

REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 28 OF 2018

BETWEEN

MR STOWELL GONDWE.....1ST CLAIMANT
BAULENI W. E MKWEZA.....2ND CLAIMANT
MALITA NASONI.....3RD CLAIMANT
ANGELLA CHUNGA.....4TH CLAIMANT

-and-

HON. DR LAZARUS CHAKWERA, PRESIDENT OF
MALAWI CONGRESS PARTY..... DEFENDANT

Coram: Honourable Mr. Justice J. M. Chirwa

Kaphale, Counsel for the Claimants

Nthewa, Counsel for the Respondent

Chitatu, Official Court Interpreter

RULING

A. Background

The 4 Claimants herein commenced these proceedings by a Specially Endorsed Summons issued on the 26th day of January, 2018 claiming the following reliefs;

- (a) A Declaration that the Defendant acted in breach of articles 30(1), 30 (2) and article 35 (1) of the Constitution of the Malawi Congress Party when by a Memorandum dated 27th August, 2015, he announced the appointment of new members of the party to non- existent positions in the National Executive Committee of the party to other positions (whether existing or non- existing) within the National Executive Committee of the Party;
- (b) A Declaration that only a convention has the power under article 66(1) of the Constitution of the Malawi Congress Party to emend the Constitution to grant the President the power to alter the composition of an elected National Executive Committee and that such constitutional amendment did not take place prior to the Memorandum of 27th August, 2015,
- (c) A Declaration that the re-constitution or reformulation of the National Executive Committee of the Malawi Congress Party that occurred on 27th August, 2015 or any that may have occurred thereafter is therefore null and void;
- (d) An order that the National Executive Committee of the Malawi Congress Party is as constituted in 2013 and February, 2014 and not in 2015 or thereafter;
- (e) An interim injunction order barring or restraining the Defendant from recognizing persons that had been elected into the National Executive Committee of the Party at the 2013 Convention but whom he shifted to other positions by Memorandum of 27th August, 2015, as holders of the new positions he shifted them to and also restraining or barring the Defendant from inviting to any National Executive Committee meeting of the Malawi Congress Party all such persons that he unilaterally appointed into non-existent offices in the said committee of the Party by Memorandum dated 27th August, 2015 until trial of this action or until further order,

(f) A Declaration that the elections into district and regional offices and of the party that took place after 2013 were null and void in so as Regional Committee elections preceded District Committee elections and the rest of the lower ranked elections,

(g) An order for costs.

At the time of the taking out this Summons the Claimants also took out an Ex-parte Application in a proceeding for an interlocutory injunction order. Upon reading the sworn statement filed in support of the said application this Court formed the view that the application did not merit being brought ex parte on grounds that the actions/decisions complained of have been in the domain of the Claimants as way back as August, 2015. Consequently, this Court ordered that the Claimant application for an interlocutory injunction order be brought inter-parties.

At the intended hearing of the Inter-parties Application for an Interlocutory Injunction order schedule for the 20th day February, 2018 at 14.30 hours the Defendant raised the following preliminary objections:

“(a) there is a live appeal filed in Civil Cause No.1347 of 2016 seeking reliefs from the Supreme Court that are exactly what is being sought in these proceedings

(b)the Claimant’s action is pre-mature, having not exhausted the Internal procedure under Article 56 of the Constitution of the Malawi Congress Party exhibited by the Claimant to the within application as Exhibit EKK1.”

B. Issues for determination:

In the determination of the within objections, this Court intends to answer the following questions:

- (a) Are the present proceedings an abuse of the process of the court in that there are pending in the Supreme Court of Appeal an appeal filed in Civil Cause No. 1347 of 2016 seeking reliefs which are exactly what are being sought in these proceedings?
- (b) Are the present proceedings premature because the Claimants have not exhausted the internal procedure provided under Article 56 of the Malawi Congress Party Constitution?

C. Determination

(a) Are the present proceedings an abuse of the process of the court?

The court has inherent jurisdiction to strike out an action where there appears to be “an abuse of the process of the court”. This term connotes that the process of the court must be used bona fide and properly and must not be abused. It is also trite that the categories of conduct rendering a claim frivolous, vexatious or an abuse of process were not closed but depended on all relevant circumstances of the particular case, public policy and the interests of justice being very material considerations- see: Ashmore –v- British Coal Corporation [1990] 2 Q.B. 338 (CA) where Stuart-Smith L.J. at p 348 said:

“A litigant has a right to have his claim litigated provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material.”

And Kerr L.J. in Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd’s Rep. 132 at p137 said:

“To take the authorities first, it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of the process, quite apart from any question of res judicata or issue of estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorise the situation in which such conclusion would be appropriate.”

The foregoing passage was cited with approval in the Ashmore case (*supra*).

The accepted test for determining whether fresh evidence is of such a kind that the court should permit a claim which would otherwise be an abuse of process is that it should entirely change the case - see: Lord Cairns L.C. in Phosphate Sewage Co. Ltd v Molleson (1879) 4 App. Cas. 801 at p.814 and adopted by Goff L.J. in McIlkenny v Chief Constable of the West Midlands [1980] Q.B. 283 at p 334.

