REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 21 OF 2022

(Before Honourable Justice Mambulasa)

BETWEEN:

PASTOR CHARLES ADAMSON CHILAMBA……1ST CLAIMANT

-AND-

PASTOR MIRINDA SOLOMON……2ND CLAIMANT

-AND-

DAVIE JOHN BANDA……3RD CLAIMANT

-AND-

PATRICK MUSSAH……4TH CLAIMANT

-AND-

AIM MASIKU……5TH CLAIMANT

-AND-

KENETH NOWA BALAKASI……6TH CLAIMANT

-VS-

PASTOR JOSEPH MFERA.....1ST DEFENDANT

-AND-

PASTOR JOSEPH CHIKAPHONYA.....2ND DEFENDANT

-AND-

MAJIGA CHURCH OF CHRIST.....3RD DEFENDANT

-AND-

NAMIKANGO MISSION.....4TH DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. Everson Benard Sitolo, Advocate for the Claimants

Mr. Elliot Mbwana, Advocate for the Defendants

Mr. Obet Chitatu, Court Clerk

Mrs. Annie Libukama, Court Marshal

RULING

MAMBULASA, J

Introduction

[1] On 1st February, 2022 the Claimants filed a without-notice application seeking an order of interlocutory injunction restraining the Defendants and/or, their agents or whosoever acting on their behalf from changing Majiga Church of Christ Bank Account signatories, disposing of church

assets, and further restraining the Defendants and congregants from using the Majiga Church of Christ Building and Sunday School Block and implementing new developments pending a with-notice application for an injunction. The application was supported by a sworn statement made by the 1st Claimant and it was taken out under Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017.

[2] When the Court considered the application, it directed that it should come on a with-notice basis.

[3] The application then came for hearing on 2nd March, 2022. On that date, the Defendants were not ready to proceed with the hearing of the application. The reason was that they had been served late and as a result, they were not able to engage a legal practitioner of their choice to represent them. They sought a postponement of 14 days to enable them do the needful. The same was granted. However, considering that this was an urgent application, the Court proceeded to grant, on provisional basis, the order of interlocutory injunction sought by the Claimants restraining the Defendants and/or their agents or whosoever acting on their behalf from changing Majiga Church of Christ Bank Account signatories pending the hearing of the with-notice application on 17th March, 2022. The Court declined to grant on the other aspects, namely, restraining the Defendants and congregants from using the Majiga Church of Christ Building and Sunday School and implementation of new developments. The Court further directed the Defendants to file all the requisite papers within 12 days from 2nd March, 2022. It also directed the Claimants to file the Summons within the same period.

[4] On 14th March, 2022 the Defendants appointed Messrs Ngolomi & Company to act on their behalf. This firm is owned by Advocate Mr. Daud Mbwana. They filed their Sworn Statement in Opposition to the Application for an Order of Interlocutory Injunction as well as Skeleton Arguments.

[5] On 17th March, 2022 when the application came up for hearing, the Claimants sought a further postponement on the ground that they had been served with a Sworn Statement in Opposition to the Application for an Order of Interlocutory Injunction on 14th March, 2022 at around 15:00 hours and when they perused it, they noted that page 4 was missing and they wanted to read that page and then, respond accordingly. The Defendants never objected to the further postponement sought. The Court extended the effect of the order of interlocutory injunction that it had granted on 2nd March, 2022 until the date of hearing on 31st March, 2022.

[6] In between 17th March, 2022 and 31st March, 2022 the Court landed on information provided to judicial officers by the Malawi Law Society that Advocate Mr. Daud Mbwana, the sole practitioner in the firm styled as Ngolomi & Company had no valid practice licence at the time he filed his papers and even by 31st March, 2022 the date of the hearing. When the Court confronted Advocate Mr. Elliot Mbwana who said was appearing on brief, that Advocate Mr. Daud Mbwana did not have a practice licence, he never disputed this fact. On 31st March, 2022 the Court did not hear any arguments from the parties and instead, it proceeded to make its determination on the application based on the papers filed by the Claimants only. The Court was of the firm view that all the steps taken and documents filed by the firm of Ngolomi & Company were a nullity. It also set aside the order of interlocutory injunction which it had granted to the Claimants on

provisional basis. This also explains why even though the Claimants had filed a Notice to Cross Examine Deponents, the Court felt that it was going to be an exercise in futility as it could not be had on documents that were a nullity. This is now its formal reasoned ruling.

Issues for Determination

[7] There were two issues for determination before the Court. First, whether the steps taken by and documents prepared and filed by Messrs Ngolomi & Company in this application were a nullity considering that Advocate Mr. Daud Mbwana, the sole practitioner in that firm did not have his annual practice licence renewed at the time he filed documents in this matter and even during the hearing on 31st March, 2022. Second, whether or not the order of interlocutory injunction which the Court provisionally granted to the Claimants on 2nd March, 2022 should be affirmed or set aside?

