

JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY

MISC. CIVIL APPLICATION NO. 141 OF 2017

BETWEEN

BLESSINGS CHIMENYA AND 17 OTHERS ..... APPLICANTS

AND

THE REGISTERED TRUSTEES OF  
ZOMBA DIOCESE ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chirwa, of Counsel, for the Applicants

Messrs Gondwe and Masowa, of Counsel, for the Respondent

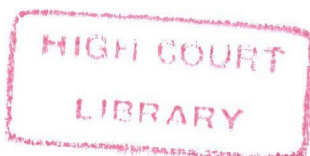
Mr. O. Chitatu, Court Clerk

ORDER

*Kenyatta Nyirenda, J*

This is an application brought under Order 29 of the Rules of the Supreme Court (RSC) whereby the Applicants seek an order restraining the Respondent from executing the order of suspension/expulsion from Zomba Catholic Secondary School imposed on the Applicants pending the determination of the main action herein or a further order of the Court.

The application came before me on 5th May 2017, by way of an ex-parte summons, and there was filed along with the ex-parte summons an affidavit, sworn by the 1st Plaintiff [Hereinafter referred to as the "Plaintiff's Affidavit". I ordered the application to come by way of inter-partes hearing on 11th May 2017. On 11th May 2017, Counsel Masowa sought an adjournment on the ground that her legal firm had received late instructions and they needed time to file the relevant documents. The case was adjourned to 16th May 2017.



On the set hearing date of 16th May 2017, the Applicants sought and were granted leave to amend the Application by (a) adding 15 more applicants to the initial four applicants, (b) altering the name of the Respondent from "The Registered Trustees of Zomba Catholic Secondary School" to "The Registered Trustees of Zomba Diocese" and (c) replacing the word "expulsion" with "suspension and expulsion".

The Plaintiffs' Affidavit is brief and I will set it out in full:

- "1. **THAT** I am one of the applicants in this matter and I am therefore duly qualified to make this affidavit
2. **THAT** my fellow applicants and I are Form Four students at Zomba Catholic Secondary School.
3. **THAT** we have been expelled from school following the disturbances which occurred at the school on the 2nd day of April 2017.
4. **THAT** the events which led to the expulsion were as follows:-
  - (a) Prior to the 2<sup>nd</sup> day of April, 2017, we submitted our grievances to the Boarding Master and the Headmaster through our colleague Byfour Fombe who was a secretary of Luangwa House at the school but no action was taken;
  - (b) On the 2<sup>nd</sup> day of April, 2017 our said friend got annoyed and started making shouting the grievances and this annoyed the school authorities;
  - (c) Byfour Fombe was expelled from school after the authorities summoned his parents,
  - (d) His expulsion annoyed the other students and a decision was made to hold a strike. During the strike which was decided upon at night, students started throwing stones at the school buildings resulting in window glasses being broken.
  - (e) The following day all of us were suspended and sent to our homes,
  - (f) Following the suspension, we were being summoned one by one during which time we were told that that we have been expelled, hence this application.
5. **THAT** we were supposed to report for classes today on the 4th day of May 2017 in order to sit for mock examinations on Monday 8<sup>th</sup>, May, 2017.
6. **THAT** we are due to sit for our final examinations in two months time which we will not do unless the order of expulsion is rescinded.
7. **THAT** we the applicants in this matter did not take part in the disturbances and should not therefore be victimised

8. **THAT** the expulsion from the school is blocking our education to which we are constitutionally entitled
9. **THAT** the decision to expel us was taken without according us a hearing so as to hear our side of the story.
10. **THAT** the decision of the school authorities was unjust and against the dictates of natural justice.

**WHEREFORE** I pray that an order of interlocutory injunction be issued restraining the Respondent from carrying out the expulsion decision until further order of the Court."

