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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NUMBER 64 OF 2022

BETWEEN:

THE MALAWI LAW SOCIETY

CLAIMANT

AND

CORPORATE LAWYERS ASSOCIATION LIMITED

1st DEFENDANT

**REGISTERED TRUSTEES OF THE COMMERCIAL
BAR ASSOCIATION**

2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Mpaka and Ngunde, Counsel for the Claimant

Msisha SC, Counsel for the 1st Defendant

Kaphale SC, Counsel for the 2nd Defendant

Mankhambera, Official Court Interpreter

ORDER

1. This is the decision of this Court on the claimant's application for summary disposal of the present matter in which the claimant seeks certain declarations against the two defendants. The application was made by the claimant under Order 12 Rule 23 of the of the Courts (High Court) (Civil Procedure) Rules as read with Order 19 Rule 27 of the of the Courts (High Court) (Civil Procedure) Rules. The application is opposed by the defendants.

2. This Court must therefore determine whether it should summarily make the declarations sought by the claimant on the basis of sworn statements without going to trial where evidence would be had and the matters in question would be thoroughly interrogated in the usual manner.
3. The facts of this case are that the claimant is a regulator of the practice of the law in Malawi by virtue of the Legal Education and Legal Practitioners Act. By virtue of section 67 of the same Act, every legal practitioner licensed to practice law in Malawi must belong to and is a member of the claimant.
4. The 1st defendant is a company limited by guarantee. It was registered in July, 2021. Its membership comprises members of the claimant in the employment of various corporations and financial institutions.
5. The 2nd defendant is an association incorporated as a trusteeship in August, 2018. Its membership comprises members of the claimant holding post-graduate qualification in commercial law or who have 15 years-experience practicing law. There are also associate members that can be admitted to the 2nd defendant on payment of a prescribed fee.
6. Some members of the claimant voluntarily associate under either of the defendants. The defendants are vehicles through which members of the claimant that have similar interests associate. The claimant's members interested in in-house lawyers' issues associate under the 1st defendant. The claimant's members interested in commercial law issues associate under the 2nd defendant.
7. The claimant has been carrying out activities to advance its objects under the Legal Education and Legal Practitioners Act by utilizing its membership. In the course of time, the claimant developed its Strategic Plan by which it was noted that 100 percent member involvement in its activities was the best way forward to for it to surmount challenges that hinder its achievement of its objectives, among others, safeguarding the interests of the public at law and also safeguarding the interests of its members.
8. Subsequently, at its General Meeting held between 23rd and 27th March, 2021, the claimant resolved to re-organize its operations framework to ensure 100 percent member involvement in its activities aimed at serving the public interest in matters of the law better. It is with regard to the foregoing that the claimant asserts that the involvement of some of its members in the activities

- of the defendants poses a conflict or potential of such conflict to its drive at reinvigorating itself for the benefit of the public interest in matters of the law.
9. The claimant asserts that some of its law practice areas of focus, for which it has set up some structures between April and October, 2021, overlap with the areas of focus of the defendants. And that this entails that some members who would have greatly contributed to the law practice areas of focus within the claimant may not be available as they would be drawn away to focus on activities of either of the defendants. The claimant further asserts that there lies conflict or potential for conflict between its own activities and those of the defendants which requires that certain provisions of the legal provisions must be read with the aim of restricting its members' freedom to associate under either of the defendants.
 10. The claimant then indicated that, with regard to in-house legal practitioners, who associate under the 1st defendant, it advised their corporate employers in 2021 that such corporate employers are in breach of restrictions over certain legal work that can only be carried out independently by licensed legal practitioners and not by the corporate employers through the in-house lawyers. Here, reference was made to section 31 (1) of the Legal Education and Legal Practitioners Act on restriction of certain conveyancing work to licensed legal practitioners. The claimant indicated that the 1st defendant objected to the position taken by the claimant with regard to the carrying out of such restricted legal work by corporate entities through their in-house lawyers asserting that this would lead to impairment of the claimant's members' right to practice law as in-house lawyers.
 11. The claimant also objected to the objects of the 2nd defendant by a letter of June 2020. However, the 2nd defendant has persisted in its objects of promoting interest in the specialized area of commercial law practice.
 12. In view of the foregoing, the claimant seeks the following declarations:

