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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 223 OF 2018

BETWEEN:

**FORUM FOR NATIONAL DEVELOPMENT LIMITED
(on behalf of and for the benefit of the People of Malawi)**

CLAIMANT

AND

THE RIGHT HONOURABLE RICHARD MSOWOYA MP

1st DEFENDANT

**THE OFFICE OF THE SPEAKER
OF THE NATIONAL ASSEMBLY**

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Chimkango, Counsel for the Claimant
Kaliwo, Counsel for the 1st Defendant
Chuma, Counsel for the 2nd Defendant
Mwafulirwa, Counsel for *Amicus Curiae*
Mankhambera, Official Court Interpreter

ORDER

This is this Court's order on the claimant's application for an order of interlocutory injunction made under Order 10 rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017.

By the instant application, the claimant seeks an order of interlocutory injunction restraining the 1st defendant from exercising, and/or continuing to exercise functions

and duties of the office of Speaker of the National Assembly and restraining the 2nd defendant from recognizing the 1st defendant as the Speaker of the National Assembly and further restraining the 2nd defendant from according the 1st defendant any rights, privileges, alike to the 1st defendant that are accorded to a person of the Speaker of the National Assembly.

This follows the resignation of the 1st defendant from the Malawi Congress Party, an opposition party represented in the National Assembly, and his declaration that he was now a member of the United Transformation Movement which is a political organization that is not represented in the National Assembly.

When this matter was brought before this Court *ex parte* by the claimant, this Court took the view that the matter should be dealt with *inter partes*, that is, on notice to the defendants in view of the matters raised on this application.

The defendants were therefore served with the claimant's application and they opposed the same.

The 2nd defendant in particular raised an objection to the claimant's application and action that it is based on.

The 2nd defendant objected to the instant action on the basis that it is commenced in breach of section 3(1) of the Civil Procedure (Suits by or against the Government or Public Officers) which requires that in the present matter an action must be commenced against the Attorney General as opposed to the 2nd defendant which is the office of the Speaker of the National Assembly.

The claimant conceded that this action was irregularly commenced against the 2nd defendant instead of the Attorney General.

This Court therefore removed the Office of the Speaker from this action. Costs to that office are to be borne by the claimant.

That left the 1st defendant to deal with the claimant's application for injunction.

The case of the claimant is as follows. The claimant is a company limited by guarantee whose objectives, among others, is to mobilize human, financial and material resources for citizen participation, leadership and empowerment as well as

to advocate for leadership that takes into account the aspirations and hopes of the citizens of Malawi as enshrined in the Constitution of Malawi.

The claimant asserted that, in the present matter, it seeks to enforce the upholding of the wishes of the Malawian people, enshrined in the Constitution of Malawi, vis a vis the provision on crossing the floor and the constitutional duty of the Speaker of the National Assembly to declare any seat vacant when a member crosses the floor as per the requirement of section 65(1) of the Malawi Constitution.

The claimant asserted that on 20th May 2014, the 1st defendant had been duly elected as a Member of Parliament for Karonga Nyungwe West on the ticket of the Malawi Congress Party which sponsored him.

The claimant asserted further that the 1st defendant holds the office of Speaker of the National Assembly having been duly elected by a majority of the members of parliament on 16th June 2014.

The claimant then stated that on 29th June 2019, the 1st defendant issued a public notice, on his facebook page, announcing that he had joined the United Transformation Movement. And further to that the 1st defendant was indeed seen at the rally launching the United Transformation Movement at Masintha ground in Lilongwe where he confirmed that he had joined the Movement.

The claimant then contended that by virtue of section 65 (1) of the Constitution of Malawi, on 29th June, 2018, upon declaring that he has resigned from the Malawi Congress Party and becoming an independent Member of Parliament, the 1st defendant crossed the floor and his seat became a subject of a declaration of vacancy.

Section 65 (1) of the Constitution of Malawi provides that

The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the material time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly, or has joined any other political party , or association or organization whose objectives or activities are political in nature.

