A containing a statement of -

(i) the name and description of the applicant,

(ii) the relief sought and the grounds upon which it is sought,

(iii) the name and address of the applicant's solicitors (if any) and

(iv) the applicant's address for service and

(b) an affidavit verifying the facts relied on.

(3) The judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open court; in any case, the Crown Office shall serve a copy of the judge's order on the applicant.

This was not an application challenging the grant of *ex-parte* order for judicial review but the order of injunction within that order. Therefore I agree with Mrs Kanyuka on her summary of the issue to be decided.

Both counsel made written submissions and the court has been greatly assisted. I commend both counsel for such industrious exposition of the law on various aspects which definitely is going to enrich this ruling.

Mrs Kanyuka relied on **Bata Shoe Company (Malawi) Limited vs Shore Rubber (Lilongwe)** – Civil Cause number 3816 of 1999 where the High Court stated as follows –

> *An interim injunction should not normally be given on an **ex-parte** application. **Courts grant ex-parte injunctions for emergency and urgency where grave injury is likely.** This is not so in this matter. The plaintiff could have waited for an interim injunction. An **ex-parte** injunction can be discharged on appeal and I would think on application if not clear or urgent enough. (**Eothen Films vs Industrial and Commercial,** [1966] FSR 356). In **Candlex Limited vs Phiri** Civil Case number 713 of 2000, this court said –*
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> > *"I have not read the judgment in **Re First Express Ltd.,** (1991) The Times, 10 October. The case is cited by the authors of Civil Litigation, J. O`Hare and R. N. Hill, Sweet & Maxwell, 8th ed. 1997; 290. That judgment is not binding on this court. It is persuasive. It is however good law. Generally, the court should grant an **ex-parte** injunction where giving notice to the opponent would cause injustice to the applicant because of the urgency of the matter or because a provisional order is necessary for surprise. Further it should not be given unless it is clear to the court that the risk in damage to the defendant can be compensated in money or is outweighed by the risk of injustice to the applicant".*

6 General principles governing grant or refusal of interlocutory injunction

6.1 *It is accepted that the procedure relating to the grant or refusal of interlocutory injunctions and the tests to be applied are generally those laid down by Lord Diplock in **American Cynamid Co. vs Ethicon Limited** [1975] AC 396; [1975] 2 W.L.R. 316. It is important to recognise these principles as guidelines which are not cast in stone although variations from them are limited. Put simply, the guidelines require that initially the applicant must show that there is a serious question to be tried. If the answer is yes, then the grant or refusal*

or an injunction will be at the discretion of the court. In exercising its discretion, the court must consider whether damages would be an adequate remedy for a party injured by the court's grant or refusal to grant an injunction. If damages are not an adequate remedy or the losing party would not be able to pay them, then the court must consider where the balance of convenience lies.

The ***American Cynamid*** *case principles were enumerated by Browne L. J. in* ***Fellowes & Sons vs Fisher*** *[1976] 1 QB 122 at 137 as follows –*

a. *The governing principle is that the court should first consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an injunction. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appears to be at that stage.*

b. *If, on the other hand damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted the defendant would be adequately compensated under the plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.*

c. *It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into*

consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

d. *Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.*

e. *The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.*

f. *If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.*

In ***Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of the National Democratic Alliance (NDA) vs Chiumia and others*** *Civil Cause number 58 of 2003 Tembo J said,*

"Ord. 29 of Rules of Supreme Court makes provision for general principles respecting the grant or refusal of application for interlocutory injunction. The usual purpose of an interlocutory injunction is to preserve the ***status quo*** *until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, thus, to restrain the defendant from doing some act. The principles to be applied in application for interlocutory*

injunctions have been authoritatively explained by Lord Diplock in ***American Cynamid Co. vs Ethicon Limited*** *[1975] AC 396;. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a sufficient remedy. If so, an injunction ought not to be granted.* ***Damages may not be sufficient remedy if the wrongdoer is unlikely to be able to pay them. Beside, damages may not be sufficient remedy if the wrong, in question, is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess. It will be generally material for the court to consider whether more harm will be done by granting or by refusing an injunction. In particular it will usually be wiser to delay a new activity rather than to risk damaging one that is established".***

And in ***Mobil Oil (Malawi) Ltd vs. Leonard Mutsinze –*** *Civil Cause number 1510 of 1992, Chatsika J stated that:-*