The Law and Submissions

[8] A legal practitioner is defined under the Legal Education and Legal Practitioners Act.[1] Section 2 defines him or her or them as follows:

> It means a person-
>
> (a) who has been admitted to practice the profession of the law before a court; and
>
> (b) whose name has been inscribed on the Roll.

[1] Act No. 31 of 2018.

[9] Section 122(5) of the Legal Education and Legal Practitioners Act saves subsidiary legislation made under the repealed Act. It is couched in the following terms:

> Any subsidiary legislation made under the Act repealed by subsection (1), in force immediately before the commencement of this Act-
>
> (a) shall remain in force unless in conflict with this Act and shall be deemed to be subsidiary legislation made under this Act;

[10] Section 14(1)(e) of the General Interpretation Act[2] is also to the same effect as section 122(5) of the Legal Education and Legal Practitioners Act. It provides as follows:

> (1) Where a written law repeals and re-enacts with or without modification, any provisions of any other written law, then unless a contrary intention appears-
>
> (e) any subsidiary legislation made under such repealed provisions shall remain in force, so far as it is capable of being made under the repealing written law, and is not inconsistent therewith, until it has been revoked or repealed by any other written law, and shall be deemed for all purposes to be subsidiary legislation made under such repealing written law.

[11] Legal Practitioners Practice Rules are among subsidiary legislation that have been saved by sections 122(5) of the Legal Education and Legal Practitioners Act as well as section 14(1)(e) of the General Interpretation Act.

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[2] Cap. 1:01 of the Laws of Malawi.

[12] Legal Practitioners Practice Rules also define a "legal practitioner". Rule 2(1) defines him or her or them as follows:

> It means a person who has been admitted to practice the profession of the law before the High Court, or before any court subordinate thereto, and whose name has been inscribed upon the Roll; and the expression, "legal practitioner" shall include a firm of legal practitioners;

[13] The law requires every legal practitioner to renew his or her annual licence to practice every year after it expires on 31st January under section 30(2) of the Legal Education and Legal Practitioners Act (LELPA).

[14] A legal practitioner who does not renew his annual licence after it expires on 31st January is not entitled to practice under section 31(1) of LELPA.

[15] Section 30 of LELPA provides in part as follows:

> (1) The Society shall, on production of a certificate to practice issued under section 22 and on payment to it of the relevant fees determined by the Society from time to time, issue an annual licence to a legal practitioner.
>
> (2) **Every licence to practice** shall **expire** on 31st January next following the date of its issue, and **every legal practitioner desirous of practising thereafter** shall renew his licence on payment of the relevant fee determined by the Society.
>
> (3) Every licence to practice shall expire on 31st January next following the date of its issue, **and every legal practitioner desirous of practising thereafter shall renew his licence** (sic).
>
> (4) A legal practitioner shall **not be entitled to practice unless** he has had issued to him **a valid licence to practice**.

[16] Section 31 of the LELPA in the relevant parts states the following:

(1) A person who is not, or who has ceased to be, **entitled to practice as a legal practitioner** by virtue of this Act or any other written law, and who, does any of the following acts-

(a) commences, carries on or defends any action, suit or other proceedings in the name of any other person or in his own name, or does any act required by law to be done by a legal practitioner in a court;

(b) draws or prepares any instrument relating to real or personal property or any proceeding in law or draws or prepares any document or caveat relating to land registration; or

(c) does any other work in respect of which scale and minimum charges are laid down by the Legal Practitioners (Scale and Minimum Charges) Rules, or any other rules for the time being in force prescribing or relating to charges for any services to be performed by a legal practitioner, commits an offence and shall upon conviction, be liable to a fine of five million Kwacha (K5,000,000.00) and imprisonment for ten (10) years.

(2) The Society may prosecute a person who contravenes this section but shall not prosecute a person for an offence under this section-

(a) without the written consent of the Director of Public Prosecutions; and

(b) for any work restricted by this section which is regulated by an Act of Parliament.

[17] Section 89 (1) and (2) of LELPA further provides in part as follows:

(1) The High Court, either of its own motion and after due inquiry, or on an application made by the Attorney General, may make an order-

(a) striking a legal practitioner off the Roll;

(b) suspending a legal practitioner; or

(c) admonishing a legal practitioner.

(2) The High Court shall make an order under subsection (1), where the legal practitioner-

(h) practices without a valid licence.

[18] Section 34 of LELPA provides as follows:

(1) The Society shall publish, soon before or after 31st March, in the *Gazette* and in at least two (2) newspapers with the widest circulation each year, a Legal Practitioners List (in this Act, otherwise referred to as "the List") of all legal practitioners licensed to practice the profession of the law during that year.