By the Originating Summons in Civil Cause No.1347 of 2016 the Applicants sought the following reliefs;

- “1. A declaration that the respondents’ purported revision of the composition of the Malawi Congress Party National Executive Committee is a breach of the Malawi Congress Party Constitution.*
- 2. A Declaration that only a convention has powers to make Constitutional amendments and alterations of the National Executive Committee.*
- 3. An order that the respondents call for an Emergency Convention within reasonable time to regularize the purported National Executive Committee reshuffle.*
- 4. An order for costs of this action”.*

And by the Notice of Appeal dated the 26th day of February, 2017 made in the said Civil Cause No. 1347 of 2106 the Applicants seek the following reliefs;

- “3.1 that the Court substitute a finding that the Constitutional amendments and alterations of the composition of the National Executive Committee of the MCP that were made by MCP unconstitutional vis- a-vis the MCP Constitution.*
- 3.2 that the Court order that a valid request had been made by more than half of the district committees of the Malawi Congress Party to call for an emergency convention”.*

It is the considered of this Court that the nature of the reliefs sought by the Applicants in Civil Cause no. 1347 of 2016, both in the High Court and the Supreme Court of Appeal, and those in the present proceedings are substantially the same. Further, the issues to be determined and even the nature of the evidence required to prove the same are also substantially the same. What may turn out to be different, in this Court’s view, is the nature of arguments to be advanced by different counsel. It is thus quite possible that this Court may reach at a conclusion which may be in conflict with the decision of the Supreme Court of Appeal. This would, in this Court’s view, certainly, bring the administration of justice into disrepute among right thinking people. It is also not in the interests of justice that

the time of courts or tribunals should be taken litigating the same claims, though in different courts.

Thus, bearing in mind the test above referred to and the objective of preventing any abuse of the process of the court, this Court would, in the premises, be inclined to sustain the Defendant's objection on this ground.

(b) Are the present proceedings premature as contended by the Defendant?

What is in contention here is Article 56 of the Constitution of the Malawi Congress Party which provides as follow

"All disputes regarding the interpretation of this constitution shall be referred to the National Executive Committee for settlement provided that the aggrieved persons may appeal to the Convention."

In the determination of this ground this Court finds it necessary to consider the definition of, first, the word "dispute."

The Oxford Advanced Learner's Dictionary of Current English by A.S. Hornby has the following meanings:

- "(1) debate, argument*
- (2) quarrels, argument, controversy"*

And the Words and Phrases Legally Defined (Volume 3) has the following meanings:

- "(1) the act of arguing against, controversy, debate,*
- (2) an argumentative consideration, a controversy; also in a weakened sense, a difference in opinion".*

Now, given that the Claimants have commenced these proceedings alleging that the Defendant has reformulated the composition of the National Executive Committee in breach of certain constitutional provisions, it follows, in this Court's considered view, that there is a controversy or a dispute between the parties hereto as regards the exercise of the powers under the said Constitution. It would be giving the word "dispute" a very restrictive definition if this Court

were to uphold the Claimants' contention that a dispute would have existed only if the Defendant had filed a response to their claim. It is the view of this Court that if the Defendant had filed a response he would then have acquiesced to the action which he believes to be irregular. It is trite that any step taken with the knowledge of an irregularity waives the irregularity.

This Court finds itself fortified in its finding that there is a dispute on the ground that if there had been no dispute between the parties the Claimants would not have, in the first place, commenced these proceedings. It would be an abuse of the court process for the Claimants to have commenced these proceedings with the full knowledge that there is no dispute which they want to be resolved by the court.

Albeit this Court has resolved that there is a dispute between the parties that is not the end of this matter because there is another question raised by the Claimants to be resolved, that is to say, is the dispute as regards the interpretation of the Constitution of the Malawi Congress Party?

The word "interpretation" is defined in the Collins Compact English Dictionary as follows;

- "(1) the act or result of interpreting or explaining.*
- (2) the particular way in which his or her view of a competition*
- (3) explanation as of a historical site, provided by the use of original objects, visual display material"*

And the Merriam Webster Dictionary has the following definitions;

- "(1) the act of the result of interpreting; explaining.*
- (2) a particular adaptation or version of a work, method or style;*
- (3) a teaching technique that combines factual with stimulating explanatory information....."*

In determining whether there has been a breach or violation of the Constitution of the M.C.P the court would, no doubt, have to construe, that is to say, get to analyse the constitutional provisions, allegedly, breached or violated by the Defendant. It would thus follow that the "dispute" between the parties is a "dispute" involving the interpretation of the said Constitution.

Consequently, this Court would be inclined to sustain the Defendant's objection on this ground also.

This Court finds the Claimants' contention that the fact that the said Constitution has a provision for the internal resolution of disputes is tantamount to an ouster of the jurisdiction of the courts erroneous. It is to be noted that both the courts and the law encourage the resolution of disputes by alternative means hence the "out of court settlements" and the provisions for the Alternative Dispute Resolutions (ADR). The fact that it is the current membership of the National Executive Committee which is being questioned cannot, in this Court's view, be a sufficient reason for a party to rush to the court before attempting to resolve the matter internally as provided by the parties' own constitutional provisions.


C. Conclusion

This Court having sustained both the Defendant's objections now proceeds to strike out the Claimants' within action on both grounds. The Claimants and their colleagues in the Malawi Congress Party are thus advised to pursue their appeal to the Supreme Court of Appeal.

D. The Costs

The costs are in the discretion of the court and normally follow the event. The event being that the Defendant has succeeded in his objections, this Court would exercise its discretion by awarding the costs to the Defendant. The same are to be taxed by the Master if not agreed upon by the parties.

Dated this 6th day of March 2018


CHIRWA J
JUDGE