"the principles upon which an application for an injunction will *be considered are set out in Order 29/1/2 and 29/1/3 of the Rules of the Supreme Court and were succinctly elucidated in the case of* ***American Cynamid Co. vs Ethicon Limited*** *[1975] AC 396.* ***Before an injunction can be granted, it must be established that the applicant has a good claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in the affidavits. A good claim is said to have been established if the applicant shows that there is a serious point to be decided.*** *When these principles have been established, the court exercises* ***its discretion on the balance of convenience.*** *In deciding the question of the balance of convenience the court will consider whether damages will be a sufficient remedy for the mischief which is complained of and even if it considers that damages will be a sufficient remedy, it must further consider and decide*

whether the defendant or wrong-doer shall be able to pay such damages"

In a presentation by Hon Justice J Mummery of High Court, Chancery Division London at the Regional Intellectual Property Colloquium for Judges of African Countries held in Accra, Ghana from 26th to 28th January 1995 (paper number WIPO/IPJV/ACC/95/5) the judge made a clear and simple elucidation concerning injunctions as follows –

1. ***Injunctions***

(1) *General*

The distinctive characteristics of an injunction are-

(a) *It is* ***coercive*** *in character. It is an order made by the court to do or, or frequently in intellectual property cases, not to do specific acts; for example, prohibiting or restraining the commission of further infringements of the right. It enforces compliance with the law.*

(b) *It is prospective and preventive. It looks to the future for the purpose of preventing repeated infringements.*

(c) *It is personal. An injunction is directed against the individual or corporation, acting by its directors, officers or agents, directing them not to do certain acts infringing the plaintiff's rights.*

(d) *It is enforceable by measures against the person who commits a breach of an injunction (or of an undertaking given to the court instead of an injunction). It is a contempt of court punishable by committal of individuals to prison, by the*

sequestration of the assets of companies or by fine.

(e) *It is discretionary. There is no absolute right to an injunction for the protection of any intellectual property right. Discretion is not to be confused with arbitrariness. There are settled principles and rules of practice governing the situations in which it is appropriate to grant an injunction and which identify the factors relevant to when injunctions are granted or refused and, if granted, in what form and in what terms. The discretion must be exercised judicially.*

(f) *It is flexible. An injunction is flexible as to who may be bound by it. The injunction may be directed to a person not only in respect of his own acts but also those of his employees and agents or, in the case of a company, its directors and officers. It may be suspended for a time before it takes effect. It may be limited in time, so that it comes to an end automatically on the occurrence of a particular event, such as the trial of the action in the case of an interim injunction and the expiration of the right.*

(2) *Interim Injunction*

An interim injunction is the most important remedy available to a plaintiff for infringement of an intellectual property right. It is a pre-trial remedy which is granted in appropriate cases before the existence ownership and infringement of the right have been fully established.

General Features

(a) ***Temporary*** *An interim injunction is granted as a temporary measure to*

regulate the rights of the parties in the period which inevitably exists between the commencement of the action and its trial.

(b) ***Urgency*** *An interim injunction is only granted in urgent cases. A case is not urgent if the only claim by the plaintiff is for damages. Judgment for damages will only be granted at the trial or, if there is no arguable defence, on an application for summary judgment. A case is only urgent if damages for the infringement for the property right committed in the pre-trial period will not be an adequate remedy to the plaintiff, in other words where the plaintiff will suffer irreparable harm if the defendant is allowed to continue committing infringements of the right.*

(c) ***Provisional*** *An interim injunction is granted on limited information. It is granted before the claims of the parties have been fully identified in pleadings and before there had been a full investigation of the claims and the defences to the claims by a discovery of documents and oral evidence. On an application for an interim injunction the evidence is usually put before the court in affidavit form. There may be conflicting accounts of the relevant facts. The view which is taken by the court at the early interlocutory stage is often provisional both on fact and law. The facts cannot be tested at that stage by cross examination. It is no function of the court at that stage to conduct a mini trial to resolve the facts nor is it appropriate for the court to make definitive legal rulings until the facts have been established. The function of the court is to make the best assessment it can of the overall situation, in the knowledge that, on further investigation of the facts and mature consideration of the law, the court's*

initial assessment may turn out to be wrong.

Particular features

The general characteristics of an interim injunction are reflected in a number of detailed points of principle and practice governing the grant of interim injunctions.

(a) ***Ex-parte injunctions***

The situation affecting the infringement of the right may be so urgent that the court is justified in granting an injunction for a short initial period before notice of the application for the injunction has been given to the other side. A situation may be so urgent that there is no time to serve the opponent with formal written notice of the proceedings required by the rules. With modern communication it is usually possible to notify the defendant informally so that he can attend the hearing at which the application for the injunction is made. In some cases, however, the applicant asks the court to make an injunction before notifying the defendant of the proceedings for fear that, once he has knowledge of the proceedings, the defendant will take steps to defeat the purpose of the injunction, e.g. disposing of infringing material. An important point of practice on an application for an ***ex-parte*** *injunction is that the plaintiff must show that he has a strong case for infringement of the right and that he would suffer irreparable harm if he gives prior notice of the proceedings to the defendant. Because of the drastic nature of an* ***ex-parte*** *injunction there is a strict duty on the plaintiff to make full disclosure to the court of all the material facts which are known to him or*

could, by use of reasonable efforts, become known to him.