[19] Chapter 5 of the Malawi Law Society Code of Ethics also obligates the Society to **quarterly** publish in leading dailies a list of licensed practitioners, their addresses and areas of expertise. The rationale is to ensure that the public has information regarding the nature and availability of legal services and access to the system. In *Joyce Zione Gomani & Ernest Muza -vs- Republic*[3] the Supreme Court of Appeal for Malawi held that the Malawi Law Society Code of Ethics is legally binding on all legal practitioners.

[20] In *Telekom Networks Malawi PLC -vs- Globe Teleservices PTE Limited*[4] the Supreme Court of Appeal for Malawi (a single member sitting) made a

[3] MSCA Criminal Appeal No. 5 of 2016 (Unreported).

[4] MSCA Civil Appeal No. 10 of 2021 (Unreported).

number of apt observations. First, it stated that the wording of section 30(4) of LELPA is clearly in mandatory terms and expressly precludes a legal practitioner to practice without a licence. It noted that this section is clear in what it provides, i.e. a legal practitioner is not entitled to practice if he has no licence and that there is no any other way around it. The Supreme Court of Appeal for Malawi further went on to state that practice in the context of that matter includes appearing and filing documents in courts. Second, the Supreme Court of Appeal for Malawi found that section 31 of LELPA spells out the consequences against persons who practice i.e. appear and file documents in courts who are not legal practitioners or have ceased to be legal practitioners. Third, from section 31 of LELPA the Supreme Court of Appeal for Malawi made a distinction between, on the one hand, a person who purports to be a legal practitioner when he is not (unqualified persons, such as non-legal practitioners, or legal practitioners whose names have been struck off the Roll) and, on the other hand, a person who is a legal practitioner but has no valid licence. Fourth, the Supreme Court of Appeal for Malawi stated that section 31 of LELPA also applied to persons that are legal practitioners but have no licence and persons who are not qualified at all (not admitted as a legal practitioner under sections 22, 23 and 24 of LELPA to practice in the legal profession. The Supreme Court of Appeal for Malawi further noted that section 31 prescribes clear sanctions against those who transgress the prohibition and that the sanctions prescribed are mainly criminal in nature. Fifth, the Supreme Court of Appeal for Malawi stated that the law, namely, LELPA, is silent as to the effect of documents prepared by legal practitioners not holding current practicing licence. Sixth, it also noted that an admission to practice entitles a person to become a legal

the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practising certificate" (*Emphasis supplied*).

The Supreme Court at paragraph 68 added the following which is illuminating:

"[68] The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes".

[22] The Supreme Court of Appeal for Malawi was persuaded by the position taken by the Supreme Court of Kenya. Thus, it was of the considered view that a distinction must be drawn between a legal practitioner who has been suspended from the Roll of Legal Practitioners subject to disciplinary hearing, which automatically suspends his practicing licence and a person who had a practicing licence but delayed in renewing it or is in the process of renewing one. In *Telekom Networks Malawi PLC*, the advocate for the Respondent failed to renew her licence in time, both at the time of filing and hearing the *inter-partes* application. In the two scenarios, so stated the Supreme Court of Appeal for Malawi, the former (a Legal Practitioner who has been suspended from the Roll of Legal Practitioners) is too extreme and should not be equated to the latter (a Legal Practitioner who had a practicing licence but delayed in renewing it or is in the process of renewing it) and

should not invalidate the documentation drawn and prepared by such advocate. The Supreme Court of Appeal for Malawi thus found that the documents prepared and filed by Advocate Mrs. Jumbe remained valid although she had not renewed her licence then.

[23] The issue of legal practitioners practising without a valid practice licence has also been litigated in the High Court of Malawi. The High Court of Malawi took a different approach from the one taken by the Supreme Court of Appeal for Malawi in the *Telekom Networks Malawi PLC* decision.

[24] In *Lucy Nkhoma -vs- Adam Mlumbe and Emmanuel Chimtengo*[5] the High Court was also faced with a situation where two advocates had not renewed their practice licences and yet they commenced and continued to prosecute a matter. Under paragraph 22 of its ruling the Court stated thus:

> The question then is, having so practiced without a licence, what is the implication of that fact on the present action? I am of the firm view that following the position of the law that without a current licence to practice Mr. Lameck was not entitled to practice, it follows that he was not entitled to conduct this matter as legal practitioner for the plaintiff in these proceedings...Since he was not entitled to practice, I find that all steps that he took in the conduct of this matter as legal practitioner for the plaintiff in that period were a nullity.