- a) A declaration that on the true construction of sections 32, 64, 67, 83 and 89 of the Legal Education and Legal Practitioners Act, there is a professional unity and oneness of the legal profession for the sake of the protection of the public and maintenance of professional standards

under one regulatory regime and/or for sustaining the functions of the claimant in the protection of public interest under the rule of law.

b) A declaration that on the true construction of sections 32, 64, 67 and 89(2)(o) and (r) of the Legal Education and Legal Practitioners Act as read with section 44(1) and 32 of the Constitution the freedom of the claimant's members to association is lawfully limited as against any association or company or grouping or trusts whose objects pose or appear to pose or are likely to place the claimant's members in potential conflict of interest with the members' duties to the claimant and to the legal profession as set out in the Act and the Malawi Law Society Code of Ethics and/or any other subsidiary legislation or instruments made or to be made under the Act.

c) A declaration that on the true construction of the Memorandum Association and Articles of Association of the 1st defendant and the Constitution of the 2nd defendant in light of the true construction of sections 32, 64, 67 and 89(2) (o) and (r) of the Legal Education and Legal Practitioners Act and Malawi Law Society Code of Ethics as read with section 44(1) and 32 of the Constitution, members of the claimant are not entitled to participate in the objects and business of the defendants.

d) A declaration that on the true construction of section 31(1) and 89(2)(l) of the Legal Education and Legal Practitioners Act as read with Rule 5(b) of the Legal Practice Rules, a person, legal or otherwise, not entitled to practice as a Legal Practitioner under the Act cannot directly or indirectly undertake any of the restricted work listed in section 31(1)(b) and (c) of the Act.

e) A declaration that on the true construction of section 2 of the Competition and Fair Trading Act as read with section 31 of the Legal Education and Legal Practitioners Act in respect of the identity of the restricted legal services and section 2 of the Financial Services Act as to the character and identity of a financial institution and financial services laws, sustaining the 1st defendant's averments that in-house lawyers are entitled to carry on restricted legal work creates a monopoly

by the financial institutions behind the 1st defendant and is anti-competitive or disruptive of fair competition in respect of the restricted legal services.

f) A declaration that on the true construction of section 2 of the Competition and Fair Trading Act as read with sections 31 and 67 of the Legal Education and Legal Practitioners Act in respect of the rights of a Legal Practitioner and Chapter 5 rr.1 and 2 of the Malawi Law Society Code of Ethics as to the identification of experts or specialists, sustaining the 2nd defendant as to the criteria for the 2nd defendants' membership creates a monopoly by the members of the 2nd defendant and is anti-competitive or disruptive of fair competition in respect of legal services in commercial matters.

g) A declaration that on the true construction of section 31(1) and 89(2)(1) of the Act as read with Rule 5(b) of the Legal Practice Rules members of the Claimant serving in the employment of persons not entitled to practice as a Legal Practitioners are not entitled as such employees to practice law in the areas restricted by section 31(1)(b) and (c) but may only do so in their individual capacity with accountability to the claimant for any consideration payable to the member pursuant to the prescriptions applicable under the said section 31(1)(b) and (c) of the Act.

h) Any other declaration, order or directions which the Court shall deem just and appropriate for the sake of enforcing the standards and meeting the objects of the claimant as set out in section 64 and any other relevant provisions of the Legal Education and Legal Practitioners Act.

i) An order providing for the costs of the present action within the discretion of the Court as the Court shall deem just and appropriate

13. The claimant then asserted that it has clearly made out its case for the declarations sought and that the defendants have no arguable defence to its request for the various declarations and seeks that this Court summarily makes the declarations sought.

14. The defendants oppose the present application for several reasons. First, the defendants contend that there is no cause of action to warrant this matter to be brought before this Court by the claimant. The defendants lamented that what the claimant has done is to bring this matter before this Court in the form of a referral as is understood under the Constitution by which only the President is entitled to bring matters before the Courts under section 89 of the Constitution. Further, that the claimant has no right that it can protect by way of the declarations it is seeking under the declarations process under Order 19 Rule 27 of the Courts (High Court) (Civil Procedure) Rules which provides that:

- (1) A person may make an application to the Court for a declaratory order.
- (2) An objection to a proceeding may not be made on the ground that the proceeding is merely seeking a declaratory order.
- (3) The Court may make a binding declaratory order based on a right even if no consequential relief is or may be claimed.