The claimant contended further that, the 1st defendant's decision of 20th June, 2018, to join the United Transformation Movement, a movement whose aim is to contest

in the forthcoming general elections, meant that the 1st defendant joined an association whose objectives and activities are political in nature, and hence the 1st defendant crossed the floor. See *Presidential Referral* MSCA Appeal number 44 of 2006.

The claimant asserted that subsequently, the actions of the 1st defendant have put the 1st defendant's parliamentary seat in line for a possible declaration of vacancy due to crossing the floor.

And further that, by crossing the floor, the 1st defendant has come into the ambit of section 65 (1) of the Malawi Constitution which mandates the Speaker to declare vacant any seat of a Member of Parliament who crosses the floor.

The claimant noted that, however, in the present case the 1st defendant is the person of the Speaker who is mandated to declare vacant the seat of a Member of Parliament in question.

And that the situation is such that the 1st defendant is in a situation where he must declare vacant his own seat in Parliament, which situation compromises the independence and impartiality of the 1st defendant in carrying out his constitutional duty.

The claimant then asserted that to allow the 1st defendant to continue performing the duties of the Speaker of the National Assembly amounts to breaching the basic rule of natural justice that no man can be judge in his own cause.

And that further to this, to allow a person whose seat became vacant by operation of law, to continue exercising the constitutional duties and functions of the office of Speaker, amounts to a breach of the Constitution which the same person swore to protect.

And that therefore, in view of the foregoing, it is against the interest of the 1st defendant's constitutional duty to continue holding the office of Speaker of the National Assembly where he is mandated to declare his own seat vacant, a development that puts the 1st defendant in a position of conflict of interest.

The claimant believes that the 1st defendant's parliamentary seat has fallen vacant by operation of law, and as such he cannot lawfully continue to exercise the functions and duties of the Speaker of the National Assembly.

Hence the claimant's prayer for an injunction restraining the 1st defendant from exercising, and/or continuing to exercise functions and duties of the office of Speaker of the National Assembly.

On the other hand, the case of the 1st defendant is as follows.

That the claimant's case is based on speculation given that the claimant asserted that the 1st defendant is in line for possible declaration that he crossed the floor. And that courts do not rule based on speculation but facts.

That the claimant wants to get the 1st defendant's removed from the position of member of the National Assembly and Speaker through the backdoor, given that the authority to remove the 1st defendant vests with the National Assembly and not this Court which can only judicially supervise the exercise of the removal powers by the National Assembly. See *Mkandawire and another v Attorney General* [1999] MLR 192.

And that the claimant's assertion is not legally sound that there is a conflict of interest on the part of the 1st defendant in that he is the Speaker and yet he must declare his own parliamentary seat vacant.

The 1st defendant asserted that the Constitution requires a member of the National Assembly to declare any conflict of interest in relation to matters to be voted on before the National Assembly. See section 61 of the Constitution.

Further, that the Standing Orders of the National Assembly provide that where there is a conflict of interest a Speaker shall not preside over proceedings in question to which such conflict relates. See Parliament Standing Order 34.

The 1st defendant also contended that the claimant has no *locus standi* or sufficient interest or personal interest above that of the general public to bring the present legal proceedings.

The 1st defendant referred to a list of cases on the subject of *locus standi*, to the effect that one must have sufficient interest or personal interest above that of the general

public to bring legal proceedings of the present nature, namely, *Civil Liberties Committee v The Minister of Justice and another* MSCA Civil appeal number 12 of 1999, *Registered Trustees of the Women and Law Malawi Research and Education Trust v The Attorney General and Others* Constitutional Case number 3 of 2003 and *State v Council of the University of Malawi ex parte Longwe and another* civil cause number 138 of 2009 (High Court)(unreported). The point being that the one bringing proceedings must have suffered a violation of one's rights.