[25] The Court further observed at paragraph 24 of the same ruling that:

> Since Mr. Kasambara, SC, commenced this action without a current practice licence, I find that this action is void *ab initio*. Counsel Lameck passionately argued that the Act should not be construed to provide that an action commenced

[5] Commercial Case No. 43 of 2016, (High Court of Malawi) (Lilongwe District Registry) (Commercial Division).

by a legal practitioner without a valid licence is void *ab initio*. This, according to Counsel, is because there is no provision in the Act that provides that an action commenced by a legal practitioner who is not licenced to practice is void *ab initio*. With respect, I do not agree with the argument advanced by Counsel. Section 23(3) of the Act is unambiguous. A legal practitioner without a current practicing licence is not entitled to practice. I am of the firm and considered view that on account of section 23(3) of the Act, since no legal practitioner is competent to practice without a current licence, it implies that such legal practitioner cannot competently commence any legal proceedings, and if such practitioner commences an action, that action is void *ab initio*.

[26] In paragraph 26 of the ruling, the Court opined as follows:

> **It is imperative that the integrity of the spirit of the legislation should be preserved and maintained at all times...[A]ny approach that is adopted in interpreting the Act should not trivialize the Act nor the practice of the law**. In my view, **interpreting the Act in a manner that effectively allows a legal practitioner without a valid practicing licence to practice, compromises the very objective of the legislation**. Allowing a legal practitioner without a current practice licence to commence proceedings under the guise of protecting the interests of the client, is in my view, allowing the unlicenced practitioner to practice via the back door. Such cannot reasonably have been the intention of the legislator (*Emphasis supplied*).

[27] The Court also considered the question of the impact of any nullification of court process on the client. At paragraph 27, this is what it said:

> Indeed holding that a matter commenced by an un-licenced legal practitioner is void *ab initio* may appear like punishing the innocent client for the transgressions of the legal practitioner. However, where a matter is voided under those circumstances, the client is not without a remedy. The client has at least two

options. Firstly, the matter can be recommenced by a duly licenced practitioner. Secondly, the client can take legal action against the legal practitioner. Therefore, notwithstanding the negative implications of nullifying the action on the innocent client, I am fully persuaded and do find that the full import of section 23(3) of the Act is that an action commenced by a legal practitioner not entitled to practice is void *ab initio*.

[28] In another decision of *Lackson Chimangeni Khamalatha and 26 others -vs- Secretary General of the Malawi Congress Party*[6] the High Court opined as follows:

> ...the functional integrity of the court is premised upon the assumption that its proceedings are conducted by persons with the requisite professional and ethical qualifications. It would be remiss to relegate the licencing requirement to a mere clerical procedure; quite the contrary, it provides a regular check on whether one retains the confidence of his professional supervisors to continue to act as an officer of the court. This court believes that, as persons who have made the professional choice to make the law their stock in trade, legal practitioners must be held to the highest standards of probity. Where one fails to adhere to such clear standards, the result must reflect the gravity of the infraction: in this case the nullification of any processes or actions conducted while so disqualified.

[29] In yet another decision of *Tarifa Suleman -vs- Suleman Gaffar Suleman*[7] the High Court was also called upon to determine whether the processes taken by the defendant in his quest to prosecute an application for stay of execution of judgment pending appeal were void *ab initio* on account that

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[6] Civil Cause No. 1347 of 2015 (High Court of Malawi) (Lilongwe District Registry) (Unreported).

[7] Civil Cause No. 290 of 2014 (High Court of Malawi) (Principal Registry) (Unreported).

the advocate having conduct of the matter did not have a valid practising licence. The Court held that section 23 is very clear and requires no magical approach to understand its import. That subsections (2) and (3) are clear that once licence expires, a legal practitioner who wants to practice must renew it and that if that is not done, he shall not be entitled to practice. The Court further held that processes filed by Counsel for the defendant when he had no valid practising licence were void *ab initio* as to render the stay order a nullity and it was consequently set aside on that account with costs.

[30] In *NBS Bank Plc -vs- Victoria Manjawira t/a Fraya Wholesalers*[8] the defendant and her advocate did not attend a scheduled session of mediation because the advocate had not yet renewed his practicing licence as such he could not appear in the matter. He gave brief to another advocate to seek an adjournment on his behalf on the same ground that he had not yet renewed his licence. The Court declined to adjourn the matter and proceeded to strike out the defendant's defence and entered judgment for the claimant. Among other things, the Court stated that:

> There are many lawyers out there who have **renewed** their licences and **are free to practice** the legal profession in Malawi. If the defendant were serious about the matter and the mediation session today, she would have engaged another lawyer to take up the matter and appear today. I do not see why the defendant should feel obliged to wait for Mr. Nkhono who has **failed to renew his licence in time** and **cannot practice law**. In the same vein, I do not find it reasonable for this Court or indeed any court, to adjourn a matter on the ground that counsel **has failed to**

[8] Commercial Case No. 367 of 2018, (High Court of Malawi) (Commercial Division) (Blantyre Registry) (Unreported).

renew his licence and **cannot appear before the court since the law bars him from doing so** (*Emphasis supplied*).