15. In response, the claimant indicated that it is perfectly legally before this Court to seek declarations with regard to the situation it has presented before this Court in relation to the differences between itself and the defendants pertaining to the conduct of the members of the claimant and the defendants in the context of the claimant's right to regulate its members under the Legal Education and Legal Practitioners Act and other relevant legal instruments plus resolutions of the claimant in the context of the Constitution.

16. This Court wishes to quickly agree with the claimant that the claimant is entitled to present this matter before this Court so that, under the given circumstances, this Court can declare the position of the law to regulate the relationship between the claimant and members of the defendants, for example. Such declarations can be obtained pursuant to Order 19 rule 27 of the Courts (High Court) (Civil Procedure) Rules. This Court does not therefore view these proceedings as being akin to a referral procedure that is reserved for the President under the Constitution. There is a dispute between the claimant and the defendants pertaining to the participation of the claimant's members in the activities of the defendants, among others. That

justifies the claimant to seek this Court's exercise of its adjudicative powers given that the claimant has statutory oversight over the conduct of its members, including those that associate under the defendants. The issue here is whether the claimant has properly exercised its statutory mandate. That is a justiciable matter warranting the seeking of declarations from this Court.

17. In the foregoing circumstances, it appears to this Court that the claimant cannot be said to be arrogating to itself rights of people as submitted by the 1st defendant. The claimant as a statutory legal entity has a right to protect its interests as such an entity. This Court is not persuaded that reference to seeking to protect a right by a person by asking for declarations from this Court under Order 19 rule 27 of the Courts (High Court) (Civil Procedure) Rules is restricted to natural persons only and to constitutional rights only as submitted by the 1st defendant. On the arguments so far, it appears that a legal person, like the claimant, can vindicate a right under the declaratory procedure under Order 19 rule 27 of the Courts (High Court) (Civil Procedure) Rules.
18. The defendants also opposed the instant application by impugning the supporting sworn statement on the instant application asserting that it must be struck out because large parts of it contain opinions and arguments and does not restrict itself to facts only contrary to Order 18 Rule 6 (1) of the Courts (High Court) (Civil Procedure) Rules. See *Malawi College of Health Sciences Board of Governors v Blantyre City Council* Revenue matter number 59 of 2021 (High Court) (Unreported). The claimant submitted that its supporting sworn statement deposes to facts. This Court has considered the claimant's sworn statement on the instant application and constructed the claimant's case factually as indicated above and in the context of this matter is unable to agree with the defendants that the sworn statement should be struck out for offending the rule that a sworn statement must contain facts only.
19. The defendants then contended that they have an arguable defence in that the claimant's attempt to curtail the association of its members under either of the defendants is unconstitutional as it breaches the claimant's members' right as legal practitioners to freedom of association as provided under section 32 of the Constitution. They added that such an attempt to curtail the claimant's members' right to freedom of association cannot pass the constitutional rights limitation test set out in section 44 of the Constitution. They added further that for a decision to be made on such a defence it is necessary that there be a trial

so that the issue is investigated based on evidence, whether indeed there exists conflict or potential for conflict between the claimants' members' involvement in the activities of the claimant and in activities of the defendants. The claimant however replied that there is no such breach of the right as alleged. The claimant indicated that in fact its members are subject to regulation and that essentially what it is doing is to limit the rights of its members to freedom of association in line with section 44 of the Constitution and that the members cannot complain about being regulated. See *The State and Registrar of Financial Institutions ex Parte Malawi Law Society* Judicial Review Case number 68 of 2014 (High Court) (unreported).