The 1st defendant also asserted that the claimant has not brought evidence that it is acting on behalf of and for the benefit of the people of Malawi.

On its part, the claimant contended that it is bringing these proceedings on behalf of and for the benefit of the people of Malawi. And that the issue of *locus standi* must, except in very clear and straightforward cases, be decided on the factual and legal context of the whole case. See *Civil Liberties Committee v The Minister of Justice and another* MSCA Civil appeal number 12 of 1999.

The claimant added that where the claimant's rights have not been infringed or violated, and he claims the general or public interest, the claimant will be held to have *locus standi* to champion rights through the courts on the basis of public or general interest, and the court will consider the following issues as stated in *Civil Liberties Committee v The Minister of Justice and another* MSCA Civil appeal number 12 of 1999, namely, the importance of the issue, the importance of vindicating the rule of law, the likely absence of any other responsible challenger and the prominence of the applicants in relation to making representations the issue in the proceedings. See also *Ex parte Malawi Law Society* MSCA civil appeal number 59 of 2017.

The claimant asserted that it satisfies the foregoing criteria and that the question of *locus standi* be decided on the whole case and not as a preliminary issue.

This Court had time to reflect on the question of *locus standi* in this matter and observed, in agreement with the claimant, that the claimant could establish *locus standi* on the basis of general or public interest. The criteria for establishing the same is as indicated and recently approved in *Ex parte Malawi Law Society* MSCA civil appeal number 59 of 2017.

This Court agrees that the claimant is likely to satisfy the public interest litigation *locus standi* criteria as set out in *Ex parte Malawi Law Society* except for the criteria that there is likely to be no other responsible challenger on the crossing of the floor by the 1st defendant.

This Court has noted that the claimant asserts that there is no possible challenger in relation to the defection of the 1st defendant from the Malawi Congress Party and that this entitles the claimant to bring the present proceedings on behalf of the people.

This Court is however of the view that the political party to which the 1st defendant belonged would be responsible to bring a challenge or his constituents.

This Court is therefore convinced that this is one of those cases where it may not have to wait until the hearing of this matter to decide on the question of *locus standi*.

It appears straight forward in this matter that there are other likely responsible challengers in relation to the alleged actions of the 1st defendant in allegedly crossing the floor.

For that reason this Court dismisses the present action with costs to the 1st defendant for the claimant's lack of *locus standi*.

This Court considered the application for injunction and its determination is as follows, assuming that the claimant had established its standing in this matter.

This Court is aware of the applicable law on interlocutory injunctions as submitted both the claimant and the 1st defendant.

The court will grant an interlocutory injunction where the claimant discloses a good arguable claim to the right he seeks to protect.

This court will not try to determine the issues on sworn statements but it will be enough if the plaintiff shows that there is a serious question to be tried. See Order 10 rule 27 (a) Courts (High Court) (Civil Procedure) Rules 2017.

The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of winning is 90 per cent or 20 per cent. See *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per

Megarry V-C at p. 474; *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373.

If the claimant has shown that he has a good arguable claim and that there is a serious question for trial this Court then next has to consider the question whether damages would be an adequate remedy on the claimant's claim. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.

Where damages at common law would be an adequate remedy and defendant would be able to pay them, an interlocutory order of injunction should be refused, irrespective of the strength of the claimant's claim. See *Mkwamba v Indefund Ltd* [1990] 13 MLR 244.

Where damages are an inadequate remedy the court will consider whether it is just to grant the injunction. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.

This will involve weighing whether the balance of convenience or justice favours the granting of the interim order of injunction. See *Kanyuka v Chiumia* civil cause number 58 of 2003 (High Court) (unreported); *Tembo v Chakuamba* MSCA Civil Appeal Number 30 of 2001 both citing the famous *American Cynamid Co. v Ethicon Ltd* [1975] 2 WLR 316.

In determining the instant application for an injunction, this Court must determine whether on the sworn statements the claimant has disclosed a triable issue.