[31] The Court also noted as follows:

> In my view, a legal practitioner who is serious about his professional practice should initiate the licence renewal process early enough to avoid finding himself in a situation **where he cannot practice law because his/her licence has expired**. As custodians of the legal profession, Courts should be in the forefront in promoting professionalism and strict adherence to professional standards by lawyers. **Consequently, no court should do anything that would promote or be seen as promoting laxity in the need for lawyers to adhere to professional requirements**. As courts, we should not promote a culture of laxity amongst lawyers towards compliance with legal and professional prescriptions. For instance, no lawyer should ever feel comfortable when they fail to renew their licence in time. **They need to know that failure to renew a licence will have serious consequences**...They need to know that **courts will not allow any lawyer to benefit in any way howsoever from his or her own professional lapses**. They need to know that the **courts will not shy away from taking steps, no matter how harsh they may appear, in order to enforce professionalism among lawyers** (*Emphasis supplied*).

[32] In *TA Kilipula -vs- Mwantende & 4 others*[9], the appellant appealed against the decision of the District Registrar dismissing his application to dismiss a matter commenced by a lawyer who did not at the material time have a current practicing licence. In dismissing the appeal, the Court held that if the Legal Education and Legal Practitioners Act were to be interpreted to mean that any action commenced by a licenceless legal practitioner was void *ab*

[9] [2007] MLR 401.

initio it would punish even the innocents which is not what the Act set out to do. On page 406 this is what the Court had to say:

> We fully appreciate the appellant's contention that the remedy for the injured client is to sue the licenceless lawyer. But we must respectfully disagree with them. In an ideal world it may be possible to sue such a lawyer. In the real one that may not always be possible. It is for that reason that we think that where appropriate the client should as much as possible be allowed to proceed with his action while the Malawi Law Society and the powers that be deal with the lawyer in terms of the Act. That interpretation of the Act we think takes care of the concerns we raised above namely the non-trivilisation of the Act and the practice of law while at the same time achieving a measure of justice for the innocent. It is the one we adopt.

[33] In *the Matter of the Renewal of Practicing Licence for Davidia Noel Nyasulu*[10] the Petitioner had applied to the Chief Justice to renew his licence out of time, six months after it had expired. The Malawi Law Society and the Attorney General objected to his renewal of the licence on the grounds that he was practising law during the period that his licence had expired and that therefore, he was not a fit and proper person. Allowing his application to renew his licence and also admonishing him, the Court said:

> While I cannot impose a penalty under section 24 without a prosecution, I believe that it is within a court's inherent authority, in an attempt to preserve professional integrity, that the applicant be strongly admonished for conduct that is glaringly unprofessional. I would hence strongly admonish the applicant and warn of the possibility of prosecution if his unprofessional misconduct became a habit.

[10] Miscellaneous Civil Cause No. 82 of 2015 (High Court of Malawi) (Principal Registry) (Unreported).

[34] Turning to the second issue of the application, Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

> The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-
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> (a) there is a serious question to be tried;
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> (b) damages may not be an adequate remedy; and
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> (c) it shall be just to do so,
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> and the order may be made unconditionally or on such terms or conditions as the Court considers just.

[35] In *Forum for National Development Limited -vs- Richard Msowoya, MP & Anor*[11] the Court stated that:

> This Court is aware of the applicable law on interlocutory injunctions as submitted both by 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.
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> 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.

[11] [2018] MWHC 1104.

Where damages at common law would be an adequate remedy and the 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 Cyanamid Co. v Ethicon Ltd* [1975] 2 WLR 316.

[36] On the first requirement whether there is a serious question to be tried, the Claimants contended that it must be answered in the affirmative. They argued that the cause of action revolves around whether or not the Defendants have a right and legitimacy to change signatories of the church bank account, dispose of the church assets and use of the church property (Church Building and Sunday School Block). Further, the Claimants contended that they have not waived their rights towards church management but were forced out or forced to leave the Church due to violence perpetuated by the Defendants and as a consequence of their actions, they are now being barred from accessing the Church structures which they single handedly constructed from the time the church was established at Majiga Church of Christ and its subsequent setting apart (dedication) as an independent one. The Claimants also submitted that they spent their energies and financial resources to put up the structures at Majiga Church of Christ.

