IN THE MALAWI SUPREME COURT OF APPEAL

at Blanyre

MSCA CIVIL CAUSE NO 230 OF 2001

(Being High Court Civil Cause No 2509 of 2001)

BETWEEN:

J. Z. U. TEMBO ..... APPELLANT

and -

GWANDA CHAKUAMBA ..... RESPONDENT

BEFORE: THE HON. JUSTICE TAMBALA, JA

Mr Kasambara, Counsel for the Appellant

Mr Mbendera, Counsel for the Respondent

Mr Kaundama, Court Official

R U L I N G

Tambala, JA.

This is appellant's application for stay of execution of an order for injunction granted by a judge of the High Court. The application was commenced by a summons and supported by an affidavit sworn by counsel for the appellant. The injunction ordered by the High Court restrains the appellant from acting or holding himself out as President of the Malawi Congress Party and/or leader of opposition both inside and outside the National Assembly. The injunction also restrains the appellant from exercising the powers of President of the Malawi Congress Party or leader of opposition. It is an interlocutory injunction. It arises from an action commenced by the respondent which seeks a permanent injunction in almost similar terms to the present injunction.

The factual background relating to this application is that for sometime there has developed a leadership struggle between the respondent and the appellant. They are both leaders of the Malawi Congress Party, the larger party in opposition in Parliament. The respondent is its President while the appellant is deputy President. When Parliament commenced sitting following the 1999 general elections, the respondent was readily accepted as the leader of opposition. However, about June 2000, due to his own conduct, the respondent found himself suspended from Parliament. The suspension was for one year. The members of Parliament belonging to Malawi Congress Party elected the appellant to be leader of opposition in Parliament during the absence of the respondent. Subsequently, the respondent challenged, in the High Court, his suspension from Parliament. He managed to obtain an interim order staying the suspension. He went back to Parliament. The appellant, nevertheless continued to exercise the powers and functions of leader of opposition in Parliament, with the apparent support of Malawi Congress Party members of Parliament, or at least the great majority of them. About November 2000, it was deemed necessary to put the issue of leadership of the opposition to the vote. Again, the appellant was voted by the members of Parliament of Malawi Congress Party to be the leader of the opposition. The appellant naturally continued to exercise the functions of leader of opposition. Then the respondent commenced, in the High Court, the action from which the present injunction was granted. Several other cases have been brought before the High Court, most of them by the respondent, relating to the leadership dispute between the appellant and the respondent.

I must now consider the legal principles which guide a court when considering an application for stay of execution pending appeal. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation. However, the Court will grant stay of execution of a judgment or order when it is satisfied that there are good reasons for doing so. A Court would also order stay of execution pending appeal where it is satisfied that failure to order a stay would render the appeal nugatory. Further, a Court will order stay of execution pending appeal when it is satisfied that the appellant would suffer loss which could not be compensated in damages: See paragraph 59/13/1 of **THE SUPREME COURT PRACTICE** (1995 Edition).

I must now consider whether the circumstances which would entitle the Court to grant a stay of execution pending appeal exist in the present application. I must first consider whether there are present good reasons which support the application.

The first point to make here is that application for interlocutory injunctions are governed by the principles stated in the **American Cyanamid case**: They are-

1. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect;

2. The Court must not attempt to decide the claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried;

3. If the plaintiff satisfies (1) and (2) above, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on a balance of convenience.

The third principle clearly directs the Court to exercise its discretion **on a balance of convenience** (emphasis supplied), when deciding whether to grant or refuse a request for an interlocutory injunction. At page 20 of his order the learned judge said that an injunction is granted on **the balance of justice** (the emphasis supplied). Clearly, that is not what the settled principles say. Then at page 21 the learned judge said:

"There would be no injustice or prejudice to the defendant if this Court decided, as it certainly will, to maintain the status quo."

At the same page the learned judge said:

"To the extent that the plaintiff's losses are greater, the balance of justice favours granting the injunction."

Further, at page 24 the learned judge said that: **"the balance of justice favours granting the injunction**." (Emphasis supplied).

Clearly the learned judge abandoned the well settled principle of granting or refusing an application for an interlocutory injunction **on a balance of convenience** and adopted the novel principle of **balance of justice**. Balance of convenience and balance of justice are

as different as sun and moon. Clearly, the principle preferred by the learned judge lacks the support of legal authority. In adopting and relying upon this novel principle when considering the application for an interlocutory injunction, the learned judge committed an error of law.

The second point to make is that after examining the facts relating to the application before him, the learned judge in the Court below, came to the conclusion that the respondent would suffer greater loss if the injunction was not granted while the appellant would suffer lesser loss following the granting of the injunction. The learned judge's conclusion ignores the glaring fact that the appellant enjoys the overwhelming support and loyalty of the Malawi Congress Party members of Parliament while much of the respondent's support exists outside Parliament. The essential contention between the appellant and the respondent is the leadership of opposition in Parliament. The appellant is not much worried or concerned with the leadership of the Malawi Congress Party. He is concerned with leadership of opposition in Parliament: See appellant's affidavit sworn on 29th October 2001 at paragraphs 13, 16, 17 and 19. It is the view of this court that the granting of the injunction has a more devastating effect on the appellant and those members of Parliament who support him than the refusal of the injunction would have on the respondent. As a matter of fact the injunction would simply cause more confusion among the Malawi Congress Party members of Parliament. This Court, therefore, takes the view that in granting the interlocutory injunction, the learned judge was influenced by a wrong conclusion of fact made by himself.

