

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 1159 OF 1994**

**BETWEEN**

**CALTEX OIL LIMITED**  
**PLAINTIFF**

**AND**

**ABDUL MAHOMED**  
**DEFENDANT**

**CORAM: MWAUNGULU, J**  
Nampota, for the plaintiff  
Banda, for the defendant  
Chigaru, Official Interpreter

**Mwaungulu, J**

**ORDER**

This is an appeal by the defendant against the order of the Registrar of 4th July, 1994. That order was made ex parte on the defendant's application. The defendant applied for a stay of execution pending an application to pay debt by instalment. The Registrar granted the order on two conditions. The defendant was to file the application to pay by instalment in the next fourteen days. The second condition, the bone of contention in this appeal, was that the defendant should pay all sheriff fees and expenses. The defendant contends in the appeal that the Registrar could not properly have done that because the plaintiff reneged on a consent order made between the parties that execution could not be had till there was an order of the Court to pay the debt by instalments. There is a preliminary objection to the appeal by the plaintiff. The plaintiff contends that the defendant cannot appeal against an ex parte order. The defendant, the plaintiff argued, should have applied to the Registrar to have the order set aside or varied.



The latter argument commends itself to this Court. It is supported by persuasive authority. I have looked at the affidavit that the defendant made in support of the application ex parte for the order that the Registrar made. There is no suggestion that there was a consent order between the plaintiff and the defendant. An ex parte order is, in its nature, a provisional one( WEA Records Ltd. -v- Visions Channel 4 Ltd. [1983] 2 All E.R. 589, 593, per Sir John Stevenson, M.R.; Becker -v- Noel [1971] 2 All E.R. 1241, per Lord Denning, M.R.). There is need for full disclosure of the information relied on by the applicant to enable the court to exercise the discretion against a party who by the nature of the application is not available before the Court. The nature of the order is such that the Court that granted it can reconsider the order at the instance of the other party should other facts emerge or should the other party show why the order should not be maintained. If, as was here, the applicant does not disclose all the material facts affecting the order and later he impugns the order that the Court made on the applicant's deficient affidavit on the pretext that certain information was not before the court, the question that rises is can he appeal without bringing the information before the Court that granted the order to enable the Court to vary the ex parte order.

This matter was considered by the Privy Council in Minister of Foreign Affairs -v- Vehicles and Supplies Ltd [1991] 4 All E.R. 65 in an appeal from the Supreme Court of Jamaica. Like Malawi, Jamaica under its Civil Procedure Code Applies the Rules of the Supreme Court where the local rules are silent. There a Judge set aside an ex parte order made by another judge. The Supreme Court of Jamaica held that he could not do that. The three judges of the Supreme Court of Jamaica were unanimous on allowing the appeal. They arrived at that result differently. Carey and Forte, JJA. , thought that a superior Court had inherent jurisdiction to set aside or vary and even revoke an ex parte order, but that this was only where new matters are brought to his attention either with respect to the facts or law. The Privy Council accepted this statement of the law. They, in reversing the decision of the Supreme Court of Jamaica, decided that the Judge, who could set aside an ex parte order of another, had material on which he could exercise the discretion.

The President of the Supreme Court of Jamaica, Rowe, JA. , Acknowledged that an ex parte order could be set aside by the Judge who made it or another. The President thought however that under the Civil Procedure Code the fact that the matter could be appealed from the only way to revoke or vary an ex parte order was by way of appeal. This was rejected by The Privy Council. Lord Oliver, delivering the opinion of the Board, said:

“Rowe P considered that s 564b, in providing for an appeal to the Full Court against a refusal of leave,



impliedly ousted any reconsideration of the matter either by the same judge or by another judge. This, with respect, is a non sequitur and it would, if correct, produce the absurd result that, even in a case where an order had been obtained by deliberate concealment of material facts and misleading evidence, the judge who had been wrongly persuaded to make the order would be incapable of revoking it.”

The Board noted that neither the Civil Procedure Code nor the rules provided a way of disposing of Ex parte orders. The Observation is as true for Jamaica as it is for Malawi. The Board however emphasized that Order 32, rule 6 is explicit in its terms:

“Neither the Civil Procedure Code nor the rules contain express provisions relating to the discharge of ex parte orders but RSC Ord 32, r 6 provides in terms; “The Court may set aside an order made *ex parte*.””


Where a court has made an order ex parte a party should request the Court that made it to vary it once it is shown that certain information was not before it or a legal aspect overlooked has to be considered. An appeal against such an order which for all intents and purposes is provisional would be an abuse of the process of the Court. ( Per Donaldson, M.R. in **WEA Ltd. -v- Vision Channel 4 Ltd**). It should be deprecated that the Court that made the order when certain information was not before it should not be given an opportunity to reconsider the order it made on the new information or better legal argument. Equally it should be discouraged that another party who was not there when the order was obtained by another to be dragged into arguing an appeal on matters that he never contested when the ex parte order was obtained. It is odd in my judgment that another party should meet his adversary for the first time on an appeal on a matter on which he was not present when the order was obtained.

There can be no doubt that the Judge can hear an appeal from the order of the Registrar made ex parte. This is provided for in rule 3 of High Court ( Exercise of Jurisdiction of Registrar) Rules. The Registrar also has jurisdiction under Order 32, rule 6 to set aside vary or revoke an order ex parte. Ex parte orders are provisional. The party applying is supposed to make full disclosure. Even then the order is only provisional. The judge can review the provisional order in the light of evidence and argument from the party affected by the order.

"This being the case," Sir Donaldson, M.R., said in WEA Ltd. -v- Visions Channel 4 Ltd. "It is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party."

I would therefore dismiss the appeal. The defendant should request the Registrar to revoke or vary the order made.

Made in Chambers this 24 th October 1995.



D.F. Mwaungulu  
JUDGE