[37] On the second requirement whether damages would be an adequate remedy on the Claimants' claim, they submitted that the Defendants would not be in a position to compensate them for the loss they have and would suffer, to wit, physical and mental anguish which they have and continue to experience as a result of the Defendants' action in barring and denying them access to the church buildings. Worse still, so contended the Claimants, the 3rd Defendant has without any plausible reasons withdrawn the pulpit from the 1st and 2nd Claimants. Thus, so they submitted, it will thus be difficult to calculate such losses in monetary terms. Furthermore, in the event that the Defendants have accessed the church bank account and the funds, it will be very difficult to recover the money from the Defendants, more so, that the 3rd Defendant is not incorporated under the Trustees Incorporation Act of the Laws of Malawi, and that it has no legal personality to sue and to be sued. The Claimants argued that thus, it will be difficult for the Defendants to raise funds equivalent to those currently in the Majiga Church of Christ bank account. In the premises, they contended that damages would not be an adequate remedy in the present case.

[38] On the third requirement whether it shall be just to do so, namely, grant the order of interlocutory injunction, the Claimants' Skeleton Arguments did not address it.

Analysis and Application of the Law to the Facts

[39] On the first issue, whether the steps taken and documents prepared and filed by Messrs Ngolomi & Company are a nullity because Advocate Mr. Daud Mbwana, a sole practitioner in that firm had no valid practice licence at the

time when he prepared and filed them and even on 31st March, 2022 the date of hearing when this Court considered the application, this Court takes the view that they are a nullity. No reliance may therefore be placed on them by this Court.

[40] There is no doubt that the *Telekom Networks Malawi PLC* decision is binding on this Court. In fact, this Court agrees with most of the observations and pronouncements made in that case. For instance, it agrees fully that the wording of section 30(4) of LELPA is clearly in mandatory terms and expressly precludes a legal practitioner to practice without a licence. That the section is clear in what it provides, i.e. a legal practitioner is not entitled to practice if he has no licence and that there is no way around it. This Court further agrees with the Supreme Court of Appeal for Malawi that practice includes appearing and filing documents in courts. Again, this Court agrees with the upper Bench that an admission to practice entitles a person to become a legal practitioner while the practising licence entitles a legal practitioner to practice in courts.

[41] If this Court has correctly understood the *ratio decidendi* in *Telekom Networks Malawi PLC* decision, it is that documents prepared and filed by a legal practitioner who for one reason or another delayed to renew his or her or their practice licences with the Malawi Law Society, or did not have one, either at the time of filing or during the hearing, remain valid. If that is correct, the logical conclusion is that legal practitioners without a valid practice licence would continue to ply their trade in our courts unabated since their documents would remain intact. In this Court's view, that would create chaos and deny the LELPA its effect, more especially section 30(4)

which the upper Bench already acknowledged is clearly in mandatory terms and expressly precludes a legal practitioner to practice without a licence.

[42] The High Court approach of invalidating and declaring all steps taken and documents prepared and filed by a legal practitioner without a valid practising licence is in tandem with the spirit of section 30 (2), (3) and (4) of LELPA. It dissuades legal practitioners who have no licences from practising the profession of the law through the backdoor up until they obtain or have a licence issued to them by the Malawi Law Society. It ensures that legal practitioners adhere to their professional requirements and sends the message that courts will not condone misconduct and criminality being committed right in their face by its own officers.

[43] It is for a reason that section 34 of LELPA requires the Malawi Law Society to publish soon before or after 31st March, in the *Gazette* and in at least two (2) newspapers with the widest circulation each year, a Legal Practitioners List entitled to practice the profession of the law during that year. Similarly, the Malawi Law Society Code of Ethics further requires that the said list and as updated from time to time be published **quarterly** in leading dailies. In *Joyce Zione Gomani & Ernest Muza -vs- Republic,* the Supreme Court of Appeal for Malawi held that the Malawi Law Society Code of Ethics is legally binding on all legal practitioners. Reading through the Malawi Law Society Code of Ethics it also places various obligations on the Society itself. This Court observes in passing that the Malawi Law Society Code of Ethics is also binding on the Executive Committee, Director and Secretariat of the Society to implement statements of principles and rules that require their action. As for the requirement to publish **quarterly** in leading dailies, a Legal Practitioners List, in addition to the reasons stated in the Malawi

Law Society Code of Ethics, it is also that the public must have information as to which legal practitioner they can engage who is fully accountable to and regulated by the Malawi Law Society. As already observed, the Malawi Law Society has a fully-fledged Secretariat[12] with full time staff members to whom the public can reach out and obtain information on licenced legal practitioners before they can engage one. It also has Chapters[13] where such information may be readily available. The Malawi Law Society may also be reached through telephone and other online media platforms. In sum, the point is that in these modern times, a reasonable member of the public who is really serious about obtaining information on licenced legal practitioners can get it.