The third point to make is that in the order granting the injunction, the learned judge made a number of findings of both fact and law in favour of the respondent. He made a finding in favour of the respondent relating to the procedure of **information in the nature of quo warranto**. The issue of **res judicata** was also decided in favour of the respondent. The learned judge also decided that there was nothing wrong with the respondent's failure to commence proceedings by way of judicial review. These were findings of law. At page 18 of the order the learned judge made a finding of fact that the speaker recognised the respondent as leader of opposition in the National Assembly because he was leader of the Malawi Congress party. He then concluded that recognition of leadership at the beginning of the National Assembly's life must be final. The learned judge also decided, on the same page, that the Parliamentary party's decision to elect the leader of opposition is the novelty.

The learned judge made further findings at page 21 of the order. He made a finding that according to the Malawi Congress Party's Constitution, the respondent is entitled to exercise the powers of leader of opposition. He also said that the Supreme Court confirmed the respondent's legal position inside and outside the National Assembly. He found that the appellant has little to lose. He said that the appellant's position was only at the pleasure and sufferance of the respondent. It would seem that the learned judge considered and made decision on almost all the essential issues raised in the action brought by the respondent and thereby rendered the trial of the case a mere formality or a

time wasting exercise. Indeed Mr. Mbendera, counsel for the respondent, proudly declared that both the application for stay and the appeal are merely delaying tactics **"since the High Court Judge dealt with an exhaustive list of the issues raised by the defendant"** in the main action. Clearly, what happened here is that the learned judge considered the issues raised in the main action and made decisions on them based on affidavit evidence which was before him. His decision to allow the application was influenced by the decisions which he made after considering the affidavit evidence. The approach adopted by the learned judge was clearly contrary to the second principle stated in the **Cyanamid's Case** which prohibits attempts by Courts to decide the plaintiff's claim on the affidavits. It is therefore the view of this Court that in arriving at the decision to grant an interlocutory injunction the learned judge adopted an erroneous approach.

The fourth point to consider is that at page 23 of the Order the learned judge expresses concern about lack of respect by the legislature of the High Court's and the Supreme Court's decision to the effect that the respondent is the leader of the Malawi Congress Party. The learned judge then suggests that one of the reasons for granting the relief of interlocutory injunction is to ensure compliance by the legislature with the Court's decisions and to resolve the apparent conflict between the judiciary and the legislature. In this regard the learned judge said:

"The concerns about the relationship of this branch of government and the legislative branch have come to the fore when granting the injunctive relief the plaintiff sought."

This Court takes the view that it is unfair to penalise the appellant by slapping him with an injunction in order to resolve a conflict, whether real or perceived, between the judiciary and parliament concerning enforcement of the Courts' judgments and orders. It must be appreciated that both appellant and the respondent are part of the legislature. They both belong to it. The power struggle, whether real or imagined, between the judiciary and parliament must not be allowed to affect the parties to the present action differently. The respondent must not derive a benefit from it while the appellant suffers prejudice. Both parties deserve to be treated equally. It is their constitutional right. It is also the core nature of judicial function. The view of this court is that in taking into account what he considered to be a conflict between the judiciary and the legislature, when deciding whether to grant the interlocutory injunction, the learned judge took into account an irrelevant factor. He, therefore, in the view of this Court, committed a gross error.

The conclusion of this Court is that there are good reasons which would entitle this Court to grant a stay of execution of the order of injunction granted by the learned judge.

The judge in the Court below readily decided that the appellant would suffer loss which

could not be compensated in damages, if an injunction was wrongly granted. The position of the law is that the fact that an appellant would suffer such loss is a proper ground for granting a stay of execution.

Finally the third principle stated in the **American Cyanamid's case** made it absolutely clear that the granting or refusal of a request for an interlocutory injunction **is a matter for the exercise of this court's discretion**, (emphasis supplied). No where does the learned judge refer to this requirement in his order. It would seem that the learned judge preoccupied himself with making decisions on a number of issues of fact and law, balancing the relative strengths of the parties' cases, balancing the scales of justice and resolving the apparent struggle between the judiciary and parliament. He, in the process, forgot to perform the core judicial function of exercising a judicial discretion in the present matter. That omission, in the view of this court, constituted a grave error of law.

The granting or refusal of an application for stay of execution pending appeal is made upon this court's exercise of its discretion. It is however a judicial discretion which must be supported by sound reasons and legal principle. In the present application, this court is of the view that there are sufficient grounds which would entitle the court to exercise its discretion in favour of granting the relief sought by the appellant. The application is allowed. The injunction granted by the judge in the court below is hereby stayed till the appellant's appeal is determined. Costs shall be costs in the cause.

MADE in Chambers this 31st day of October 2001, at Blantyre.

D. G. Tambala

JUDGE OF APPEAL