The claimant asserted that there are triable issue, among others, whether the 1st defendant crossed the floor in terms of section 65 (1) of the Constitution.

This Court agrees that there is indeed a triable issue. The point being that the claimant asserts that the 1st defendant crossed the floor whereas the 1st defendant contends that he did not voluntarily leave the Malawi Congress Party and as such cannot be said to have crossed the floor.

The next question is whether damages are an adequate remedy on the granting or refusal of the injunction. See Order 10 rule 27 (b) Courts (High Court) (Civil Procedure) Rules 2017.

Both the claimant and the 1st defendant did not express a view on this aspect.

This Court is however of the view that if the injunction is wrongly declined it would be difficult to quantify damages to be paid to the claimant.

On the other hand, if this Court grants the injunction the 1st defendant would not be adequately compensated in damages if it turns out, after trial, that the injunction was not merited. This is given the fact that the subject matter in question is an office and the exercise of such powers of the office together with the attendant privileges.

It would be difficult to quantify damages suffered if it turns out the injunction ought not to have been granted.

So, damages are not an adequate remedy in the circumstances.

The last issue is whether granting the order of interlocutory injunction herein would be just. See Order 10 rule 27 (c) Courts (High Court) (Civil Procedure) Rules 2017.

The balance of justice appears to this Court to tilt in favour of not granting the injunction sought by the claimant in this matter.

There are several reasons for this conclusion.

Firstly, contrary to the claimant's assertion, the 1st defendant is answerable to the National Assembly in relation to the exercise of his functions as Speaker of the National Assembly. This is also true in relation to the declaration of his parliamentary seat vacant.

The claimant could not explain against the authoritative view expressed by the Malawi Supreme Court of Appeal that the authority to remove the 1st defendant from the National Assembly vests with the National Assembly and not this Court which can only judicially supervise the exercise of the removal powers by the National Assembly. See *Mkandawire and another v Attorney General* [1999] MLR 192.

At this point, the National Assembly has not had a chance to consider the matter. Probably because it is on recess.

The matter herein would only be ripe for consideration by this Court where the National Assembly had a chance to consider the matter and this Court would come in to interfere by way of judicial supervision of the exercise of power by the National Assembly.

Otherwise, it is premature and may be a usurpation of the powers of the National Assembly by this Court if it effectively removed the 1st defendant by injunction before the National Assembly has had an opportunity to look at the matter and exercise its constitutional authority.

The second reason is that the perceived and alleged claim of conflict of interest on the part of the 1st defendant in this matter is well addressed by the internal procedures of the National Assembly.

Where there is a conflict of interest the Speaker would be bound not to preside. He would therefore not preside where a motion was moved for his removal as a Member of Parliament or as Speaker. His Deputy would preside as per the applicable Standing Order 34.

The alleged conflict of interest on the part of the 1st defendant is therefore an issue that is based on the claimant's misconception of the applicable procedures

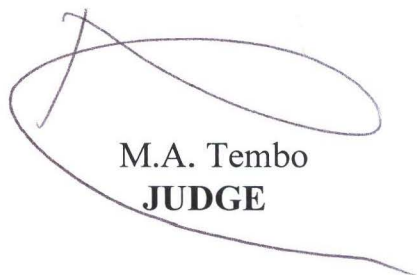
Lastly, it is highly contested whether the 1st defendant voluntarily left the Malawi Congress Party. The claim of the 1st defendant is that he did not leave the Malawi Congress Party voluntarily.

It would, in the circumstances, be highly prejudicial to assume at this stage that the 1st defendant in fact left the Malawi Congress Party voluntarily and use that aspect to grant the injunction sought by the claimant.

In foregoing circumstances, it appears not just to this Court to grant the order of injunction sought by the claimant in this matter.

For the foregoing reasons, the application of the claimant for an injunction is declined. Costs shall be for the 1st defendant.

Made in chambers at Blantyre this 2nd November 2018.



M.A. Tembo
JUDGE