[44] This Court is at great pains to follow the *ratio decidendi* in the *Telekom Networks Malawi PLC* decision in the present case. It proceeds to distinguish it from the present case on several fronts. First, it did not consider some of the provisions that have a bearing on the issue of a legal practitioner practising without a valid licence in the LELPA. Two of the provisions are sections 34 and 89. Section 89 makes it clear that any legal practitioner who practices without a licence commits a misconduct for which they may be, struck off the Roll of Legal Practitioners, suspended or admonished by the High Court. In *Re Davidia Noel Nyasulu* decision, he was admonished for practicing without a licence. In the view of this Court, relying on documents prepared and filed by an unlicenced legal practitioner in court would be tantamount to allowing an unlicenced legal practitioner to benefit not only from their criminality under section 31 but also misconduct

[12] *See* Section 78 of the Legal Education and Legal Practitioners Act.

[13] *See* Section 74 of the Legal Education and Legal Practitioners Act.

under section 89. That would totally defeat the import of section 30(4) of LELPA. It would also be an abuse of court process. Second, as it has been shown, there are High Court decisions that dealt with the same issue, which decisions are in no way binding on the upper Bench, but which perhaps, should have been reviewed and considered by the Supreme Court of Appeal for Malawi in its decision and shown to the lower Bench why they are not good law. Perhaps, that would have served a useful purpose of ensuring a systematic development of jurisprudence in this area of the law. Third, the silence in the LELPA on the consequences of documents prepared and filed by an unlicenced legal practitioner in a court of law does not clip the hands of the court to do nothing about the situation. Courts have always relied on their residual powers under the inherent jurisdiction to make necessary consequential orders when they supervise those who appear before them. In his paper entitled, *The Courts and the Lawyer's Ethics - The Role of the Judiciary in the Development of and Compliance with Ethics*[14] Justice R. R. Mzikamanda, JA, SC, as he then was, quotes Chief Justice Dickson of Canada in *British Columbia Government Employees Union vs Attorney General of British Columbia*[15] at 307 that:

> For the essential character of a superior court of law necessarily involves that it should be invested with power to maintain its authority and prevent its process being obstructed or abused. Such a power is intrinsic in a superior court; it is its very life blood, its very essence, its immanent attribute. Without such power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court

[14] Presented at the Malawi Law Society's Continuing Professional Development Workshop, Crossroads Hotel, Lilongwe, May 29, 2015.

[15] (1988) 44 C.C.C.C (3rd) 289 (SCC).

> of law. The juridical basis of this jurisdiction is therefore the authority to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.

In addition to the LELPA effect, the nullification of steps taken and documents prepared and filed by non-licenced legal practitioners also comes from the inherent power of superior courts, as one way of preventing its processes being abused. Otherwise, what would be the point in publishing the Legal Practitioners List in the *Gazette,* two newspapers with wide circulation if that information cannot be used by the public? The Malawi Law Society also goes an extra mile beyond the requirement of the law to make the said list available to all the courts in Malawi. The scheme of the LELPA seems to this Court to be protective of the innocent party. It does so by requiring the innocent party to use the mechanism which the law has put in place to protect himself, namely, consult the Legal Practitioners List. If members of the public fail to take reasonable steps to find out the status of the legal practitioners with the Malawi Law Society before they engage them, then, they should be prepared to take all the risks and consequences that go with it. In any case, a legal practitioner being an agent of a client, the relationship has its own consequences. As Katsala, JA puts it in *Patrick Ngwira et al -vs- Francis Ngwira*:[16]

> Lawyers are agents of their clients. And it is legally accepted that the actions of the lawyers can have serious adverse effects on the clients' cases or even lives. Where there is a breach of the agency relationship it is up to the client to seek redress against the lawyer. It is not up to the court to exercise sympathy and fail to

[16] MSCA Civil Appeal No. 16 of 2020 (Unreported).

make a lawful order for fear of victimizing the client for the default of his lawyer...

Fourth, this Court notes that some of the Judges who made some of the High Court decisions now sit in the upper Bench. They may not have changed their position on this matter. At an opportune time, the full Bench may need to pronounce itself on this matter so that the lower Bench is guided with finality.

[45] All in all, this Court finds that the Legal Practitioners Practice Rules were saved by sections 122(5) of LELPA and 14(1)(e) of the General Interpretation Act. In terms of rule 2(1) of the said Rules, the firm of Ngolomi & Company is a legal practitioner. All the documents in this matter for the defendants were prepared, signed and filed by the firm of Messrs Ngolomi & Company. The sole practitioner in the firm of Ngolomi & Company, Advocate Mr. Daud Mbwana did not have a valid practising licence issued to him by the Malawi Law Society at the time of filing and even during the hearing of this application. For lack of a valid practice licence, Advocate Mr. Daud Mbwana could not practice law. Consequently, all the steps the firm took and the documents that were prepared and filed in this matter on behalf of the defendants cannot be relied upon by this Court and they are hereby declared a nullity. This disposes of the first issue and now takes the Court to the application for the order of interlocutory injunction.