(b) Arguable Case

*In the case of an **inter partes** application for an injunction the plaintiff must satisfy the court that he had a reasonably arguable case that the defendant has infringed and is continuing to infringe his intellectual property rights. He must show that there is a serious question to be tried on the facts and in law, that his claim is not frivolous and has a reasonable prospect of success. Once a plaintiff has shown he has a reasonably arguable case, the court goes on to consider other factors relevant to the grant of an injunction. What it must not do is embark on a trial and come to final conclusions on facts and law on incomplete and untested factual material.*

(c) ***Damages***

The plaintiff must satisfy the court that an award of damages would not be an adequate remedy for him for any loss that he may suffer by the continuance of the infringement during the period pending trial. If damages are an adequate remedy there is no need for an injunction. Damages are an adequate remedy if there is no need for an injunction. Damages are an adequate remedy if they can be assessed with reasonable accuracy and if the defendant is able to pay them.

The court also considers the damage which might be suffered by a defendant in consequence of an injunction which turns out, at the trial, to have been wrongly granted. The plaintiff must therefore satisfy the court that, if damages are not an adequate remedy to him and an injunction is granted, he is in a position to compensate the defendant on a cross

undertaking in damages. The court normally requires the plaintiff to give an undertaking to the court to compensate the defendant for any damage which he may suffer by reason of the grant of the injunction, if it turns out at the trial that the plaintiff fails in his action and should never have been granted an earlier interim injunction. The purpose of the cross undertaking in damages is to protect the defendant for the loss unjustifiably inflicted on him by the court's grant of an injunction to the plaintiff. If it would be possible to assess the damages which the defendant would suffer and the plaintiff would be in a position to pay those damages, then the court would usually grant an injunction to a plaintiff who would otherwise suffer irreparable harm pending trial.

(d) ***Balance of Convenience***

If damages are not an adequate remedy for the plaintiff and a cross undertaking in damages is not adequate to protect the defendant (for example, it may be difficult to assess the compensation inflicted on him by reason of the injunction or it may be doubtful whether the plaintiff is financially able to meet the potential substantial liability on the cross undertaking) the court then considers the balance of convenience and justice. Who will suffer more if the court turns out to be wrong; the plaintiff wrongly refuses an injunction or the defendant against whom an injunction is wrongly granted? In making this decision the court considers many factors; for example, whether the plaintiff has delayed in bringing the matter to court and whether the defendant has been prejudiced by the delay. The defendant may have altered his position in the genuine and reasonable belief that the plaintiff did not object to his actions. The court looks at the conduct of the parties e.g. whether the defendant took a risk with his eyes open. There is a strong inclination to make an

order which will preserve the status quo i.e., the position which existed before the defendant began to do the actions of which the plaintiff complains. If the case goes in the defendant's favour at the trial, the only loss he will often have suffered is postponement of his proposed activities until it has been fully decided by the court whether they are lawful or not.

Injunctions are the most important remedy in intellectual property cases. Damages are a second best remedy. In cases of infringement of copyright and trademark and passing off damages are rarely an adequate remedy for any wrong suffered by the plaintiff. They are difficult to assess (e.g. damage to goodwill). It is often appropriate to grant an interim injunction because the facts of the case are relatively clear. It is unusual for a novel or difficult question of law to be raised. Patent cases are more difficult. Interim injunctions are more often refused on the ground that damages will provide an adequate remedy for infringements occurring between the commencement of the proceedings and their trial. Patent cases can raise more difficult questions affecting validity and infringement of the right. The court (and the plaintiff) are less willing to take the risk of being wrong in granting an injunction to restrain alleged infringement.

The practical advantages of interim injunctions is that they can be obtained quickly and relatively inexpensively. The argument on the application for the injunction and the decision given by the court is sometimes decisive of the whole case, thereby saving the court and the parties the time and expense of a full trial. The parties are made to face up to the realities of the situation early in the dispute. After the plaintiff has heard the case put up by the defendant he may realise that his claim is not as strong as he originally thought. Similarly, when the defendant has considered the plaintiff's evidence against him he may realise

that it is not worth fighting. The advantage for both sides is that they obtain an early reaction or indication from the court about the likely result in the proceedings.