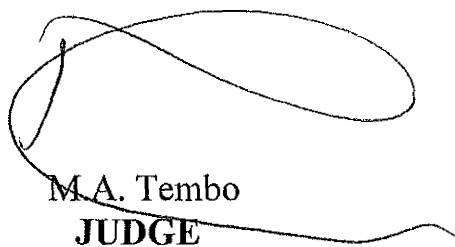
20. The defendants then contended that another strand of their defence is that the claimant is acting in a discriminatory manner contrary to section 20 (1) of the Constitution by targeting its action against the defendant associations when no such action has ever been taken with regard to the Women Lawyers' Association which has existed for a much longer period than the defendants and under which some members of the claimant have and do associate. The claimant replied that its action against the defendants does not constitute discrimination against the defendants because the claimant has a choice in the manner it can proceed and has also been engaging with the Women Lawyers' Association to develop a synergy in terms of serving the public interest in matters of the law.
21. The 2nd defendant does not agree that the facts in this matter warrant any declaration with reference to the Competition and Fair Trading Act sought by the claimant given that it also admits associate members who do not have to possess qualifications of full members. And that therefore there it cannot be a monopoly of any kind.
22. This Court has considered the law on applications such as the instant one which has been correctly alluded to by the parties in this matter. For this Court to make the declarations sought herein summarily, the defendants must have served a defence and the claimant must convince the Court that the defendants do not have any real prospect of defending the claim. See Order 12 Rule 23 of the of the Courts (High Court) (Civil Procedure) Rules. This Court does not lose sight of the fact that, at the same time, the claimant must also make out his case clearly to warrant the remedy sought against the defendant against

whom the summary process is taken out. Case authorities abound on the foregoing point.

23. This Court has carefully considered the case of the claimant for summary disposal of the present matter. This Court agrees with the defendants that this matter does not warrant summary disposal because the defendants have shown that there is a defence that is worth investigation at trial. There is a real prospect of the defendants defending this matter.
24. The defence essentially centres around whether the claimant can curtail the freedom of association of its members under the defendants. That is a matter that ought to be thoroughly investigated. That has to also involve investigating whether there indeed exists a conflict or potential conflict between the involvement of the claimant's members within the claimant's structures and their involvement under the defendants.
25. This Court agrees with the defendants that the right to freedom of association held by the members of the claimant is recognized under the Constitution. It is a right that is also recognized internationally. According to the United Nations' Basic Principles on the Role of Lawyers, lawyers have freedom of association and freedom to form independent professional associations to represent their interests and to promote their continuing education, among others. No wonder a simple search online will reveal that apart from many jurisdictions having mandatory Law Societies such as the claimant in our case, lawyers form other bar associations equivalent to the defendants herein to promote specialties within the practice of the law.
26. Consequently, limiting the association of lawyers under any association is not something that should be dealt with summarily except in the clearest of cases which is not the case in the present matter.
27. Further, the claimant has only proceeded to seek to curtail the rights of its members with regard to the defendants. The claimant has not done the same with regard to its members regarding the Women Lawyers' Association. Additionally, as pointed out by the defendants, no action has been taken with regard to the claimant's members involvement with regional and international Bar Associations. This is a scenario in which the issue of discrimination by the claimant as raised by the defendants in their defence calls for examination at a full trial.

28. There are further matters, namely, whether there is a breach of the Competition and Fair Trading Act because the defendants will eventually create monopolies due to specialty of their membership which has been denied by the defendants and the question whether restricted legal work can be carried out by in-house lawyers who are members of the 1st defendant and are employed by corporations. These are also matters that require close scrutiny at trial and which cannot be determined summarily on sworn statements.
29. In the foregoing circumstances, this Court's determination is that it is not persuaded by the claimant's contention that the defendants do not have any real prospect of defending the claimant's claim for the declarations in this matter. The present application is therefore declined with costs to the defendants.
30. This Court has formed the view that the instant matter expressly concerns the application of the Constitution especially with regard to the proposed curtailing of the rights of the claimant's members to associate under the defendants. This Court therefore, in exercise of its powers, refers this matter to the Chief Justice for certification to be heard by a panel of not less than three Judges to determine the constitutional question whether the claimant can curtail its member's freedom of association in the circumstances and to deal with the entirety of this matter pursuant to section 9 (2) of the Courts Act.

Made in chambers at Blantyre this 8th December, 2022.



M.A. Tembo
JUDGE