[46] The law on the grant or refusal of interlocutory order of injunctions is settled. In terms of Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 the Court may, on application, grant an injunction

by an interlocutory order when it appears to the Court that (a) there is a serious question to be tried, (b) damages may not be an adequate remedy, and (c) it shall be just to do so, and the order may be made unconditionally or on such terms or conditions as the Court considers just.

[47] On the first requirement, whether there is a serious question to be tried, the Court investigates the merits of the claim to a limited extent only, namely, whether 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. In this case, the Claimants argued that the cause of action revolves around whether or not the defendants have a right and legitimacy to change signatories of the church bank account, dispose of church assets and use of the church property. They further contended that they have not waived their rights towards management of Majiga Church of Christ but were forced out or forced to leave this particular Church due to violence perpetuated by the Defendants and as a consequence of their actions, the Claimants are now being barred from accessing the church structures which they single handedly constructed from the time the church was established and set apart (dedicated) as an independent one. The Claimants submitted that they spent their energies, time and financial resources to put up the structures. The Court is satisfied that there is indeed a serious question to be tried in this matter.

[48] On the second requirement, the Court considers whether damages may not be an adequate remedy on the claimant's claim. Where they would be, and the defendant would be able to pay them, an order of interlocutory injunction should not be granted. In this application, the Claimants submitted that the Defendants would not be in a position to compensate them for the loss they

have or would suffer, to wit, physical and mental anguish which they have and continue to experience as a result of the Defendants' action in barring and denying them access to the church buildings. They also argued that the 3rd Defendant has without any plausible reasons withdrawn the pulpit from the 1st and 2nd Claimants and that it will thus be difficult to calculate such losses in monetary terms. Furthermore, the Claimants contended that in the event that the Defendants have accessed the church bank account and the funds, it will be very difficult to recover the money from the Defendants, more so, that the 3rd Defendant is not incorporated under the Trustees Incorporation Act and therefore it has no legal capacity to sue and to be sued. In the premises, damages would not be an adequate remedy. The Court agrees with the Claimants that for the kind of losses that they have or would continue to suffer, the same cannot be quantified in monetary terms and that therefore damages may not be an adequate remedy.

[49] However, the Court does not agree with the Claimants that it will be difficult to recover the money from the Defendants, if they access the church bank account and the funds in the bank. In the first place, the church funds do not belong to the Claimants. They also do not belong to the Defendants. None of the two parties has any right to claim ownership of the church funds. Church funds are contributed by members and in some cases by non-members as well and other partners. Church funds do not belong to one person or few individuals who are in leadership positions or members who are in leadership positions and gave towards the same. In this case, they belong to Majiga Church of Christ. The Claimants and Defendants are mere stewards or custodians of the church funds on behalf of the whole membership of Majiga Church of Christ. No evidence was laid before the Court to show that

with the departure of the Claimants, Majiga Church of Christ has no capacity to raise funds for itself or through its partners. Second, there is no legal requirement under the Trustees Incorporation Act that individual branches of a Church or denomination or Ministry should also be registered separately. In any case, if the 3rd Defendant has no legal capacity to sue and to be sued, the question still remains, why did the Claimants sue it then?

[50] On the third requirement, whether it would be just to grant the order of interlocutory injunction, the Claimants did not address the Court on the same. This Court actually takes the view that it would actually be unjust to grant the order of interlocutory injunction being sought by the Claimants because it would paralyze all the operations of Majiga Church of Christ. No institution, religious or secular, can run smoothly without access to its own finances. Further, the Defendants and other congregants would be prevented from using the Church Building and the Sunday School building. Their right to freedom of worship would be significantly affected by such an order. Yet, the Claimants would be able to exercise their right to freedom of worship as they are already meeting and have established another branch at Magalasi in the same denomination of Church of Christ. That would not be just. On this score, the Court finds that the Claimants did not satisfy all the requirements for the grant of the order sought as provided for under Order 10, rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017. The scales tilted in favour of setting aside the order that was provisionally granted by the Court on 2nd March, 2022 to the Claimants. The same is hereby set aside. For the avoidance of doubt, the Defendants can access the Majiga Church of Christ account held at National Bank of Malawi and the funds therein.

[51] In the final upshot, for the reasons given in the foregoing paragraphs, the order of interlocutory injunction which this Court provisionally granted to the Claimants on 2nd March, 2022 is hereby set aside. Costs will be in the cause. The Registrar of the Court is directed to bring this ruling to the attention of the Malawi Law Society so that it may consider whether or not to take disciplinary measures against Advocate Mr. Daud Mbwana.

[52] Made in Chambers this 21st day of April, 2022 at Blantyre, Malawi.

M. D. MAMBULASA
JUDGE