(3) ***Final injunction***

Although the decision whether or not to grant final injunction at trial is a matter of discretion, the court normally grants an injunction to restrain repetition of infringement or right once the right is established, its infringement is proved and it is shown that, in the absence of an injunction, the defendant intends to continue committing the act complained of. The reason why an injunction is normally granted is that damages for continuing infringement are not an adequate remedy. Prospective damages are difficult to assess. The practical effect of refusing to grant an injunction is that the defendant unilaterally obtains the benefit of a compulsory licence to commit the infringing acts. No cross undertaking is required on a final injunction for the simple reason that it is the end of the case, subject to any appeal. One particular problem that sometimes arises on the grant of a final injunction is where the defendant, in his infringing activities, has mixed up infringing material with non-infringing material. If it is possible to separate them the injunction will only go against the infringing material, but if, by his wrongful act, the defendant has so mixed up the different kinds of material that they cannot be separated, he takes the consequences of his wrong and the injunction is granted in relation to the whole of his infringing article.

Since it is realised that this important and useful remedy can be abused there is power vested in the court to discharge injunctions.

In ***B. M Kasema vs National Bank of Malawi****, Civil Cause number 2299 of 2001, Mwaungulu J said,*

*"This 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 partes**: the defendant should appeal. **London Underground Ltd vs National Union of Railwaymen [1989]** I.R.L.R 341 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 dissolved **ex-parte** injunctions obtained when facts are suppressed to the court. This court has done so often following **Boyce vs Gill** (1891) 64 LT 824. Courts discharge or waive **ex-parte** injunction if, according to **Regent Oil Company Limited vs J. T. Leavesley (Inchfield) Ltd** [1966] 2 All ER 454, the injunction was founded on a decision wrong in law. The authors of The Supreme Court Practice, **Sweet & Maxwell** 1995 ed., 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 for 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 an **ex-parte** injunction. It will not serve any purpose, if for example, to restrain a defendant to pursue a course of action that has occurred and concluded. Consequently, if unknown to the plaintiff, the substratum of the application is affected in his way, on notice of the fact, the plaintiff should withdraw the injunction if that fact was not known to the applicant until at the hearing of the **inter partes** application. A court will on application vacate the injunction.*

The remedy of injunction is equitable and 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 make a full and frank disclosure of all material facts.

Suppression of material facts

In **Brown Mpinganjira and others vs The Speaker of the National Assembly and the Attorney General** Kapanda J. extensively considered the issue of suppression of material facts and 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".*
>
> *In **Ian Kanyuka suing on his own behalf and on behalf of all National Executive Members of the National Democratic Alliance (NDA) vs Chiumia and others** Civil Cause number 58 of 2003 Tembo J said,*
>
> *"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 under review was irregularly obtained by suppression of 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 which was wrong in law".*

FINDINGS

Was it mere coincidence that the UDF Party and DPP decided to hold their rallies on 25th March 2007? I think these parties follow each other's activities closely. Initially the UDF

Party was supposed to hold its Chisitu rally on 18th March 2007 and they had duly informed the police. It was not until 15th March 2007 that there was change of date to 25th March 2007. This was not disclosed when obtaining the injunction order. The picture that was painted by the applicants was that the respondents were bent to stop the UDF Party rally in order to allow the DPP rally. The applicants failed to disclose to the court that they were asked to reschedule their rally either to Saturday 24th March or later than 25th March 2007. It is very clear that the respondents did not prohibit the applicants and their UDF Party from holding a rally at all. Mr Kasambara argued that it was the UDF Party which was first to think of 25th March 2007 as proper date for their rally. There is no evidence to show that DPP is the copycat of that date. It could equally be that the UDF Party was the copycat.

Secondly, national security issues are sensitive and should not be compromised. I would not have granted an injunction on ***ex-parte*** order in an application for leave for judicial review on a matter that hinges on national security issues. The applicants should have taken a separate summons for injunction order and dealt with it on ***inter partes*** basis.

In a paper delivered by chief Justice Pius Langa to Southern African Judges Commission Meeting on 10th August, 2006 entitled **"Balancing National Security and Human Rights"** he wrote as follows: -

> *One of the functions of the courts in a democratic society is to uphold the rule of law, which included ensuring that constitutionally protected rights are upheld. Though the executive and the legislature are in the best position to determine policy with regard to national security, the courts have a crucial role to play in ensuring that security measures are done within the confines of the law and without unjustifiable limitation of human rights.*

CONCLUSION

Having heard the arguments of both parties and having duly considered their submissions, I am satisfied that the order staying the decision of the respondents and an order of injunction

contained in the ***ex-parte*** order for leave for judicial review granted to the applicants be discharged as already ordered on 25th March 2007.

MADE in chambers this 14th day of February 2008 at Blantyre.

Chimasula Phiri
JUDGE