The Respondent is opposed to the application for the interlocutory injunction and it, accordingly, filed an affidavit in opposition, sworn by Brother Jumbe, the Headmaster of Zomba Catholic Secondary School [Hereinafter referred to as the "Respondent Affidavit"]. For purposes of parity of treatment, I will also set out in full the material part of the Respondent's Affidavit. It reads:

- "3. **THAT** the respondent is a National Grant Aided Secondary School located in Zomba District and owned by the Registered trustee of Zomba District and owned by the Register of trustees Zomba Diocese.
4. **THAT** there is no Respondent in the name of the Registered Trustees of Zomba Catholic Diocese who are the legal owners of the said school and such the Applicants have sued a non-existent entry in this matter.
5. **THAT** the students herein are on suspension and not on expulsion and as such the Application herein is premature and ought to be dismissed.
6. **THAT** the action herein is embarrassing and prejudicial by proceeding against the said Respondents and that the action ought to be struck out for being frivolous and is tantamount to being an abuse of the Court process.
7. **THAT** there is freedom of association between the school and the students and that the said right is governed by the contract between the students and the school.
8. **THAT** being a grant aided school; it can choose who to associate with since school association is contractual.
9. **THAT** the plaintiffs association with the Respondent is governed by rules and regulations of the school.
10. **THAT** the plaintiffs breached the School Rules and regulations by damaging the school's property amounting to MK1, 000,000.00 (One Million Malawi Kwacha)

**11. THAT** the respondents in adherence to rules of natural justice accorded a fair hearing to the plaintiffs.

**THAT** the applicants have not been expelled but rather suspended pending the conclusion of the disciplinary process which also involves the Ministry of Education.

**13. THAT** if the Applicants did not take part in the disturbances, the Disciplinary process will vindicate their innocence

**14. THAT** the right of education comes with its obligations on the part of the students and failure to adhere to the school Rules and Regulations attracts penalties as stipulated in the school Rules and Regulations.

**15. THAT** I refer to paragraph .9 of the Affidavit in support and state that the students are on suspension and will be advised of the outcome only after the conclusion of the disciplinary process.

**16. THAT** there is nothing to restrain as there is no decision expelling the Applicants at the moment

**17. THAT** an order of an interlocutory injunction will violate the School's right of association which imposes duly on both the students and the school.

**18. THAT** to leave the students unpunished will set a very bad precedent for continuing students in that they will find a justification for violating their contractual obligations.

**20. THAT** granting the Order of an injunction will be tantamount to condoning students' misbehavior.

**WHEREFORE** I humbly pray to the Honourable court to dismiss an application for an interlocutory injunction herein with costs."

The Applicants filed an affidavit in reply, sworn again by the 1st Applicant, Blessings Chimenya [Hereinafter referred to as the "Affidavit in Reply"]. The Affidavit in Reply is relatively very brief and it as follows:

"2. **THAT** I have read the affidavit of Brother Jumbe filed in opposition to the application and would like to reply as follows: -

(a) The act of suspending us in itself is complete and not immature as it bars us from accessing the facilities at the school which affects our studies while we prepare for our final examination from about 23rd June, 2107.

- (b) *As a result of the suspension, we are not sure that we shall sit this years' Malawi School Certificate exams we do not even know our examination centers.*
  - (c) *Commenting on paragraphs 12, 13 and 14 of the affidavit in opposition, I would like to state that that if the disciplinary process is still ongoing what was the basis of sending us home and banning us from writing exams at the school? In any e vent it is not known when the disciplinary process will be concluded considering the slow pace at which the Ministry of Education works in such matters. It could well be after exams will have been concluded and we shall be the losers.*
3. **THAT** *without admitting liability for alleged damage, we are ready and willing to contribute the K1 million which the respondents say is the total cost of repairs. This would allow us at least write our exams and we have made this offer to the respondents.*
  4. **THAT** *we do not say that we should not be punished but that the punishment should only be meted out, after the disciplinary process if found guilty.*
  5. **THAT** *the grant of an interlocutory injunction will not violate the school's right of association but rather it will maintain the status quo until the conclusion of the disciplinary process which the respondents have commenced."*

#### Main Action

The application for interlocutory injunction was filed shortly after the Applicants had commenced an action against the Respondent by originating summons wherein the Applicants seek the Court:

- "1. *Do declare that the decision by the defendants to expel them from school was unjust and against the Rules of Natural Justice.*
2. *Do grant the plaintiffs a permanent order of injunction restraining the defendants from executing the order of expulsion of the plaintiff from school and stopping the said defendants from barring the plaintiffs from access to the school facilities and from classes.*
3. *Do grant an order for costs against the defendants. "*

#### Application for an Interlocutory Injunction

The main issue for determination is whether this Court should grant an order of interlocutory injunction, as was argued by the Applicants through their Counsel, or dismiss the application, as was argued by Counsel for the Respondent.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see O. 29, r. 1(2) of the RSC, **Series 5 Software Ltd v. Clarke & Others (1996] 1 ALL ER t853** and **Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003**. In the latter case, Justice Tembo, as he then was, observed as follows:

*"The usual purpose of an interlocutory injunction is to 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 applications for injunction have been authoritatively explained by Lord Diplock in **American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396**"*

Is there a serious question to be tried?

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

In the present case, the Applicants are questioning, among other matters, whether the action by the Respondent does not breach their constitutional right to education as enshrined in section 25 of the Constitution. Counsel Chirwa argued that the deprivation of that right would in turn erode the Applicant's right to economic activity as set out in section 29 of the Constitution. The Applicants are also of the strong view that their suspension/expulsion was taken without regard to the rules of natural justice and also because they were not involved in the disturbances which resulted in damage to some school property.

On the other hand, the Respondent takes the position that there is no serious issue to go for trial. Counsel Gondwe submitted that in that the Applicants are yet to commence the substantive action.

I have carefully read and considered the affidavit evidence and the submissions by Counsel. The argument by Counsel Gondwe lacks merit. The Court file shows that

the Applicants issued the originating summons and the same was duly served on the Respondent. Further, it is clear to me that the facts in the present case are very much in dispute. For example, the Applicants allege that they were expelled but the Respondent denies expelling them. The Applicants' Affidavit was followed by the Respondent Affidavit. Thereafter, the Applicants traversed most of the averments in the Respondent's Affidavit by filing an Affidavit in Reply. It will be recalled that the Applicants state that they were suspended a day after the disturbances and sent home and thereafter they were summoned from their respective homes and told that they had been expelled. Is this what the Respondent means when it states, in paragraph 11 of the Respondent's Affidavit that ***"THAT the respondents in adherence to rules of natural justice accorded a fair hearing to the plaintiffs."***

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

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

Are damages an adequate remedy]

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

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

as it will be noted from the Affidavit in Reply, the Applicants are prepared, on a "without prejudice" basis, to contribute the sum of K1,000,000 which the respondents say is the total cost or repairs.

#### Balance of Convenience

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

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

The rationale is that if the defendant is enjoined temporarily from doing something that he or she has not done before, the only effect of the interlocutory injunction in the event of his or her succeeding at the trial is to postpone the date at which he or she is able to embark upon a course of action which he or she has not previously found it necessary to undertake. On the other hand to interrupt him or her in the conduct of an established enterprise would cause much greater inconvenience to him or her since he or she would have to start again to establish it in the event of his or her succeeding at the trial.

It is commonplace that the Applicants were suspended from school on 4th April 2017, they have missed their mock mock examinations they are due to sit for their final examinations in less than two months' time. The Respondent concedes that the disciplinary process takes a long time because it involves Ministry of Education. The Respondent did not furnish the Court with any evidence of the concrete steps it has taken to expedite the disciplinary process so that the disciplinary matter should be determined before to the commencement of the final examinations.

As the matter stands, it would be foolhardy to treat the Applicants with the same brush. It could very well be that some of them were indeed not involved. As such, the Respondent's action has potentially disastrous effect on the Applicants. In the circumstances, justice demands that the Applicants be granted the interlocutory injunction being sought until the main action is determined one way or the other. It is so ordered.



Pronounced in Chambers this 16<sup>th</sup> day of May 2017 at Blantyre in the Republic of Malawi.

**Kenyatta Nyirenda**  
**JUDGE**

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